



Budget & Appropriations

BOL Meeting Minutes - Final

Committee Chair: Catherine Borgia

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

Monday, March 15, 2021

10:00 AM

Committee Room

CALL TO ORDER

Meeting jointly with the Committees on Law & Major Contracts and Parks & Recreation

With a quorum present, Chair Borgia called the meeting to order at 10:08 AM.

Pursuant to Governor Andrew Cuomo's Executive Order No. 202.1, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," which temporarily suspends portions of the New York State Open Meetings Law.

A section of the order, "Suspension of law allowing the attendance of meetings telephonically or other similar services," provides for the suspension of "Article 7 of the Public Officers Law, to the extent necessary to permit any public body to meet and take such actions authorized by the law without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed."

Others in Attendance: BOL: Alessandra Restiano, Jill Axelrod, Elizabeth LoBello, Lisa Hochman BOL REMOTE: MaryJane Shimsky, Colin Smith, Jose Alvarado, Kitley Covill, Melanie Montalto LAW: John Nonna, Rachel Noe, Jack Micciche LAW REMOTE: Tami Altschiller, David Chin, Elizabeth Sacksteder, Sean Carey

Present: Legislator Borgia and Legislator Boykin

Remote: Legislator Barr, Legislator Cunzio, Legislator Gashi, Legislator Johnson, Legislator Maher, Legislator Parker, Legislator Tubiolo, Legislator Walter, Legislator Williams and Legislator Woodson-Samuels

MINUTES APPROVAL

March 10, 2021 10AM Minutes

This was tabled

I. ITEMS FOR DISCUSSION

1. [ACT-2021-37](#) ACT - Lawsuit Settlement - "K.O"

An ACT authorizing the County of Westchester to compromise its right to be reimbursed for health care and wage benefits paid to or on behalf of a County employee from a settlement of

her legal action against a third-party tortfeasor.

Submitted by COMMITTEES ON BUDGET & APPROPRIATIONS AND LAW & MAJOR CONTRACTS

Joint with LMC

Guests: Senior Assistant County Attorney Sean Carey

Senior Assistant County Attorney Sean Carey came before the joint committees to discuss Lawsuit Settlement – K.O. Mr. Carey explained that this is an Act to authorize the County to compromise its claim to be reimbursed for health care and wage benefits paid on behalf of County employee K.O. Mr. Carey discussed that on June 11, 2019, K.O. an employee of the Parks Department fell down steps at the Westchester Hills Golf Course located at 401 Ridgeway, White Plains. As a result, K.O. sustained injuries to her left hip and left leg and missed six weeks of work. She is currently back to work at full capacity. K.O. filed a claim for her injury with the NYS Workers' Compensation Board, which was not disputed. K.O. also retained counsel in advance of commencing a personal injury action against Westchester Hills Golf Club. On February 12, 2021 K.O. agreed to settle her personal injury claim before litigation in the amount of \$125,000, K.O. counsel waived his fee of \$41,662.50. It was noted that between the date of the injury and the date of the settlement, the County expended medical benefits to or on K.O. behalf in the amount of \$15,812.02 and indemnity (lost wages) in the amount of \$16,654.68. The Law Department is looking to reduce the lien by 33.33% equaling \$10,821.15. The County would accept in satisfaction of its present lien a total of \$21,645.55. After the County is reimbursed and legal fees are paid, K.O. would receive \$61,691.95.

On motion of Legislator Maher, seconded by Legislator Barr, the above item was signed by committee. The motion carried by the following vote:

Aye: Legislator Borgia, Legislator Barr, Legislator Boykin, Legislator Cunzio, Legislator Gashi, Legislator Johnson, Legislator Maher, Legislator Parker, Legislator Tubiolo, Legislator Walter, Legislator Williams and Legislator Woodson-Samuels

2. [ACT-2021-36](#) **ACT - Settlement of Westchester County v. E.E. Cruz & Co.**

AN ACT authorizing the County Attorney to settle on behalf of the County of Westchester the claims of E.E. Cruz & Company, Inc. against the County for additional compensation under Contract No. 11-503-REV for Rehabilitation of the Fulton Avenue Bridge over Hutchinson River (BIN 3348220), City of Mount Vernon and Village of Pelham Manor.

Submitted by COMMITTEES ON BUDGET & APPROPRIATIONS AND LAW & MAJOR CONTRACTS

Joint with LMC

Guests: County Attorney John Nonna, Associate County Attorney Rachel Noe and Assistant County Attorney Jack Micciche

County Attorney John Nonna, Assistant County Attorney Jack Micciche and Associate County Attorney Rachel Noe joined the joint committees to discuss the following items together, a Settlement of Westchester County v. E.E. Cruz & Company and a Settlement of claim against Henningson, Durham & Richardson Architecture and Engineering, P.C. (HDR Engineering). Mr. Micciche began by explaining that the first settlement is an Act that would authorize the County to settle the claims of E.E. Cruz & Company, Inc. against the County of Westchester for additional compensation for work done in association of the rehabilitation of the Fulton Avenue Bridge over the Hutchinson River in the City of Mount Vernon and the Village of Pelham.

