

Westchester County Courthouse Construction and Rehabilitation Project

**Report of the Inspector General
and the Chief Auditor
New York State Unified Court System**

Sherrill Spatz, Esq.

Dennis Donnelly, CPA



September 23, 2003

Table of Contents

EXECUTIVE SUMMARY	i
METHODOLOGY	xi
REVIEW TEAM	xiii
ACKNOWLEDGMENTS	xv
I. INTRODUCTION	1
II. LEGAL BACKGROUND	3
A. Framework: The Court Facilities Act	3
B. The Court Facilities Capital Planning Process	5
C. Court Facilities Project Financing	6
D. Program Implementation and Glossary	7
III. FACTUAL BACKGROUND	11
A. 1974-1997: Early History of the Courthouse and Development of Westchester County's 1997 Capital Plan	11
B. 1998-2003: Implementation of the Capital Plan	16
1. 1998 - Mobilization	16
2. 1999 - Hints of Problems to Come	19
3. 2000 - Bad News and Tough Choices	21
4. 2001 - Escalating Problems	25
5. 2002 - Old Problems Linger; New Problems Emerge	27
6. 2003 - Toward a Solution	31
IV. ANALYSIS OF CAUSES OF PROJECT DELAYS AND COST OVERRUNS ..	35
A. Project Growth to Correct the Inadequate 1997 County Plan	35
1. Development of the 1997 Plan	36
2. Growth of the Annex	36
a. Program Review and Development	36
b. Reasons for Increase in Annex Program	38
3. Growth of the Tower	41

4. “Unfunded” Items	42
5. Reduction of Annex Height from Eight Stories to Three Stories	42
B. Impact of Construction Market Conditions	44
1. Construction Boom of the Late 1990s	44
2. Construction Bust of 2001-2003	44
C. Project Contingencies and Change Orders	45
D. Contaminated Soil on the Annex Site	47
E. Increased Architectural, Engineering and Management Costs	49
F. Other Factors Impacting Project Progress and Cost	50
1. Effect of Delays and Contractor Problems	50
2. Award of the Delcon Contract	52
3. Compounding Effects of the Wicks Law	54
V. INFORMATION EXCHANGE AND DECISION-MAKING	57
VI. CONCLUSIONS AND RECOMMENDATIONS	63
APPENDIX (separately bound)	

Executive Summary

Introduction

At the request of the Chief Administrative Judge of the State of New York, Jonathan Lippman, and under his delegated authority, this report analyzes the causes of significant delays and cost overruns associated with the ongoing renovation and expansion of the Westchester County Courthouse. The Courthouse renovation and expansion project began in 1998 under State mandate, and is now several years behind schedule and an estimated \$51 million over budget.

This report concludes that many of the problems the Courthouse project encountered after its October 1997 approval by Westchester County were unanticipated. While the project would later grow in size and scope, encounter extremely unfavorable market conditions, become complicated by soil contamination, and face delays arising from multiple errors and contractor insolvencies, the record demonstrates that the full magnitude of these difficulties was not apparent at the time that Westchester County's 1997 Capital Plan was promulgated. Rather, these difficulties would only unfold, and their impact in time and money would only become fully realized, during the subsequent years of design and implementation.

With hindsight, however, the primary causes of these difficulties are readily apparent. First and foremost, Westchester County's original \$140 million cost-estimate by which some affected parties have gauged project performance was never a realistic figure for the work ultimately required, largely because the planning process that produced the estimate was flawed. A long history of missteps, delays and indecision by the prior Westchester County Administration throughout the 1980s and 1990s led in late 1997 to a deficient plan, which set the stage for the project team to attempt a complex construction job with an insufficient budget and plans that contained extensive errors and omissions. The process of correcting these insufficiencies required the project (and thus the cost) to grow substantially.

