



George Latimer  
County Executive

Office of the County Attorney

John M. Nonna  
County Attorney

April 11, 2023

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

Dear Honorable Members of the Board:

Attached for your consideration is an Act which, if approved by your Honorable Board, would authorize the County of Westchester (the "County") to retain, at County expense, the law firm of Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin" or the "Firm") to provide outside counsel legal services to the County in connection with a default by Custom Marine, Inc. ("Custom") under Department of Public Works & Transportation (the "Department") Contract No. 12-517-REV (the "Contract").

By way of background, this matter stems from a default by Custom under a contract for Cellular Bulkhead Rehabilitation Phase III & IV at the Yonkers Joint Wastewater Treatment Plant (the "Project"). By letter dated March 3, 2023, the County sent Custom a Notice of Default under the Contract regarding Custom's obligation under Executive Law Article 15-A to seek 20% participation of the contracted work on the Project for a combination of Minority Business Enterprises and/or Women Business Enterprises (the "Participation Goal"). The County alleged in the Notice of Default that Custom misrepresented the participation in the Project of its subcontractor, Empire State Commercial Diving Services, LLC, as a Minority Business Enterprise, as well as Custom's efforts to attain the Participation Goal. The County may therefore be required to commence legal action against Custom, and any other necessary party, to protect its rights regarding the default. Such parties include, but are not limited to, Sompo International Holdings, Ltd. as successor in interest to Endurance American Insurance Company, the Surety for Custom under the Contract, who issued a Performance and Payment Bond dated September 20, 2020, and identified by Bond No. EAIC4008030. Further, it is anticipated that Custom may pursue legal action against the County in response to the Notice of Default.

Due to the complex and specialty nature of construction law litigation, and the evaluation and analysis of damages related to such claims, it is in the best interests of the County to retain counsel qualified to handle such litigation. Sheppard Mullin is a firm that specializes in this type of litigation. Moreover, its lead attorney, Ira M. Schulman, Esq. is a nationally-

recognized construction law attorney with over 37 years of experience in the field and has successfully represented the County in the past on similar matters. The Firm will be retained to provide legal advice to the County concerning the default, and represent the County in prosecuting any legal actions commenced by it regarding the default. Additionally, the Firm will be retained to defend the County in any legal action commenced by Custom against it regarding the default, and, if necessary, prosecute on the County's behalf, any appropriate counterclaims, cross claims, and/or the impleader of third parties (the "Services").

For the Services rendered to the County by Sheppard Mullin, the Firm will be paid at the agreed upon rates as follows: \$630.00 per hour for the services of Ira M. Schulman, Esq.; \$500.00 per hour for Sophia Cahill, Esq.; and \$200.00 per hour for paralegal services; or personnel within Sheppard Mullin with comparable experience and ability as those mentioned at the same rate of pay. In no event shall the total amount payable to the Firm under the retainer exceed the sum of One Hundred Thousand Dollars (\$100,000.00). In addition, the Firm will be reimbursed, at cost, for *reasonable and necessary* out of pocket expenses and disbursements. The term of the Agreement will commence retroactive to March 13, 2023 and will continue until the matter has been resolved.

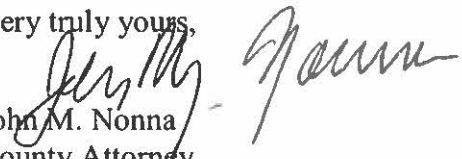
Procurement of the Services would, normally, be conducted in accordance with Section 7 of the Westchester County Procurement Policy and Procedures ("Section 7"). Under Section 7, if the procurement is expected to cost more than \$75,000 "a request for qualifications or a request for proposals shall be issued and qualification statements or proposals shall be received." However, due to the time-sensitive nature of this matter, and the need to take immediate steps to ensure that the County's interests are protected, there was insufficient time to follow the normal solicitation procedure.