Mr. Micciche discussed that in 2016 there was a contract approved for work to be completed for the Fulton Avenue Bridge, A bascule movable bridge over the Hutchinson River, he explained that the scope of work included removal and replacement of the steel bridge deck, stringers and bracing and sidewalk panels. In February 2020 E.E. Cruz submitted a statement to the Commissioner of the Department of Public Works and Transportation listing two separate claims for additional compensation for work performed in the amount of \$1,744,719.00

The first claim concerns the removal of existing steel from the Bridge. The consultant (HDR Engineering, Inc.) prepared drawings, the specifications and necessary bidding information for the project, which included the removal of approximately 178,684 pounds of existing steel from the Bridge. Per the specs prepared by HDR, the pay unit for the removal of the existing steel from the Bridge was per pound of steel removed. In its Bid for the project, Cruz provided an itemized proposal containing a unit price of \$8.00 per pound resulting in a bid amount of \$1,429,472.00 the amount E.E. Cruz has been paid. E.E. Cruz submitted an additional request for payment of \$1,292,000.00 from the County claiming that they removed a total of 340,184 pounds of steel from the Bridge, or 161,500 pounds over the original amount. Upon investigation by the Department of Public Works the County discovered that HDR neglected to include the Bridge's steel decking in the original amount.

The second claim concerns in-field modifications along the upper and lower flanges of the Bridge's Floor Beam 5. The modifications were required when the upper and lower flanges made contact with separate joints during test operations. E.E. Cruz claims that the interferences were results of errors in the design documents prepared by HDR related to the deck joint assembly work contemplated by the contract. E.E. Cruz claims it is entitled to additional compensation in the amount of \$452,718.00.

The Commissioner of the DPW/T is the arbitrator per the terms of the contract. The Commissioner determined that in respect to the first claim, that E.E. Cruz is entitled to an additional \$1,061,745.00 and the Commissioner determined in respects to the second claim that E.E. Cruz is not entitled to compensation. The Commissioner determined that a disincentive assessment of \$366,000.00 applied for failure of E.E. Cruz to timely complete the projects and therefore would reduce the additional payment of the first claim to \$695,745.60. The Commissioner determined that E.E. Cruz is due an additional payment, but rejected the claim that they had removed 340,184 pounds of steel (an overrun of 161,500 pounds). He noted that E.E. Cruz offered no support for their numbers. The Commissioner pointed to a balanced equation by E.E. Cruz in its communications with the County to determine that in fact they removed 311,402.2 pounds of steel, with an overrun of 132,718.2 pounds. He then multiplied that by the agreed bid price of \$8.00 per pound to determine the payment of \$1,061,745.60.

The Commissioner rejected the additional compensations for the in-field modifications noting that clear and unequivocal languages contained in the contract required E.E. Cruz to perform all necessary field surveys to verify field conditions and to verify all dimension affecting the fabrication, construction and fit of replacement concrete and steel elements required to complete the project. The contract also states that E.E. Cruz was to fabricate all materials in accordance with their own measurements and not rely solely on the specifications provided by HDR. The Commissioner stated that they should have known the potential interference to the upper and lower flanges of Floor Beam 5 prior to testing.

The project was required to be completed by November 22, 2017, the work was not completed until May 24, 2018, which was 183 days beyond the completion date. According to the Special Notice attached to the bid, a disincentive assessment of \$2000 per day must be

applied reducing the sum to \$695,745.60

E.E. Cruz disagrees with the Commissioners determination of the second claim, and intends to challenge via an Article 78 proceeding. The Departments and E.E. Cruz have engaged in negotiation to avoid litigation which have resulted in a proposed settlement.

The second Settlement of claim against Henningson, Durham & Richardson Architecture and Engineering, PC (HDR) is an Act that would authorize the County to settle the claim of the County against HDR. For defense and indemnification with respect to the claims of E.E. Cruz & Company, Inc. for additional compensation for the project known as the Rehabilitation of the Fulton Avenue Bridge over Hutchinson River. As previously discussed in the first item, the County acting through its County Attorney's Office demanded that HDR indemnify and hold harmless the County with respect to E.E. Cruz's claims. Additional to avoid any further litigation cost, the County and HDR have resulted in a proposed agreement to settle the County's claim for defense and indemnification. It has been agreed that HDR is to pay the County the total sum of \$154,254.40 as a contribution to a proposed \$850,000 settlement between the County and E.E. Cruz for its claims.

