

George Latimer  
County Executive

Office of the County Attorney

John M. Nonna  
County Attorney

April 23, 2024

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

Re: Legislation authorizing the County of Westchester to enter into an agreement with Endurance American Insurance Company (“Endurance”), as surety for Custom Marine, Inc., and with Mace Contracting, Inc., (“Mace”), for the County to settle its claim against Endurance regarding DPWT Contract No. 12-517-Rev. (the “Contract”), whereby Endurance shall tender to the County, the services of Mace, and Mace shall agree, to complete the remaining work under the Contract.

Dear Honorable Members of the Board:

This request, if enacted, would authorize the County of Westchester (the “County”), acting by and through the Commissioner of DPWT, or his designee, to enter into an agreement (the “Proposed Agreement”) with Endurance American Insurance Company (“Endurance”), as surety for Custom Marine, Inc. (“Custom”), and with Mace Contracting, Inc. (“Mace”), for the County to settle its claim against Endurance regarding DPWT Contract No. 12-517-Rev. (the “Contract”), whereby Endurance shall tender to the County, the services of Mace, and Mace shall agree, to complete the remaining work under the Contract (the “Remaining Work”).

On or about September 24, 2020, the County entered into the Contract with Custom, for an amount not-to-exceed \$6,628,460.00, regarding work identified as Cellular Bulkhead Rehabilitation, Phase III & IV, at the Yonkers Joint Wastewater Treatment Plant, in the City of Yonkers, NY.

On or about September 29, 2020, Endurance, on behalf of Custom, issued a performance bond to the County, and a labor and materials payment bond to the County, regarding the Contract. Both bonds bear bond no. EAIC4003080, and each has an individual penal sum of \$6,628,460.00.

As part of Custom's obligations under the Contract, it agreed to make a good faith effort to have 20% of the work performed by a combination of Minority Business Enterprises and/or Women Business Enterprises (the "20% Participation Goal").

By letter from the County to Custom dated March 3, 2023, the County declared Custom in default of the Contract, due to its failure to make a good faith effort to attain the 20% Participation Goal. Additionally, the County asserted in said letter, that Custom not only failed to make a good faith effort to attain the 20% Participation Goal, but misrepresented to the County that it had attained said goal. The County then terminated the Contract due to Custom's default.

By ACT No. 73-2023, Your Honorable Board authorized the County Attorney to retain the law firm of Sheppard, Mullin, Richter, and Hampton, LLP ("Sheppard Mullin") to represent the County regarding Custom's default under the Contract.

By letter from Sheppard Mullin to Endurance dated April 27, 2023, the County demanded that Endurance, pursuant to its obligations under its Performance Bond, complete the remaining work under the Contract.

Pursuant to the County's demand upon Endurance to complete the remaining work under the Contract, Endurance now proposes an agreement to tender to the County, the services of Mace, and Mace agrees to complete, the remaining work under the Contract.

The Proposed Agreement shall contain the following terms. The County shall agree to administer the Contract with Mace in the same manner and upon the same terms as set forth therein, except that it shall pay Mace, for completion of the remaining work, the sum of \$2,449,098.70, constituting the remaining balance under the Contract. The remaining balance is subject to increase or decrease in accordance with the terms of the Contract. Mace shall agree to assume all obligations under the Contract in its completion of the remaining work. The County shall also pay Mace, an amount up to \$444,404.00 for any authorized Miscellaneous Additional Work provided for under the Contract. Mace shall deliver to the County, a performance bond, and a payment bond, in the form required by the Contract, with each bond having a separate penal sum of \$2,449.098.70, and each naming the County as obligee.

In exchange for Endurance's tender of Mace to the County, the County shall agree to discharge and release Endurance, together with its representatives, owners, officers, directors, employees, attorneys, successors, and assigns, from any and all performance obligations, claims, causes of action, costs, expenses, losses, damages or other claims or rights concerning the Contract and/or under the Custom Performance Bond.


