

George Latimer
County Executive

John M. Nonna
County Attorney

January 29, 2021

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

Re: Request for authorization to settle an action commenced by the County of Westchester (the "County"), against International Fidelity Insurance Company ("IFIC"), in the action entitled, *County of Westchester v. International Fidelity Ins. Co.; International Fidelity Ins. Co. v. R & S Waste Services, LLC, et. al;* Index No. 53642 / 2019; Supreme Court of the State of New York, County of Westchester; for the total amount of \$75,000, regarding breach of an obligation under a payment and performance bond, relating to a breach of an agreement by, and termination of an agreement with, R&S Waste Services, LLC, dated February 16, 2017, for which IFIC is the Surety.

Dear Honorable Members of the Board:

Attached for your consideration is an Act, which if approved by your Honorable Board, would authorize the County Attorney to settle a claim commenced by the County against IFIC, for the total amount of \$75,000, in the action entitled, *County of Westchester v. International Fidelity Ins. Co.; International Fidelity Ins. Co. v. R & S Waste Services, LLC, et. al;* Index No. 53642 / 2019; Supreme Court of the State of New York, County of Westchester.

Pursuant to authorization of the Board of Legislators on or about February 8, 2019, the County commenced an action on March 7, 2019 against IFIC for a claim related to breach of its obligations under a payment and performance bond relating to breach of an agreement by, and termination of an agreement with, R & S Waste Services, LLC ("R&S"), dated February 16, 2019 (the "County / R&S Agreement"), for which IFIC is the surety.

Under the County / R&S Agreement, R&S was obligated to remove solid waste from various County locations. The County / R&S Agreement was for an amount not to exceed \$1,407,124, and had a term from March 1, 2017 through February 29, 2020, with the County having the option to extend the term two additional years.

Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, New York 10601

Telephone: 914-995-3630

Fax: 914-995-3132*

*Please be advised that service by facsimile is not accepted.



The County paid R&S for its services on a monthly basis, pursuant to monthly invoices rendered by R&S. R&S charged a flat rate for removing United States Department of Agriculture (“USDA.”) regulated solid waste from international sources (“international solid waste”) from the Westchester County Airport (the “Airport”), and ordinary solid waste from Hilltop Hanover Farm in Yorktown, and 100 East First Street in Mount Vernon. R&S also charged the County various rates per ton for different classifications of ordinary solid waste removed by it from all other County locations as detailed in the County / R&S Agreement.

The County / R&S Agreement obligated R&S to furnish the County with a bond guaranteeing its faithful performance of the Agreement. On or about February 16, 2017, IFIC, as Surety, executed and delivered a bond to the County for the penal sum of \$469,041.33. The bond had an initial term of one year from March 1, 2017 through February 28, 2018, which IFIC renewed on or about February 15, 2018 for an additional one year from March 1, 2018 through February 28, 2019 (the “Bond”).

The County / R&S Agreement obligated R&S to comply with the provisions of all applicable federal, state and local laws, rules and regulations, including but not limited to, those applicable to R&S as an employer of labor or otherwise, including, without limitation, Labor Law, Worker’s Compensation Law, State Unemployment Insurance Law, and the Federal Social Security Law.

By Opinion and Order dated March, 28, 2018, the United States District Court for the Southern District of New York (Carter, U.S.D.J.), in the action entitled *Trustees et al. v. Rogan Brothers Sanitation, et al.*, (the “federal action”), determined that R&S violated the Employment Retirement Income Security Act (ERISA). On April 24, 2018, a Judgment was entered against R &S for its violation of ERISA in the amount of \$4,260,339.16.

As R&S was obligated under the County / R&S Agreement “to comply...with the provisions of all applicable federal, state, and local laws, rules and regulations”, its violation of ERISA as determined by the March 28, 2018 Decision and Order, constitutes its material breach of the Agreement.

By letter dated June 21, 2018, the County notified R&S that it materially breached the County / R&S Agreement by violating the ERISA, and demanded that it cure same within forty-eight hours after its receipt of the letter. By letter dated July 9, 2018, the County notified R&S that the County / R&S Agreement was terminated due to R&S’ failure to cure its breach.

By letter to IFIC dated July 16, 2018, the County made a claim under the Bond, demanding that IFIC indemnify and save it harmless against all costs and damages resulting from R&S’ breach of the County / R&S Agreement, including that IFIC complete the work agreed to be performed by R&S. By letter dated October 12, 2018, IFIC denied the County’s claim under the Bond in its entirety.

Due to R&S’ material breach of the County / R&S Agreement, the County was caused to obtain replacement solid waste hauling services (“replacement services”) at rates higher than those charged by R&S under the County / R&S Agreement.

The time period for the County's recovery of damages for replacement services against IFIC, is from July 9, 2018; the termination date of the County / R&S Agreement, through February 28, 2019; the expiration date of the Bond as renewed by IFIC.