In summary, the total amount of the settlement awarded to E.E. Cruz will be \$850,000 which will include a payment of \$695,745.60 from the County and \$154,254.40 from HDR.

On motion of Legislator Maher, seconded by Legislator Barr, the above item was signed by committee. The motion carried by the following vote:

Aye: Legislator Borgia, Legislator Barr, Legislator Boykin, Legislator Cunzio, Legislator Gashi, Legislator Johnson, Legislator Maher, Legislator Parker, Legislator Tubiolo, Legislator Walter, Legislator Williams and Legislator Woodson-Samuels

3. [ACT-2021-38](#) **ACT - Settlement of claim against Henningson, Durham & Richardson Architecture and Engineering, P.C.**

AN ACT authorizing the County Attorney to settle a claim on behalf of the County of Westchester against Henningson, Durham & Richardson Architecture and Engineering, P.C. in association with HDR Engineering, Inc., for defense and indemnification in connection with the claims of EE Cruz & Company, Inc. for additional compensation under Contract No. 11-503-REV for Rehabilitation of the Fulton Avenue Bridge over Hutchinson River (BIN 3348220), City of Mount Vernon and Village of Pelham Manor.

Submitted by COMMITTEES ON BUDGET & APPROPRIATIONS AND LAW & MAJOR CONTRACTS

Joint with LMC

Guests: County Attorney John Nonna, Associate County Attorney Rachel Noe and Assistant County Attorney Jack Micciche

Please refer to item # 2 (2021-200).

On motion of Legislator Barr, seconded by Legislator Maher, the above item was signed by committee. The motion carried by the following vote:

Aye: Legislator Borgia, Legislator Barr, Legislator Boykin, Legislator Cunzio, Legislator Gashi, Legislator Johnson, Legislator Maher, Legislator Parker, Legislator Tubiolo, Legislator Walter, Legislator Williams and Legislator Woodson-Samuels

4. [2021-153](#) **ACT - Second Restated and Amended Playland Management Agreement with Standard Amusement, LLC**

AN ACT authorizing the County of Westchester to enter into a Second Restated and

Amended Playland Management Agreement with Standard Amusements, LLC in order to fully resolve the allegations set forth in the Chapter 11 case entitled: *In re Standard Amusements LLC, Debtor, Case No. 19-23061 (RDD) and the Adversary Proceeding No. 19-08264 (RDD), Standard Amusements LLC, Plaintiff v. The County of Westchester, by and through George Latimer, in his official capacity as County Executive of Westchester, Kathleen O'Connor in her official capacity as the Commissioner of the Department of Parks, Recreation and Conservation, and Hugh J. Greechan, in his official capacity as the Commissioner of the Department of Public Works and Transportation, Defendant.*

Submitted by COMMITTEES ON BUDGET & APPROPRIATIONS, LAW & MAJOR CONTRACTS AND PARKS & RECREATION

Joint with LMC & PR

Guests: County Attorney John Nonna, Assistant Chief Deputy County Attorney Tami Altschiller, Associate County Attorney David Chen, and Elizabeth Sacksteder, Partner, Paul Weiss Rifkind Wharton & Garrison

Chair Barr and Legislator Borgia agreed that we had finished discussing alienation. Mr. Nonna answered Legislator Parker's questions regarding the Tiki Bar. He noted that after extensive negotiations, Standard was given the opportunity to redesign and construct a new Tiki Bar in consideration for the union labor provision. Ms. Sacksteder said the critical provisions are in Section 6F(iv) on pages 29-30. For the first year, the Tiki Bar will continue to be operated by the current licensee, pursuant to the revised agreement with the licensee. At the end of 2022, Standard's rights with respect to the Tiki Bar kick in. Standard is obligated to invest at least \$2.25 million in demolition and construction of a new restaurant, and they have to do this in the first five years. The work will be subject to all of the County's approval rights under section 6B of agreement. If the County doesn't agree to Standard's plans and specs for the new facility or Standard can't get the permits and approvals it needs, Standard can decline to proceed with constructing a new facility. Standard may then continue to operate the current facility, but they are not obligated to, and they can relinquish all rights in the Tiki Bar back to the County. This is a no lose proposition for the County. She said that we added a provision that the new facility can't impede public access to the Boardwalk or Ice Casino.

Legislator Borgia asked if there is a time limit on how long construction can take. Ms. Sacksteder said there is no specific time limit for construction, but it is in Standard's commercial interest to get it done quickly so they don't lose revenue.

