

Law & Major Contracts Meeting Agenda



Committee Chair: Nancy Barr

800 Michaelan Office Bldg.
148 Martine Avenue, 8th Floor
White Plains, NY 10601
www.westchesterlegislators.com

Wednesday, July 14, 2021

10:00 AM

Committee Room

CALL TO ORDER

Joint with the Budget & Appropriations committee

MINUTES APPROVAL

July 12, 2021 at 1:00 p.m.

I. ITEMS FOR DISCUSSION

1. [2021-405](#) ACT - Essential Manufacturing Corporation Lawsuit

AN ACT authorizing the County Attorney to commence legal action, including a lawsuit, against Essential Manufacturing Corporation and Jason Brand, individually, to recover moneys paid by the County of Westchester to Essential Manufacturing Corporation for 3M brand N95 respirator masks.

COMMITTEE REFERRAL: COMMITTEES ON BUDGET & APPROPRIATIONS AND LAW & MAJOR CONTRACTS

Guests: County Attorney John Nonna and Assistant County Attorney Jack Micciche

2. [2021-438](#) Lawsuit Settlement - ACME Bus Corp. v. Westchester County Dept. of Health

AN ACT authorizing the County of Westchester to settle the adversary proceeding pending in the United States Bankruptcy Court, Eastern District of NY, titled ACME Bus Corp. v. Westchester County Department of Health.

COMMITTEE REFERRAL: COMMITTEES ON BUDGET & APPROPRIATIONS AND LAW & MAJOR CONTRACTS

Guests: County Attorney John Nonna and Senior Assistant County Attorney Sean Carey

II. OTHER BUSINESS

County Attorney John Nonna will provide an update on the latest developments regarding the opioid lawsuit.

III. RECEIVE & FILE

ADJOURNMENT

George Latimer
County Executive

Office of the County Attorney

John M. Nonna
County Attorney

June 24, 2021

Westchester County Board of Legislators
800 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601

Re: Request for Authorization to Commence Legal Action, Including a
Lawsuit, against Essential Manufacturing Corporation and Jason Brand to Recover
Moneys paid by the County of Westchester for 3M Brand N95 Respirator Masks

Dear Honorable Members of the Board of Legislators:

At the request of Richard G. Wishnie, Commissioner of the Westchester County Department of Emergency Services (the "WCDES"), attached for your consideration is an Act which, if approved, would authorize the commencement of legal action, including a lawsuit, against Essential Manufacturing Corporation ("Essential") and Jason Brand ("Brand"), individually, to recover payments made by the County of Westchester (the "County") for 3M brand N95 respirator masks (the "3M Masks") pursuant to a September 2, 2020 Purchase Order and December 11, 2020 Revised Purchase Order.

In or about May 2020, the County issued a "Request for Bid" seeking *inter alia* to establish a "File Price" for items of Personal Protection Equipment, inclusive of 3M Masks. In response to the Request for Bid, Essential and Brand, a representative of Essential, submitted to the County, a "Bid Response" dated June 6, 2020 and a "Sales Quote" dated August 24, 2020 (collectively, the "Proposal"), soliciting from the County an order for the purchase and delivery of 3M Masks. 3M Masks are considered the gold standard in reliance on the Proposal and the representations communicated by Brand that Essential was capable of supplying to the County the 3M Masks contemplated by the Proposal, the County entered into an agreement to Purchase from Essential 1,500 boxes of 3M Masks (the "Purchase Order"). On December 11, 2020, the County revised the Purchase Order to include an additional 33 boxes of 3M Masks (the "Revised Purchase Order"). Pursuant to the Proposal, the Purchase Order, and the Revised Purchase Order, the County paid to Essential \$206,955.00.

On or about February 11, 2021, 3M issued a notification (the "Notification") identifying increasing reports of fraud, inclusive of reports of counterfeit 3M Masks sold. In response to the Notification, the WCDES contacted the "3M Covid Fraud Hotline" that ultimately confirmed that

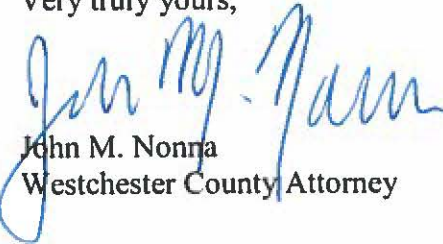


the 3M Masks purchased from and delivered by Essential are counterfeit. 3M further advised the WCDES not to use any of the masks purchased from and delivered by Essential.