Should the County enter into the Proposed Agreement, Endurance and Custom shall enter into an agreement, whereby Custom shall pay Mace a supplemental sum of \$733,000.00, in excess of the \$2,449.098.70 remaining contract balance, regarding Mace's completion of the remaining work. The County has no involvement in this proposed agreement, nor shall it have any obligation to pay any portion of the supplemental sum.

Additionally, should the County enter into the Proposed Agreement, Endurance and Mace shall enter into an agreement whereby Endurance shall defend and indemnify Mace regarding its completion of the remaining work.

It is advisable that the County enter into the Proposed Agreement with Endurance and Mace,, as it will allow the remaining work to be completed, and without cost to the County additional to that authorized under the Contract.

To protect the County's legal interests, and upon recommendation of Hugh J. Greechan, Commissioner of the Department of Public Work and Transportation, authority for the County to enter into the Proposed Agreement with Endurance, and Mace, is requested.

Very truly yours,

  
John M. Nonna  
County Attorney

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BOARD OF LEGISLATORS  
COUNTY OF WESTCHESTER

Your Committee is in receipt of a proposed Act, which if approved by your Board, would authorize the County of Westchester (the “County”), acting by and through the Commissioner of the Department of Public Works and Transportation (“DPWT”), or his designee, to enter into an agreement (the “Proposed Agreement”) with Endurance American Insurance Company (“Endurance”), as Surety for Custom Marine, Inc. (“Custom”), and with Mace Contracting, Inc. (“Mace”), for the County to settle its claim against the Surety regarding DPWT Contract No. 12-517-Rev. (the “Contract”), whereby Endurance shall tender to the County, the services of Mace, and Mace shall agree, to complete the remaining work under the Contract (the “Remaining Work”).

On or about September 24, 2020, the County entered into the Contract with Custom, for an amount not-to-exceed \$6,628,460.00, regarding work identified as Cellular Bulkhead Rehabilitation, Phase III & IV, at the Yonkers Joint Wastewater Treatment Plant, in the City of Yonkers, NY.

On or about September 29, 2020, Endurance, on behalf of Custom, issued a performance bond to the County, and a labor and materials payment bond to the County, regarding the Contract. Both bonds bear bond no. EAIC4003080, and each has an individual penal sum of \$6,628,460.00.

As part of Custom’s obligations under the Contract, it agreed to make a good faith effort to have 20% of the work performed by a combination of Minority Business Enterprises and/or Women Business Enterprises (the “20% Participation Goal”).

By letter from the County to Custom dated March 3, 2023, the County declared Custom in default of the Contract, due to its failure to make a good faith effort to attain the 20% Participation Goal. Additionally, the County asserted in said letter, that Custom not only failed to make a good faith effort to attain the 20% Participation Goal, but misrepresented to the County that it had attained said goal. The County then terminated the Contract due to Custom's default.

By ACT No. 73-2023, Your Honorable Board authorized the County Attorney to retain the law firm of Sheppard, Mullin, Richter, and Hampton, LLP ("Sheppard Mullin") to represent the County regarding Custom's default under the Contract.

By letter from Sheppard Mullin to Endurance dated April 27, 2023, the County demanded that Endurance, pursuant to its obligations under its Performance Bond, complete the remaining work under the Contract.

Pursuant to the County's demand upon Endurance to complete the remaining work under the Contract, Endurance now proposes an agreement to tender to the County, the services of Mace, and Mace agrees to complete, the remaining work under the Contract.

The Proposed Agreement shall contain the following terms. The County shall agree to administer the Contract with Mace in the same manner and upon the same terms as set forth therein, except that it shall pay Mace, for completion of the remaining work, the sum of \$2,449,098.70, constituting the remaining balance under the Contract. The remaining balance is subject to increase or decrease in accordance with the terms of the Contract. Mace shall agree to assume all obligations under the Contract in its completion of the remaining work. The County shall also pay Mace, an amount up to \$444,404.00 for any authorized Miscellaneous Additional Work provided for under the Contract. Mace shall deliver to the County, a performance bond,

and a payment bond, in the form required by the Contract, with each bond having a separate penal sum of \$2,449.098.70, and each naming the County as obligee.