Ms. Sacksteder also noted that Standard is solely responsible for the cost of demolition and construction and any extraordinary maintenance or repairs to the Tiki Bar for as long as they are operating it. Mr. Nonna noted that Standard must use union labor. Unlike other provisions, there is no time limit on use of union labor for construction and demolition of the Tiki Bar. If Standard does subsequent work on the facility, they do not have to use union labor for that. Legislator Barr asked if there is any possibility that we could be left with a demolished Tiki Bar but no new Tiki Bar. Ms. Sacksteder said County approval in advance of demolition is required by Section 6B, and Standard would need permits to start demolition. She noted that there is financial assurance in the agreement that Standard has the wherewithal to do the entire project from the beginning. \$2.25 million of the manager's investment is earmarked for the Tiki Bar, and demolition would not cost anywhere near that much. She noted that demolition without building a new facility would be a material breach of agreement, and the County could terminate the agreement and recover any associated damages.

Legislator Parker asked for clarification about labor, buildout, and discussions related to the County's compensation for that. Ms. Sacksteder said the prior agreement had no provisions

on union labor, and the new provisions were heavily negotiated. Legislation Parker acknowledged that at least the union labor provision covers the original stage of Standard's takeover.

In terms of the parameters of a buildout, Ms. Sacksteder said any change in size or location of the Tiki Bar shall be subject to County's consent, which cannot be unreasonably withheld or delayed. We wanted a consent right to ensure that any new facility will not impinge on any public access or be detrimental to our vision of Playland Park. Legislator Parker noted that this has been a big issue with the current Tiki Bar, and asked what about size, and whether there was discussion regarding public areas such as the pier, boardwalk, and seaside walkway. Ms. Sacksteder said the discussion was principally around the boardwalk, and there was no specific discussion regarding square footage or what the new facility would look like. The consent right is meant to address issues like that as they arise.

Ms. Altschiller reviewed the terms of the amended agreement with the current licensee for the Tiki Bar. This was discussed in executive session last week because the agreement had not yet been made public. It has since been approved by A & C, so it can now be discussed in open session.

Legislator Barr asked about the "morality clause" in the agreement. Mr. Nonna discussed various provisions, including Section 2D, which provides that the park has to be operated in accordance with the rules and regulations of the Parks Department; Section 2BB, the revised key personnel clause, which requires key personnel have no prior convictions for theft, embezzlement, or a crime of moral turpitude; Schedule H-1 which requires a criminal background check. He noted that Section 10 requires that subcontractors have integrity, and Section 11 requires removal of any employee whose conduct, demeanor, or appearance is objectionable to the Commissioner.

Chairman Boykin asked how this fits with the "Ban the Box" law, which prohibits asking about criminal convictions on job applications. Mr. Nonna said you can't refuse to hire someone because of a criminal conviction unless the job relates to the crime they committed and poses a risk. He noted that "Ban the Box" does not say you can never ask, just not on the application. You can give a conditional job offer pending a background check.

Legislator Walter asked if the clause regarding criminal conviction applies to Nick Singer, the principal of Standard. Mr. Nonna said he is subject to the criminal disclosure law, which covers principals and not just employees.

Legislator Walter asked if the contract is assignable. Mr. Nonna said yes, but Section 10 provides that the County can evaluate anyone Standard seeks to assign to for their integrity and financial ability, and it requires the County's prior written consent which cannot be unreasonably withheld. This was not in the prior agreement.

Mr. Nonna addressed Legislator Maher's question regarding continuing meetings beyond five years. The meetings for the first five years relate to the marketing plan. Section 2(O) requires Standard to attend quarterly meetings with County personnel throughout the entire term of the agreement.

Chair Barr discussed the remaining issues by noting that Mr. Nonna has said he does not expect there to be an issue with having Standard agree to free parking in the off-season. Mr. Nonna said they are talking to Standard about summer employment. He noted that they will add language to the agreement regarding the qualifications for the monitor.

Mr. Nonna asked if the committee had any suggested criteria for sponsorships to bring to Standard. Legislator Barr asked the legislators to submit that information to her or Mr. Nonna within the next week. He noted that the Parks Department could promulgate rules and regulations regarding the types of advertisements that would not be permitted because they

pose a danger to young people. Ms. Sacksteder asked if it would be sufficient if they proposed no tobacco, vaping or alcohol sponsorship. Legislator Parker said we shouldn't include alcohol since some local businesses might be hurt by that.

Legislator Maher said that we should take the position that Standard has to get County approval since the agreement goes for 35 years and we cannot foresee what might arise in the future. We can discuss this with the Parks Department at our next meeting on Wednesday.

This ACT was tabled

II. OTHER BUSINESS

III. RECEIVE & FILE

ADJOURNMENT

On motion of Legislator Parker, seconded by Legislator Barr, the Board adjourned at 11:59 AM.