The County's obtained replacement solid waste hauling services for said time period, detailed as follows:

On or about July 12, 2018, the County contracted with City Carting and Recycling, LLC ("City Carting") on an emergency basis (the "County / City Carting Emergency Agreement"). The County / City Carting Emergency Agreement was for an amount not to exceed \$720,000, and had a term July 12, 2018 through January 11, 2019. The County / City Carting Emergency Agreement did not provide for the removal of USDA regulated international solid waste from the Airport, as upon information and belief, City Carting had no license at such time to perform same.

To avoid interruption of the removal of USDA regulated international solid waste at the Airport, AVPORTS, as Airport manager and operator, retained Waste Management Reduction Services, LLC ("WMRS") on or about July 2018 to perform said service as the sole entity known to it at such time that was licensed to perform same, and as federal regulations require that such waste be removed from the Airport within 72 hours from the time it arrives. Under AVPORTS's agreement with WMRS, AVPORTS pays WMRS and is reimbursed by the County.

On or about October 26, 2018, the County published "invitations to bid" for the removal of solid waste from various County locations, except the USDA regulated international solid waste at the Airport, on a non-interim basis. On or about January 10, 2019, the County entered into a contract with City Carting as sole bidder to perform said services (the "County / City Carting Bid Agreement"). The County / City Carting Bid Agreement is for an amount not to exceed \$1,418,722, and has a term from January 12, 2019 through January 11, 2022, with the County having the sole option to renew for one additional two year period.

On or about December 7, 2018, the County published "invitations to bid" for the removal of the USDA regulated international solid waste from the Airport. On or about January 9, 2019, the County conditionally accepted the bid of WMRS as sole bidder to perform said service. However, the County subsequently elected not to contract with WMRS, upon its determination that WMRS' charge to the County for said service would be greater than what it was charging AVPORTS for said service under the AVPORTS / City Carting Agreement.

Subsequent and in response to the County's commencement of its action against IFIC on March 7, 2019, IFIC, commenced a third-party action on May 29, 2020 against R&S, and other entities and certain individuals, for indemnification for any liability it may have to County.

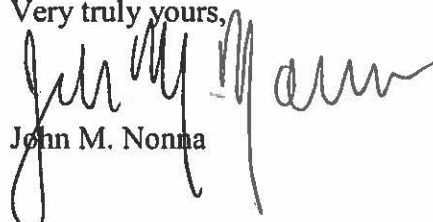
On July 20, 2020, R&S asserted a counterclaim against the County, alleging that the County breached the County / R&S Agreement. By Decision and Order dated September 16, 2020, the Court dismissed R&S' counterclaim. On or about November 9, 2020, R&S motioned the Court for re-argument of the Court's September 16, 2020 Decision and Order dismissing its

claim against the County, which the County opposed, and for which a decision from the Court is pending.

The County has calculated its total damages for the time period from July 9, 2018 through February 28, 2019, in the total principal amount of \$156,274.23. However, the County has agreed to settle its claim against IFIC for the total amount of \$75,000, given the evaluated attendant risks to full recovery of its damages at trial.

Accordingly, I request authority on behalf of the County to settle the County's claim against IFIC for the total amount of \$75,000.

Very truly yours,



John M. Nonna

JMN/cji

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 County Attorney to settle a claim commenced by the County against International Fidelity Insurance Company (“IFIC”), for the total amount of \$75,000, in the action entitled, *County of Westchester v. International Fidelity Ins. Co.; International Fidelity Ins. Co. v. R & S Waste Services, LLC, et. al*; Index No. 53642 / 2019; Supreme Court of the State of New York, County of Westchester.

Your Committee is informed that pursuant to authorization of the Board of Legislators on or about February 8, 2019, the County commenced an action on March 7, 2019 against IFIC for a claim related to breach of its obligations under a payment and performance bond relating to breach of an agreement by, and termination of an agreement with, R & S Waste Services, LLC (“R&S”), dated February 16, 2019 (the “County / R&S Agreement”), for which IFIC is the surety.

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charged the County various rates per ton for different classifications of ordinary solid waste removed by it from all other County locations as detailed in the County / R&S Agreement.

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The County / R&S Agreement obligated R&S to comply with the provisions of all applicable federal, state and local laws, rules and regulations, including but not limited to, those applicable to R&S as an employer of labor or otherwise, including, without limitation, Labor Law, Worker’s Compensation Law, State Unemployment Insurance Law, and the Federal Social Security Law.

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As R&S was obligated under the County / R&S Agreement “to comply...with the provisions of all applicable federal, state, and local laws, rules and regulations”, its violation of ERISA as determined by the March 28, 2018 Decision and Order, constitutes its material breach of the Agreement.