The evidence further demonstrates that the problems inherent in the 1997 County Plan were exacerbated by a number of other factors, including the project team's ineffective management of key aspects of the project. The project schedule and cost were also adversely affected by dramatic changes in the construction market. At the time bids were solicited in 1999 and again in 2000, the regional construction market was highly saturated and thus expensive; soon thereafter a general downturn in the construction industry impaired the performance of several project contractors — causing further delays and adding to the project cost.

Statutory Background

The legislative basis for the Courthouse project is a series of State statutes that require localities to construct and maintain suitable court facilities and that empower the Chief Administrative Judge to enforce that mandate. In 1977, the State assumed from local governments the financial and management responsibility for trial court operations. However, the takeover statute continued and restated the pre-existing obligation of counties and cities to operate and maintain “facilities suitable and sufficient for the transaction of [court] business.” Under State law, if a county or city fails to meet this obligation, the Chief Administrative Judge may impose sanctions by determining the value of such failure and instructing the State Comptroller to withhold from the locality that amount of State aid.

Subsequent legislation, the 1987 New York State Court Facilities Act, assisted localities in meeting this obligation in three ways. First, the Act provided State aid for localities that complied with applicable court-facility construction and maintenance mandates. Second, the Act made the financing and construction- management services of the Dormitory Authority of the State of New York (DASNY) available at local option to assist localities in the financing and (re)construction of court facilities. Third, the Act established a court facilities capital planning process under the jurisdiction of a newly-created Court Facilities Capital Review Board (CFCRB) that must approve localities’ capital plans and capital plan amendments.

These key statutes circumscribe the purview of this report. State law obliges Westchester County to maintain its Courthouse for the safe, efficient and dignified transaction of public affairs. The Chief Administrative Judge, by virtue of his office and his position as chair of the CFCRB, must enforce that duty.

Factual Background

Westchester County completed construction of the County Courthouse in White Plains in 1974. Serious construction defects were apparent almost from the day the Courthouse opened. The facade crumbled and both the roof and windows leaked. These and other defects caused water damage to the Courthouse interior and parking garage—jeopardizing safety, impairing building operations and requiring nearly constant stopgap repairs. County neglect in maintaining the Courthouse and remedying these defects exacerbated these problems. In addition, the building design failed to provide adequate elevators, leading to chronic delays. Meanwhile, Westchester County was experiencing significant population growth and concomitant economic development, resulting in large docket increases in the local courts that dramatically increased demand on already insufficient court facilities.

In 1988, pursuant to the provisions of the Court Facilities Act, the County hired consultants to prepare the facilities-assessment and capital plan required under that

legislation. The County's interim plan, submitted in 1989, concluded that significant renovation and expansion of the Westchester County Courthouse was necessary. Over the following seven years, the former County Administration formulated and recycled several additional plans — resulting in a partial 1991 Plan and a complete 1994 Plan. None of these plans was submitted to the Westchester County Board of Legislators for final approval. The 1994 Plan was approved by the CFCRB but never implemented by the County.

By 1997, Westchester County had still not implemented a capital plan pursuant to the Court Facilities Act. On February 22, 1997, a large slab of cement fell from the exterior of the 19th floor of the Courthouse and injured a pedestrian, leading to litigation that the County later settled. Meanwhile, the former County Administration estimated that rehabilitating and expanding the Courthouse would cost approximately \$140 million. That summer, the Westchester County Board of Legislators rejected public referenda that would have asked voters to approve either a \$140 million plan for a new Justice Center annex and subsequent renovation of the existing Courthouse tower, or a more limited \$70 million plan to rehabilitate the Courthouse and temporarily relocate the courts. In mid-1997, with no County court-facilities plan in place or apparently forthcoming, the Chief Administrative Judge indicated that he would sanction Westchester County for \$140 million unless the County promptly adopted and implemented a suitable plan to rehabilitate its Courthouse.