In lieu of that longer process, my office determined that Sheppard Mullin, as a firm expert in construction law, can competently and readily provide the Services, and that the hourly rate proposed is reasonable in light of my office's knowledge of the overall marketplace for legal services. Since this means that the County will not be able to rely upon Section 7 as the procurement basis for the proposed Agreement, my office will seek authority from the Board of Acquisition and Contract to exempt this procurement from compliance with the Westchester County Procurement Policy and Procedures, pursuant to Section 3(a)(xxi) thereof.

The Planning Department has advised that the proposed retainer agreement does not meet the definition of an action under New York State Environmental Quality Review Act and its implementing regulations 6 NYCRR Part 617. As such, no environmental review is required. Please refer to the memorandum from the Department of Planning dated January 12, 2023, which is on file with the Clerk of the Board of Legislators.

Accordingly, your Honorable Board's approval of the attached Act is most respectfully requested.

Very truly yours,

  
John M. Nonna  
County Attorney

**HONORABLE BOARD OF LEGISLATORS  
COUNTY OF WESTCHESTER**

Your Committee is in receipt of a proposed Act transmitted by the County Attorney which, if adopted, would authorize the County of Westchester (the “County”) to retain, at County expense, the law firm of Sheppard, Mullin, Richter & Hampton LLP (“Sheppard Mullin” or the “Firm”) to provide outside counsel legal services in connection with a default by Custom Marine, Inc. (“Custom”) under Department of Public Works & Transportation (the “Department”) Contract No. 12-517-REV (the “Contract”).

The County Attorney has advised your Committee that this matter stems from a default by Custom under a contract for Cellular Bulkhead Rehabilitation Phase III & IV at the Yonkers Joint Wastewater Treatment Plant (the “Project”). By letter dated March 3, 2023, the County sent Custom a Notice of Default under the Contract regarding Custom’s obligation under Executive Law Article 15-A to seek 20% participation of the contracted work on the Project for a combination of Minority Business Enterprises and/or Women Business Enterprises (the “Participation Goal”). The County alleged in the Notice of Default that Custom misrepresented the participation in the Project of its subcontractor, Empire State Commercial Diving Services, LLC, as a Minority Business Enterprise, as well as Custom’s efforts to attain the Participation Goal. The County may therefore be required to commence legal action against Custom, and any other necessary party, to protect its rights regarding the default. Such parties include, but are not limited to, Sompo International Holdings, Ltd. as successor in interest to Endurance American Insurance Company, the Surety for Custom under the Contract, who issued a Performance and Payment Bond dated September 20, 2020, and identified by Bond No. EAIC4008030. Further, it is anticipated that Custom may pursue legal action against the County in response to the Notice of Default.

The County Attorney has further advised your Committee that due to the complex and specialty nature of construction law litigation, and the evaluation and analysis of damages related to such claims, it is in the best interests of the County to retain counsel qualified to handle such litigation. Sheppard Mullin is a firm that specializes in this type of litigation. Moreover, its lead attorney, Ira M. Schulman, Esq. is a nationally-recognized

construction law attorney with over 37 years of experience in the field and has successfully represented the County in the past on similar matters. The Firm will be retained to provide legal advice to the County concerning the default, and represent the County in prosecuting any legal actions commenced by it regarding the default. Additionally, the Firm will be retained to defend the County in any legal action commenced by Custom against it regarding the default, and, if necessary, prosecute on the County's behalf, any appropriate counterclaims, cross claims and/or the impleader of third parties (the "Services").

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The County Attorney has advised your Committee that procurement of the Services would, normally, be conducted in accordance with Section 7 of the Westchester County Procurement Policy and Procedures ("Section 7"). The County Attorney has advised your Committee that, under Section 7, if the procurement is expected to cost more than \$75,000 "a request for qualifications or a request for proposals shall be issued and qualification statements or proposals shall be received." The County Attorney has advised your Committee that, however, due to the time-sensitive nature of this matter, and the need to take immediate steps to ensure that the County's interests are protected, there was insufficient time to follow the normal solicitation procedure.