In exchange for Endurance's tender of Mace to the County, the County shall agree to discharge and release Endurance, together with its representatives, owners, officers, directors, employees, attorneys, successors, and assigns, from any and all performance obligations, claims, causes of action, costs, expenses, losses, damages or other claims or rights concerning the Contract and/or under the Custom Performance Bond.

Should the County enter into the Proposed Agreement, Endurance and Custom shall enter into an agreement whereby Custom shall pay Mace a supplemental sum of \$733,000.00, in excess of the \$2,449.098.70 remaining contract balance, regarding Mace's completion of the remaining work. The County has no involvement in this proposed agreement, nor shall it have any obligation to pay any portion of the supplemental sum.

Additionally, should the County enter into the Proposed Agreement, Endurance and Mace shall enter into an agreement whereby Endurance shall defend and indemnify Mace regarding its completion of the remaining work.

It is advisable that the County enter into the Proposed Agreement with Endurance and Mace,, as it will allow the remaining work to be completed, and without cost to the County additional to that authorized under the Contract.

Your Committee has carefully considered the subject matter and the accompanying Act, and recommends authorizing the County, acting by and through the Commissioner of the Department of Public Works and Transportation, or his designee, enter into the Proposed Agreement with Endurance, and with Mace, for the County to settle its claim against Endurance,

whereby Endurance shall tender to the County, the services of Mace, and Mace shall agree, to complete the remaining work under the Contract.

An affirmative vote of a majority of the Board is required to pass this legislation.

Dated: White Plains, New York  
April , 2024

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COMMITTEE ON

AN ACT authorizing the County of Westchester to enter into an agreement with Endurance American Insurance Company (“Endurance”), as surety for Custom Marine, Inc., and with Mace Contracting, Inc. (“Mace”), for the County to settle its claim against Endurance regarding DPWT Contract No. 12-517-Rev. (the “Contract”), whereby Endurance shall tender to the County, the services of Mace, and Mace shall agree, to complete the remaining work under the Contract.

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

Section 1. The County is hereby authorized by and through the Commissioner of Public Works and Transportation, or his designee, to enter into an agreement (the “Proposed Agreement”) with Endurance American Insurance Company (“Endurance”), as surety for Custom Marine, Inc., and with Mace Contracting, Inc. (“Mace”), for the County to settle its claim against Endurance regarding DPWT Contract No. 12-517-Rev. (the “Contract”), whereby Endurance shall tender to the County, the services of Mace, and Mace shall agree, to complete the remaining work under the Contract.

Section 2. The County, as part of the Proposed Agreement, is authorized to discharge and release Endurance, together with its representatives, owners, officers, directors, employees, attorneys, successors, and assigns, from any and all performance obligations, claims, causes of action, costs, expenses, losses, damages or other claims or rights concerning the Contract, and/or under its Performance Bond for the Contract, identified as Bond No. EAIC4003080.

Section 3. The County Attorney or his duly designated representative is hereby authorized to prepare and execute all documents necessary or desirable to accomplish the purpose of this Act.

Section 4. This Act shall take effect immediately.



# FISCAL IMPACT STATEMENT

SUBJECT: Custom Marine, Inc.

NO FISCAL IMPACT PROJECTED

## OPERATING BUDGET IMPACT

(To be completed by operating department and reviewed by Budget Department)

A)  GENERAL FUND       AIRPORT       SPECIAL REVENUE FUND (Districts)

### B) EXPENSES AND REVENUES

Total Current Year Cost      \$ 0

Total Current Year Revenue \$ 0

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 Revenues:      Annual Amount \$ \_\_\_\_\_

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

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

Current Year: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Next Four years: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Prepared by: Christopher J. Inzero

Title: Associate County Attorney

Department: Law

Reviewed By: Lawrence C. Soule

Budget Department

If you need more space, please attach additional sheets.