By letter dated June 21, 2018, the County notified R&S that it materially breached the County / R&S Agreement by violating the Employee Retirement Security Act, and demanded that it cure same within forty-eight hours after its receipt of the letter. By letter dated July 9, 2018, the County notified R&S that the County / R&S Agreement was terminated due to R&S' failure to cure its breach.

By letter to IFIC dated July 16, 2018, the County made a claim under the Bond, demanding that IFIC indemnify and save it harmless against all costs and damages resulting from R&S' breach of the County / R&S Agreement, including that IFIC complete the work agreed to be performed by R&S. By letter dated October 12, 2018, IFIC denied the County's claim under the Bond in its entirety.

Due to R&S' material breach of the County / R&S Agreement, the County was caused to obtain replacement solid waste hauling services ("replacement services") at rates higher than those charged by R&S under the County / R&S Agreement.

The time period for the County's recovery of damages for replacement services against IFIC, is from July 9, 2018; the termination date of the County / R&S Agreement, through February 28, 2019; the expiration date of the Bond as renewed by IFIC.

The County obtained replacement solid waste hauling services for said time period, detailed as follows:

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Airport, as upon information and belief, City Carting had no license at such time to perform same.

To avoid interruption of the removal of USDA regulated international solid waste at the Airport, AVPORTS, as Airport manager and operator, retained Waste Management Reduction Services, LLC (“WMRS”) on or about July 2018 to perform said service as the sole entity known to it at such time that was licensed to perform same, and as federal regulations require that such waste be removed from the Airport within 72 hours from the time it arrives. Under AVPORT’S agreement with WMRS, AVPORTS pays WMRS and is reimbursed by the County.

On or about October 26, 2018, the County published “invitations to bid” for the removal of solid waste from various County locations, except the USDA regulated international solid waste at the Airport, on a non-interim basis. On or about January 10, 2019, the County entered into a contract with City Carting as sole bidder to perform said services (the “County / City Carting Bid Agreement”). The County / City Carting Bid Agreement is for an amount not to exceed \$1,418,722, and has a term from January 12, 2019 through January 11, 2022, with the County having the sole option to renew for one additional two year period.

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Subsequent and in response to the County's commencement of its against IFIC on March 7, 2019, IFIC, commenced a third-party action on May 29, 2020 against R&S, and other entities and certain individuals, for indemnification for any liability it may have to the County.

On July 20, 2020, R&S asserted a counterclaim against the County, alleging that the County breached the County / R&S Agreement. By Decision and Order dated September 16, 2020, the Court dismissed R&S' counterclaim. On or about November 9, 2020, R&S motioned the Court for re-argument of the Court's September 16, 2020 Decision and Order dismissing its claim against the County, which the County opposed, and for which a decision from the Court is pending.

The County has calculated its total damages for the time period from July 9, 2018 through February 28, 2019, in the total amount of \$156, 274.23. However, the County has agreed to settle its claim against IFIC for the total principal amount of \$75,000, given the evaluated attendant risks to full recovery of its damages at trial.

Accordingly, it is advisable that the County Attorney be granted authority to settle the County's claim against IFIC for the total amount of \$75,000.

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

Dated: February , 2021
White Plains, New York

COMMITTEE ON

l:cji

ACT NO.

- 2021

AN ACT authorizing the County Attorney to settle an action on behalf of the County of Westchester (the "County") against International Fidelity Insurance Company ("IFIC") for the total amount of \$75,000, regarding breach of an obligation under a payment and performance bond, relating to a breach of an agreement by, and termination of an agreement with, R&S Waste Services, LLC ("R&S"), dated February 16, 2017, for which IFIC is the Surety.

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 to settle its legal action against IFIC, in the action entitled, *County of Westchester v. International Fidelity Ins. Co.; International Fidelity Ins. Co. v. R & S Waste Services, LLC, et. al*; Index No. 53642 / 2019; Supreme Court of the State of New York, County of Westchester, for the total amount of \$75,000, regarding breach of an obligation under a payment and performance bond, relating to a breach of an agreement by, and termination of an agreement with, R&S, dated February 16, 2017, for which IFIC is the Surety.

Section 2. The County Attorney or his duly designated representative is hereby authorized to undertake all 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: Settlement of Action Against Surety

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 \$ \$75,000.00

Source of Funds (check one): Current Appropriations

Transfer of Existing Appropriations Additional Appropriations Other (explain)

Identify Accounts: 101-52-1000-1000-9670

Potential Related Operating Budget Expenses: Annual Amount \$ _____

Describe: _____

Potential Related Revenues: Annual Amount \$ _____

Describe: The County will be settling an action to receive \$75,000.

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

Current Year: _____

Next Four years: _____

Prepared by: Christopher J. Inzero

Title: Senior Assistant County Attorney

Department: Law

Reviewed By: _____

Budget Department

1/27/21

If you need more space, please attach additional sheets.