By letter dated April 1, 2021, the Office of the County Attorney demanded the return of the \$206,955.00 paid by the County to Essential no later than April 12, 2021 on behalf of WCDES. As of the date hereof, Essential has failed and/or refused to return to the County the moneys paid by the County to Essential.

At the request of WCDES Commissioner Richard G. Wishnie, I am respectfully requesting authorization on behalf of the County to commence legal action, including a lawsuit to recover moneys paid by the County to Essential, plus interest, costs, and disbursements.

Very truly yours,



John M. Nonna
Westchester County Attorney

JNM/ggm
Encls.

BOARD OF LEGISLATORS
COUNTY OF WESTCHESTER

Your Committee is in receipt of a proposed Act which, if approved by your Honorable Board, would authorize the commencement of legal action, including a lawsuit against Essential Manufacturing Corporation (“Essential”) and Jason Brand (“Brand”), individually, to recover \$206,995.00 paid by the County to Essential for 3M brand N95 respirator masks (“3M Masks”).

Pursuant to a September 2, 2020 Purchase Order and December 11, 2020 Revised Purchase Order (the “Purchase Orders”), the County by its Department of Emergency Services (the “WCDES”) purchased from Essential 1,533 boxes of 3M Masks based upon the representations of Essential by way of Brand that Essential would deliver authentic 3M Masks to the County upon its purchase.

Notwithstanding Essential and Brand’s representations to the contrary, communication with the “3M Covid Fraud Hotline” confirms that the 3M Masks purchased from and delivered by Essential are counterfeit. By letter dated April 1, 2021, the WCDES, by way of the County Attorney’s Office, demanded the full return of the \$206,995.00 paid by the County to Essential no later than April 12, 2021. As of the date hereof, Essential fails and/or refuses to comply.

The County Attorney seeks authorization to commence a lawsuit against Essential and Brand to recover the \$206,995.00 paid by the County to Essential, plus interest, costs, and disbursements.

[Remainder of page intentionally left blank]

Your Committee concurs with the Westchester County Attorney, and therefore recommends that your Board approve the annexed Act to commence legal action, including a lawsuit against Essential and Brand, individually, to recover moneys paid by the County to Essential, plus interest, costs, and disbursements.

Dated: White Plains, New York
_____, 2021

COMMITTEE ON

AN ACT authorizing the County Attorney commence legal action, including a lawsuit, against Essential Manufacturing Corporation and Jason Brand, individually, to recover moneys paid by the County of Westchester to Essential Manufacturing Corporation for 3M brand N95 respirator masks.

BE IT ENACTED by the Board of Legislators of the County of Westchester as follows:

Section 1. The County Attorney is hereby authorized on behalf of the County of Westchester to commence legal action, including a lawsuit, against Essential Manufacturing Corporation (“Essential”) and Jason Brand (“Brand”), individually, and any other necessary parties, to recover moneys paid by the County of Westchester to Essential for 3M brand N95 respirator masks (“3M Masks”), plus interest, costs, and disbursements, pursuant to a September 2, 2020 Purchase Order and December 11, 2020 Revised Purchase Order (collectively, the “Purchase Orders”). Pursuant to the Purchase Orders, the County of Westchester paid to Essential \$206,955.00 based upon the representations of Brand—a representative of Essential—that Essential would deliver to the County of Westchester 1,533 boxes of 3M Masks, considered the gold standard in personal protection equipment respirator masks. Notwithstanding Brand’s representations, and the County’s explicit request and purchase of 3M Masks, Essential delivered to the County 1,533 boxes of personal protection equipment respirator masks.

Section 2. The County Attorney or her duly designated representative is hereby authorized and empowered to undertake such legal proceedings and prepare all documents necessary or desirable to accomplish the purpose of this Act.

Section 3. This Act shall take effect immediately.