In October 1997, the County responded by completing and approving a capital plan and financing package for \$140 million in Courthouse renovations, to be financed by DASNY. That three-phase plan called for: (1) recladding the exterior of the tower, (2) constructing an eight-story Justice Center annex adjacent to the tower, and (3) following completion of the annex, comprehensively renovating the tower interior. The Board of Legislators contemporaneously authorized the County to contract with DASNY to supervise the reconstruction on the County's behalf. The CFCRB approved the County Plan in November 1997, and a Construction Management Agreement was signed by DASNY and the prior County Administration the following month.

The 1997 County Plan ultimately proved deficient, exacerbated by several contributing factors that inflated the time and cost required to expand and rehabilitate the Courthouse. In light of these defects, an independent present-cost estimate jointly requested by the Chief Administrative Judge and the Board of Legislators determined in June 2003 that approximately \$51 million in additional funding will be required to complete the final phase of the project-renovation of the tower interior to replace failing building systems and address the serious health and safety conditions adversely affecting Courthouse users. On advising the County Administration and Board of Legislators of the results of the independent cost review, the Chief Administrative Judge directed the Inspector General and the Chief Auditor of the New York State Unified Court System to undertake a comprehensive inquiry of the reasons for the delays and cost overruns, and to

present their findings to the Chief Administrative Judge, Westchester County government and the public.

This report is the result of that directive. Reflecting exhaustive review of thousands of pages of documents and dozens of interviews, the report traces the evolution of the Westchester County Courthouse project and examines the performance of public and private entities in the project's approval, design, financing and implementation. The report then analyzes the many issues that have been identified by observers as contributing to the delays and cost of this project, including:

- the architectural history and integrity of the 1974 Courthouse;
- the prior County Administration's conduct of its Capital Planning process, including its repeated reformulation of the capital plan;
- the programmatic viability of the 1997 Capital Plan;
- the legitimacy of the prior County Administration's \$140 million cost estimate in 1997 based on available project and site information;
- the subsequent redesign of the Courthouse annex, including the decision to reduce its height from eight stories to three;
- the conduct of the bidding process, including the decision to restructure the work from two phases to three phases after Phase II bids came in significantly over budget;
- the project team's management of the project;
- the discovery and remediation of contaminated soil on the site;
- the impact of changing conditions within the construction market, including the bankruptcies of the general contractor and roofing subcontractor; and,
- the performance of DASNY and other members of the project team, the County Administration, and the Board of Legislators in exchanging and acting on available information in a timely and appropriate fashion.

Analysis and Findings

There were multiple, often interrelated causes for the project delays and cost overruns. These causes—unanticipated by the County and DASNY at the time of the project's approval and commencement—fall into three general categories:

- **Inadequate capital planning by the prior County Administration in the early to mid 1990s, which resulted in unanticipated growth of the project;**
- **The project team's ineffective management of key aspects of the project, which caused both delays and cost increases; and,**
- **Dramatic changes in the construction market at critical points in the project.**

Specifically, the report finds:

