

84392

TO: Honorable Members of the Board of Acquisition and Contract

FROM: John M. Nonna
County Attorney

DATE: April 16, 2021

SUBJECT: Authority to enter into an agreement with Henningson, Durham & Richardson Architecture and Engineering, P.C. in association with HDR Engineering, Inc., to settle the claim of the County for defense and indemnification under Agreement No. 10-910 in connection with the claims of E.E. Cruz & Company, Inc. for additional compensation under Contract No. 11-503-REV for the Rehabilitation of the Fulton Avenue Bridge over the Hutchinson River (BIN 3348220), City of Mount Vernon and Village of Pelham Manor, New York.

By resolution approved on April 29, 2010, your Honorable Board authorized the County of Westchester (the "County") to enter into Agreement No. 10-910 with the firm of Henningson, Durham & Richardson Architecture and Engineering, P.C. in association with HDR Engineering, Inc. ("HDR") for engineering services associated with the Rehabilitation of the Fulton Avenue Bridge over the Hutchinson River, (BIN 3348220), City of Mount Vernon and Village of Pelham Manor, New York, (the "Project") for a total compensation of \$748,775.00, for the first phase of the multi-phased project (the "Original Agreement"). The County and HDR entered into the Original Agreement on May 14, 2010.

By a resolution approved on April 10, 2014, your Honorable Board authorized the County to amend the Original Agreement to provide for design and construction administration services in connection with the Project, increase the fee by \$1,396,647.00 for a total maximum fee of \$2,145,411.00, approve subconsultants and extend the completion date to December 31, 2017 (the "First Amendment"). The County and HDR entered into the First Amendment on April 30, 2014

By a resolution approved on June 29, 2017, your Honorable Board authorized the County to amend the Original Agreement, as amended by the First Amendment, to provide for additional design and construction administration services for the Project, increase the fee by \$950,000.00 for a total maximum fee to \$3,095,411.00, and extend the completion date to December 31, 2018 (the "Second Amendment"). The County and HDR entered into the Second Amendment on July 13, 2017.

On or about May 12, 2016, the County entered into Contract No. 11-503-REV with E.E. Cruz & Company, Inc. (the “Contractor”) for the construction of the Project.

On or about February 2, 2020, the Contractor submitted to the Commissioner of the Department of Public Works and Transportation a verified statement in the form of a “Final Application for Payment,” asserting claims for additional compensation under Contract No. 11-503-REV, Contract Item Nos. 589.01, 800.23 and 800.34 in the total sum of \$1,744,719.00 (the “Contractor’s Claims”).

By letter, dated September 25, 2020, the County, acting by the County Attorney’s Office, demanded that HDR indemnify and hold harmless the County, pursuant to Paragraph Eighth of the Original Agreement, as amended, with respect to the Contractor’s Claims.

On March 22, 2021, by Act No. 2021-201, the County Board of Legislators authorized the County Attorney to settle the claim of the County for defense and indemnification against HDR in connection with the Contractor’s Claims as follows: (i) HDR will pay the total sum of \$154,254.40 to the County as contribution to a proposed \$850,000.00 settlement between the County and the Contractor for the Contractor’s Claims, and (ii) the County and HDR will release each other with regard to the Contractor’s Claims.

Authorization is now sought from your Honorable Board to enter into an agreement with HDR to settle the claim of the County for defense and indemnification against HDR as set forth above (the “Settlement Agreement”).

Submitted simultaneously with this Resolution is a resolution to (i) rescind the resolution approved on August 27, 2020 approving Change Order No. 2 to the Contract in the amount of \$695,745.60, and (ii) authorize the County to enter into an agreement with the Contractor to settle the Contractor’s Claims as follows: (a) the County will pay \$850,000.00 to the Contractor in full and final satisfaction of the Contractor’s Claims of which \$154,254.40 will be contributed to the County by its engineer for the Project, HDR, (b) the Contractor and the County will release each other from all claims associated with the Contractor’s Claims, and (c) the County will release and retract the disincentive assessment made in the Commissioner of Public Works and Transportation’s Determination, dated August 27, 2020, identified as Item No. 698,93940015

The proposed Settlement Agreement is in the public’s best interest because the County will avoid incurring the potential expense of litigation, hearing, or adjudication of any issues of fact or law with regard to the Contractor’s Claims.

I recommend adoption of the attached proposed Resolution.

JMN/rn
Encl.