FISCAL IMPACT STATEMENT

SUBJECT: Initiate legal action-Essential/Brand NO FISCAL IMPACT PROJECTED

OPERATING BUDGET IMPACT

To Be Completed by Submitting Department and Reviewed by Budget

SECTION A - FUND

GENERAL FUND

AIRPORT FUND

SPECIAL DISTRICTS FUND

SECTION B - EXPENSES AND REVENUES

Total Current Year Expense \$ -

Total Current Year Revenue \$ -

Source of Funds (check one): Current Appropriations Transfer of Existing Appropriations

Additional Appropriations

Other (explain)

Identify Accounts: _____

Potential Related Operating Budget Expenses: Annual Amount _____

Describe: _____

Potential Related Operating Budget Revenues: Annual Amount \$206,995

Describe: _____

Anticipated Savings to County and/or Impact on Department Operations:

Current Year: _____

Next Four Years: _____

Prepared by: Mark Medwid

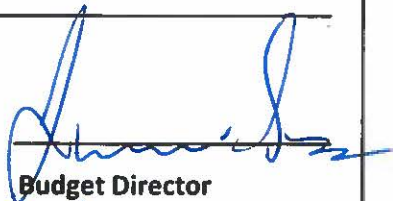
Title: Associate Budget Director

Department: Budget

Date: June 23, 2021

Reviewed By:

MM

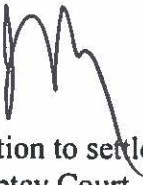

Budget Director

Date: 6/23/21

PRIVILEGED & CONFIDENTIAL

Date: July 12, 2021

To: Kenneth W. Jenkins
Deputy County Executive

From: John M. Nonna
County Attorney 

Re: Request for authorization to settle the adversary proceeding pending in the United States Bankruptcy Court, Eastern District of New York, titled *ACME Bus Corp. v. Westchester County Department of Health*, Adv. Pro. No. 20-ap-8208 (REG) (E.D.N.Y.)

Attached for your information is a copy of the legislation concerning the above-referenced matter, which was submitted today to the Board of Legislators for its consideration.

If you have any questions, please contact me.

JMN/stc

Enclosures

cc: Joan McDonald, Director of Operations
Catherine Cioffi, Director of Communications

George Latimer
County Executive

Department of Law

John M. Nonna
County Attorney

July 12, 2021

Westchester County Board of Legislators
800 Michaelian Office Building
148 Martine Avenue
White Plains, NY 10601

Re: An Act authorizing the County of Westchester to settle the adversary proceeding pending in the United States Bankruptcy Court, Eastern District of New York, titled *ACME Bus Corp. v. Westchester County Department of Health*, Adv. Pro. No. 20-ap-8208 (REG) (E.D.N.Y.)

Dear Honorable Members of the Board:

Attached for your review is proposed legislation that, if enacted, would authorize the County of Westchester to enter a settlement and general release agreement fully resolving the adversary proceeding titled *ACME Bus Corp. v. Westchester County Department of Health*, Adv. Pro. No. 20-ap-8208 (REG) (E.D.N.Y.) (the "Instant Proceeding").

Plaintiff ACME Bus Corp. ("ACME") is represented by both bankruptcy counsel, KLESTADT WINTERS JURELLER SOUTHARD & STEVENS, LLP, 320 Old Country Road, Suite 203, Garden City, NY 11530, and special counsel, HAMBURGER, MAXSON, YAFFE & MCNALLY, LLP, 225 Broadhollow Road, Suite 301, Melville, NY 11747. Defendant Westchester County Department of Health is represented by this Office and TULIS & GEIGER LLP, 220 White Plains Road, Tarrytown, NY 10691 (*see* Westchester County Act. 2021-10 [adopted January 25, 2021, approved January 26, 2021]).

Background to the Instant Proceeding

Contract between ACME and the County

ACME is a business corporation that primarily provided bus transportation services to school districts in Westchester County and Long Island.

On or about July 13, 2017, ACME and the County, acting by and through the Westchester County Department of Health ("WCDOH"), entered a five-year contract for the performance of transportation services for children with special needs in northern Westchester (the "Original Contract") (*see* Contract No. E/T533 [approved as to form on July 13, 2017]; A&C Resolution No. 57950 [approved July 13, 2017]; *see also* Public Health Law §§ 2541 [13], 2552 [1] [obligating the County to provide early intervention services to eligible children



and their families]; Education Law § 4410 [1] [g], [8] [obligating the County to provide certain transportation services]; 8 NYCRR part 200 [regulations regarding same]).