- 1. The 1997 Capital Plan prepared by the prior County Administration was marred by a variety of errors and omissions.** As a result, the prior County Administration's \$140 million cost estimate—itsself a summary one-page document without supporting data—was later revealed to seriously understate the project's true cost from the start.
- 2. The insufficiency of the County's 1997 Capital Plan set the stage for subsequent unanticipated expansion of the project to correct errors and omissions in the 1997 County Plan.** The post-1997 design process revealed that the annex would have to be larger than the 1997 County Plan anticipated to adequately accommodate its intended functions. The design process also demonstrated that, due to inaccurate drawings by the County's previous architects, the 1997 County Plan significantly understated the square footage of the tower space that the County intended to renovate.
- 3. Not all of the necessary project costs were included in the budget.** The County's 1997 project budget did not provide for required furniture, equipment, data cabling, and moves of Courthouse occupants. These essential items required additional expenditures of an estimated \$3.4 million for Phase II and \$3.5 million for Phase III, or approximately \$6.9 million.
- 4. The project was whipsawed by the construction market.** The project was bid out at the peak of the construction boom of the late 1990s, with the result that bids came in very high. After the tower recladding and the annex construction had commenced, there was a sharp downturn in the construction market, causing a number of key contractors to experience serious financial difficulties, which further increased the delays and project costs.
- 5. Project contingencies and change orders added significantly to the cost of the project.** Many of these contingencies and change orders appear to have resulted from the fact that design documents for the annex and connecting link to the tower included an excessive number of errors and omissions. Many of these errors and omissions resulted from reliance on inaccurate drawings of the Courthouse tower provided to the project team by the County (which had previously received them from the architects who designed the 1974 tower) and on design drawings that were not coordinated with existing conditions.
- 6. Soil contamination on the annex site increased the Phase II budget by \$3.36 million.** Removal of petroleum- and PCB-contaminated soil added \$3.36 million to the cost of Phase II and delayed its completion by nearly three months.
- 7. There were significant increases in Architectural, Engineering and Construction Management fees and costs because of changes in scope, the redesign in 2000 after bids came in over budget, the repackaging of the bids, and the multi-year delays experienced on the project.** Almost \$2 million in fee increases have been approved to date, and the Phase III budget now calls for an additional \$6.6 million in such costs, bringing the total projected impact of these cost increases to \$8.6 million.

8. Numerous other factors impacted the progress of the project. These factors include delays in awarding Phase II contracts, contractor difficulties encountered throughout the project and especially in Phase II, and the project team’s failure to manage these problems effectively — all exacerbated by the compounding effects of the Wicks Law. While this report is unable to quantify all of these adverse effects, this inquiry found no evidence to question the validity or sufficiency of the June 2003 DASNY estimate of \$7.7 million as a reserve for additional costs that may be associated with completion of Phase II.



With regard to the exchange of information and the effectiveness of decision-making among DASNY, the project team, the County Administration and the Board of Legislators, the report concludes that, in general, there appears to have been regular and appropriate communication throughout the project, and specifically, that DASNY kept the County Administration and the Board of Legislators, as appropriate, informed of the progress of the project.

The project management agreement between the County and DASNY provided that the County Administration would identify persons to serve as liaisons on the project. Throughout the project those persons have been in close and regular contact with DASNY, attending regular project meetings and receiving copies of correspondence, meeting minutes and other appropriate project documents. DASNY officials also appeared before the Board of Legislators to apprise it of relevant project developments, although, consistent with the DASNY-County agreement pursuant to which the Administration was the liaison for the project, the legislative briefings were less frequent and less detailed than DASNY’s coordination with the County Administration.

However, regardless of any communication problems that may have existed, this inquiry found no evidence that communication issues had any impact on the schedule or cost of the project.



Conclusions and Recommendations

This report demonstrates that though the causes of the significant delays and cost overruns on the Westchester County Courthouse project were largely unanticipated at their inception, their sources are now clear. Delays, indecision and inadequate planning by the former County Administration led to a deficient 1997 County Plan and a \$140 million budget estimate that was insufficient to fund the necessary program. In attempting the subsequent complex reconstruction effort, DASNY and other project team members relied on a deficient plan, a deficient cost estimate, and incorrect site drawings inherited from the County. Because of erroneous (albeit genuine) belief that changes could be made

within the initial incorrect budget, the project team failed to detect and remedy many glaring insufficiencies until some time later, thus compounding error with error. Further aggravating the situation were poor coordination among the project team members and unfavorable market conditions and contractor bankruptcies that resulted in even further delays and budgetary accommodations.

The remaining issues relate not to the past but to the future. Particularly after decades of indecision and mishaps, the People of Westchester County are entitled to safe, efficient and dignified court facilities. The People are also entitled to reasonable assurances that the long-delayed completion of the Westchester County Courthouse will not repeat the problems of the past. Further delays may only increase the cost necessary to complete the project. To that end, effective mechanisms should be implemented to ensure the expeditious and on-budget completion of the remaining construction and rehabilitation work on the Courthouse.