The County Attorney has further advised your Committee that, in lieu of that longer process, his office determined that Sheppard Mullin, as a firm expert in construction law, can competently and readily provide the Services, and that the hourly rates proposed are reasonable in light of his office's knowledge of the overall marketplace for legal services. The County Attorney has advised your Committee that, since this means that the County

will not be able to rely upon Section 7 as the procurement basis for the proposed Agreement, his office will seek authority from the Board of Acquisition and Contract to exempt this procurement from compliance with the Westchester County Procurement Policy and Procedures, pursuant to Section 3(a)(xxi) thereof.

The Planning Department has advised that the proposed retainer agreement does not meet the definition of an action under New York State Environmental Quality Review Act and its implementing regulations 6 NYCRR Part 617. As such, no environmental review is required. Please refer to the memorandum from the Department of Planning dated January 12, 2023, which is on file with the Clerk of the Board of Legislators.

An affirmative vote of a majority of the voting strength of the Board is required for approval of the attached Act.

Your Committee recommends approval of the attached Act.

Dated: \_\_\_\_\_, 2023  
White Plains, New York

**COMMITTEE ON**

c:JPG 04.10.23

# FISCAL IMPACT STATEMENT

SUBJECT: Sheppard, Mullin, Richter 12-517-REV  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 \$ 100,000

Total Current Year Revenue \$ -

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

Additional Appropriations

Other (explain)

Identify Accounts: 101\_18\_1000\_4923 The term of the agreement will commence retroactive to March 13, 2023 and will continue until the matter has been resolved.

Potential Related Operating Budget Expenses: Annual Amount \$0

Describe: An act authorizing the County of Westchester to retain, at County expense, the law firm of Sheppard, Mullin, Richter & Hampton LLP in connection with a default by Custom Marine, Inc. under Department of Public Works & Transportation Contract No. 12-517-REV.

Potential Related Operating Budget Revenues: Annual Amount \$0

Describe: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

Current Year: \$0

Next Four Years: \$0

Prepared by: Patricia Haggerty

Title: Sr. Budget Analyst

Department: Budget

Date: April 13, 2023

Reviewed By: 

PH

Budget Director

Date: 4/13/23

ACT NO. 2023 - \_\_\_\_\_

AN ACT authorizing the County of Westchester to retain, at County expense, the law firm of Sheppard, Mullin, Richter & Hampton LLP, for the provision of outside counsel legal services in connection a default by Custom Marine, Inc. under Department of Public Works & Transportation Contract No. 12-517-REV.

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

**Section 1.** The County of Westchester (the “County”) is hereby authorized to retain, at County expense, the law firm of Sheppard, Mullin, Richter & Hampton LLP (“Sheppard Mullin” or the “Firm”) for the provision of outside counsel legal services in connection with a default by Custom Marine, Inc. (“Custom”) under Department of Public Works & Transportation (the “Department”) Contract No. 12-517-REV (the “Contract”).

**§2.** The Firm shall be retained to provide legal advice to the County concerning the default, and represent the County in prosecuting any legal actions commenced by it against any necessary parties regarding the default, including but not limited to, Custom, and Sompo International Holdings, Ltd., as successor in interest to Endurance American Insurance Company, the Surety for Custom under the Contract. The Firm shall also be retained to defend the County in any legal action commenced by Custom against it regarding the default, including prosecuting on the County’s behalf, any appropriate counterclaims, cross claims, and/or the impleader of third parties. (the “Services”).

**§3.** For the aforesaid Services rendered to the County by Sheppard Mullin, the County is authorized to pay the Firm at the following rates: \$630.00 per hour for the services of Ira M. Schulman, Esq.; \$500.00 per hour for Sophia Cahill, Esq.; and \$200.00 per hour for paralegal services; or personnel within Sheppard Mullin with comparable experience and ability as those mentioned at the same rate of pay. In no event shall the total amount payable by the County to the Firm exceed the sum of One Hundred Thousand

Dollars (\$100,000.00). In addition, the Firm will be reimbursed, at cost, for *reasonable and necessary* out of pocket expenses and disbursements. The term of the Agreement will commence retroactive to March 13, 2023 and will continue until the matter has been resolved.

**§4.** This Act shall take effect immediately.