In the Original Contract's third year—on October 1, 2019—the County (i) terminated the provision of certain services that were to be provided under the Original Contract, effective October 20, 2019; and (ii) thereby modified the Original Contract, forming the agreement that is the subject of the Instant Proceeding (the “Subject Contract”).

School Closings Due To COVID-19

On March 16, 2020, the Governor of the State of New York issued the first of a series of executive orders closing New York State schools due to the COVID-19 pandemic. *See* 9 NYCRR § 202.4 (Executive Order No. 202.4). That same day, WCDOH notified ACME that it would have no need for ACME's transportation services during the impending closure period.

Through a series of executive orders, the Governor kept the schools closed for the remainder of the 2019–2020 school year. *See* 9 NYCRR §§ 8.202.11, 8.202.14, 8.202.18, 8.202.28, 8.202.37, 8.202.45 (collecting Executive Orders Nos. 202.11, 202.14, 202.18, 202.28, 202.37, and 202.45). During that period, contracted-for services were neither authorized nor provided.

ACME's Bankruptcy

To ACME's business model, the statewide school closures were catastrophic. On May 27, 2020, a phalanx of creditors forced ACME into bankruptcy (*see In re ACME Bus Corp.*, No. 20-bk-72122 [REG] [ED NY Bankr]). On July 27, 2020, a United States Trustee appointed an Official Committee of Unsecured Creditors to participate in the formulation of ACME's reorganization plan (*see* 11 USC § 1103 [discussing duties and powers of creditors' committees]).

Transfer of Subject Contract to Third Party

On or about August 1, 2020, ACME requested the County's permission to assign ACME's rights under the Subject Contract to Orange County Transit, LLC (“Orange County”), an unrelated limited liability company. The County authorized that transfer on August 12, 2020 (*see* A&C Resolution No. 78576 [dated August 13, 2020]). In September 2020, the school closures ended and the contracted-for services resumed.

The Instant Proceeding

On December 3, 2020, ACME commenced the Instant Proceeding—one of thirty-six proceedings commenced by ACME against its current and former contractual partners. As each of these proceedings concerns a distinct contract with distinct terms, they are incurably singular. Still, a common theme pervades: ACME claims that it is entitled to payments for services it did not perform simply because it stood ready, willing, and able to do so.

Against the County specifically, Plaintiff alleges both breach of the Subject Contract and unjust enrichment and seeks money damages in an amount of not less than one hundred ninety-one thousand one hundred fifteen and 00/100 dollars (\$191,115.00).

On February 5, 2020, the County moved to dismiss the Instant Proceeding under two theories. First and as a threshold matter, ACME lacked standing; along with the remainder of the Subject Contract, ACME assigned any right it had to assert a claim for breach to Orange County. Second, pursuant to the terms of the Contract, the County's obligation to pay ACME upon the provision of transportation services.

In conjunction with moving to dismiss, the County also filed a claim in the bankruptcy estate for one hundred thousand and 00/100 dollars (\$100,000.00) (the "Bankruptcy Claim"). The Bankruptcy Claim was premised upon ACME's September 19, 2019 breach of both the Original Contract and a separate but related contract for the performance of transportation services for children with special needs in Katonah, Mt. Kisco, and Yorktown (the "Related Contract") (*see* Contract No. E/T537 [approved as to form on July 13, 2017]; A&C Resolution No. 57950 [approved July 13, 2017]). Notably, this claim is not without logistical issues. Furthermore, as of the date of this proposed legislation, the total amount claimed in the Bankruptcy is thirty-three million, nine hundred seventy-one thousand, two hundred ninety-six and 21/100 dollars (\$33,971,296.21). Against the total amount claimed, the County's claim represents less than one percent —0.294% to be exact. It is far too soon to determine the full value of the estate, so the value of this claim is uncertain. That said, there is no expectation that if the County were to press its claim, it would recover any of the claimed amount.

The County was not the only adversary proceeding defendant to move to dismiss, and ACME has been inundated with myriad issues associated with litigating so many cases simultaneously. As a result, the parties have agreed to extend ACME's time to oppose the County's motion; as of today's date, no opposition has been filed.

In advance of opposing the County's motion, ACME has presented a settlement offer. This Office now presents that offer to the Board.