Several steps have already been taken to achieve those ends. First, the Judiciary, in consultation with the Board of Legislators, directed the preparation of an in-depth and independent cost estimate by Baer and Associates to calculate the remaining Phase III costs. That independent cost estimate was transmitted to the County Administration and Board of Legislators in May 2003. In addition, at the Judiciary's request, DASNY performed — in consultation with the Construction Manager — a complete re-estimate of the remaining “soft costs” associated with the Phase III work. In contrast to earlier project estimates, these detailed and specific assessments provide that no key items are omitted and all of the work to be done is properly accounted for.

Second, consistent with the independent cost estimate, the Judiciary offered to contribute approximately \$9 million in State aid — the maximum authorized by law — to assist Westchester County to complete Phase III, provided that Westchester County timely approves the funding for the remainder of the project. Under the terms of the independent cost estimate, this aid grant would reduce Westchester County's Phase III principal cost to approximately \$42 million.

Third, beyond its previous reduction of its project-management fee, DASNY agreed to make several million dollars in interest income from the original 1998 bond proceeds available to Westchester County to support the increased project costs.

In addition to the foregoing steps, this report recommends as follows:

- 1. Promulgate a new project management agreement.** If Westchester County decides to continue with DASNY as the project manager, the County and DASNY should develop a more specific project management agreement than the now-lapsed agreement that previously governed the project. The new agreement should include procedures that provide for better protection for the County, akin to the agreements governing DASNY's execution of the New York City Courts Program. For example, the agreement should require mandatory value engineering exercises to keep the project within budget.

2. **Commit to the budget.** The parties should adopt the May 2003 independent cost estimate and its soft-cost assessment as a formal project budget that will not be exceeded. To that end, the parties should commit to using all appropriate project management tools to control project cost, including — in consultation with the Judiciary — the adoption of any reasonable value-engineering reductions necessary to conform Phase III to the existing budget.
3. **Vigorously manage outstanding claims.** DASNY should make every effort to recover additional costs associated with the completion of the annex by aggressively pursuing its contractual rights with respect to the performance of various consultants and contractors. DASNY should also seek to preserve project funds by aggressively defending against various claims that have been or may be asserted.
4. **Establish a legislative point of contact.** Regardless of the identity of the project manager, the Board of Legislators should select an individual legislator to serve as a point of contact for the Courthouse project. The Board of Legislators should require that this individual timely receive all relevant communication, minutes, updates, agreements and other materials relating to the project.
5. **Implement regular and thorough inter-branch coordination.** For the duration of the Courthouse project, the County Administration and Board of Legislators should jointly commit to high-level and transparent consultation and collaboration both between the branches of government and together with the project manager. Such consultation should include regular reports to the Board of Legislators in such form and at such times as the Board may require. The County Administration and Board of Legislators should also consider whether to formalize such expanded consultation in any new project management agreement the County may choose to adopt, whether with DASNY or with a private project-management firm.
6. **Solicit a continuing fiscal-control mechanism.** To further assist in performing the outstanding construction on time and on budget, Westchester County should consider seeking an ongoing fiscal-control presence to periodically review cost performance and promote project completion according to the schedule and budget set forth by the parties.



In evaluating its options, Westchester County should be cognizant of its unconditional obligations under the Judiciary Law and the Court Facilities Act to provide and fund required court facilities. This inquiry revealed nothing that relieves the County of that responsibility. Thus, the County should not be distracted or delayed by suggestions that there may be other sources of funding for this project. Under current law, there are no other such sources — funding remains the legal obligation of the County.

Accordingly, this report concludes that Westchester County, with the benefit of the foregoing recommendations, should expeditiously proceed to complete its Courthouse by enacting all necessary financing and project-management approvals.