Terms of the Proposed Settlement

Under the terms of the proposed settlement, ACME will accept in full satisfaction of its claims against the County (i) payment of fifteen thousand and 00/100 dollars (\$15,000.00); and (ii) withdrawal and waiver of any right to payment on the Proof of Claim.

If approved, the proposed settlement would dispose of all of ACME's claims against the County and the WCDOH.

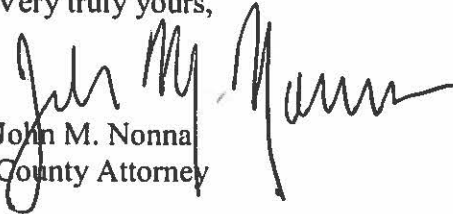
Recommendation of Westchester County Attorney's Office

The County's exposure in this matter is limited. However, given the fact that the settlement is for a small amount of money, this Office recommends accepting this settlement, which represents, essentially, nuisance value (*i.e.*, the cost and time of continued litigation).

[Remainder of Page Intentionally Left Blank]

I respectfully request authority from this Board pursuant to Section 158.11 of the Westchester County Charter to enter into the proposed Consent Order and settle the above-referenced matter. I therefore recommend passage of the accompanying Act.

Very truly yours,



John M. Nonna
County Attorney

JMN/stc

BOARD OF LEGISLATORS
COUNTY OF WESTCHESTER

Your Committee is in receipt of a proposed Act which, if enacted by your Board, would authorize the County of Westchester to enter a settlement and general release agreement fully resolving the adversary proceeding titled *ACME Bus Corp. v. Westchester County Department of Health*, Adv. Pro. No. 20-ap-8208 (REG) (E.D.N.Y.) (the “Instant Proceeding”).

Your Committee is informed that Plaintiff ACME Bus Corp. (“ACME”), a business corporation that primarily provided bus transportation services to school districts in Westchester County and Long Island, commenced an adversary proceeding in the United States Bankruptcy Court, Eastern District of New York, against the Westchester County Department of Health on December 30, 2020. In their complaint, ACME alleges that the Department of Health breached a Contract for the performance of transportation services for children with special needs in northern Westchester by failing to approve and reimburse ACME for transportation services during the statewide school closure that occurred between March 2020 and August 2020.

As a result of negotiations with ACME’s counsel, the terms of a proposed settlement were negotiated which would, among other things, require the County to pay ACME fifteen thousand and 00/100 dollars (\$15,000.00), withdraw a proof of claim filed against ACME in its related bankruptcy proceeding, and waive any right of payment on such claim.

Your Committee recognizes that entering into the proposed settlement will allow the County to settle this matter without further litigation or trial. Moreover, should the County fail to enter into the proposed settlement, it could result in a judgment against the County in the full amount sought by ACME in the Instant Proceeding, one hundred ninety-one thousand one hundred fifteen and 00/100 dollars (\$191,115.00).

Your Committee has carefully considered the matter and recommends approval of the annexed Act. The Act, which would authorize the County to enter into the proposed settlement to effectuate the resolution of the lawsuit, is in the best interests of the County.

Your Committee therefore recommends this Honorable Board approve the annexed Act authorizing the County to enter into the proposed settlement of the above-referenced lawsuit. An affirmative vote by a majority of the Board is required to pass this Act.

Dated: White Plains, New York
July __, 2021

AN ACT authorizing the County of Westchester to settle the adversary proceeding pending in the United States Bankruptcy Court, Eastern District of New York, titled *ACME Bus Corp. v. Westchester County Department of Health*, Adv. Pro. No. 20-ap-8208 (REG) (E.D.N.Y.).

BE IT ENACTED by the Board of Legislators of the County of Westchester as follows:

1. The County of Westchester is hereby authorized to settle the adversary proceeding pending in the United States Bankruptcy Court, Eastern District of New York, titled *ACME Bus Corp. v. Westchester County Department of Health*, Adv. Pro. No. 20-ap-8208 (REG) (E.D.N.Y.), by disbursing to Plaintiff an amount not to exceed fifteen thousand and 00/100 dollars (\$15,000.00), withdrawing a proof of claim filed against Plaintiff in its related bankruptcy proceeding, and waving any right of payment on such claim.
2. The County Attorney or his designee is hereby authorized to execute and deliver all documents and take such actions as the County Attorney deems necessary or desirable to accomplish the purpose hereof.
3. This Act shall take effect immediately.