Methodology

This report is based on an extensive review of the project record and on interviews with over 40 current and former officials of Westchester County, the New York State Unified Court System, DASNY and numerous private-sector individuals and entities involved in the renovation and expansion of the Westchester County Courthouse over the last decade.

Because this inquiry issued no subpoenas, the record on which this report relies includes information willingly provided by the parties. In many cases, the parties provided additional documents or responses to follow-up questions on request by the investigators and auditors.

Review Team Members

Sherrill Spatz, Esq., *Inspector General*

Dennis Donnelly, CPA, *Chief of Internal Audit*

George Danyluk, CIA, *Internal Audit Manager*

Dwayne Durn, *Internal Auditor*

Cosmas Grant, *Investigator*

Carol Hamm, Esq., *Deputy Inspector General*

Cynthia Hartung, *Internal Auditor*

Daniel Johnson, CPA, *Internal Audit Supervisor*

Linda Miller, CPA, *Internal Audit Manager*

Robert Piazza, *Investigator*

Gregory Salerno, *Investigator*

Acknowledgments

The authors extend their appreciation to all parties who cooperated in this inquiry.

Alvarado, Jose	<i>Member, Westchester County Board of Legislators</i>
Boland, Robert J.	<i>Director of Fiscal Affairs, Board of Legislators</i>
Brina Jr., William T.	<i>Coord. of Capital Planning, Office of Court Admin.</i>
Bronz, Lois T.	<i>Chair, Westchester County Board of Legislators</i>
Buono, John	<i>Former Executive Director, DASNY</i>
Carrano, Kate	<i>Budget Director, Westchester County</i>
Casey, Paul	<i>Director of Administrative Analysis, DASNY</i>
Corrigan, Michael T.	<i>Deputy Chief Financial Officer, DASNY</i>
D'Angelo, Nicholas	<i>Executive Vice President, Fuller & D'Angelo</i>
Delfino, Joseph	<i>Mayor, City of White Plains</i>
Dominelli, Edward	<i>Director of Internal Affairs, DASNY</i>
Dunphy, Edward	<i>Corporation Counsel, City of White Plains</i>
Egan, Dennis	<i>Project Manager, Pei Cobb Freed & Partners</i>
Feigel, William	<i>Field Representative, DASNY</i>
Fickeria, Dominick	<i>Vice President, URS Corp.</i>
Fisch, Rob	<i>Principal, RicciGreene Associates</i>
Frasco, Frank	<i>Project Manager, DASNY</i>
Fuller Sr., Joseph	<i>President, Fuller & D'Angelo</i>
Fuller Jr., Joseph	<i>Vice President, Fuller & D'Angelo</i>
Gismondi, Michael A.	<i>Commissioner of Buildings, City of White Plains</i>
Gray, James	<i>Director of Construction Administration, DASNY</i>
Grestas, George D.	<i>Executive Officer, Mayor's Office, City of White Plains</i>
Habel, Sue	<i>Commissioner of Planning, City of White Plains</i>
Indelicato, Ray	<i>Senior Administrative Analyst, Board of Legislators</i>

Ingrassia, Angelo J.	<i>Former Administrative Judge, Ninth Judicial District</i>
Lippman, Jonathan	<i>Chief Administrative Judge, State of New York</i>
Kemp, Jack	<i>Chief of Construction Contracts, DASNY</i>
Koopman, Paul	<i>Chief of Professional Services Contracts, DASNY</i>
LaMotte, Ursula	<i>Member, Westchester County Board of Legislators</i>
Landi, Anthony	<i>Commissioner of Environmental Facilities, Westchester County</i>
Miller, Alan	<i>Assistant Contracts Administrator, DASNY</i>
Miller, George H.	<i>Partner, Pei Cobb Freed & Partners</i>
Murphy, Thomas J.	<i>Former Executive Director and Chair, DASNY</i>
O'Rourke, Andrew P.	<i>Former County Executive, Westchester County</i>
Oros, George	<i>Member, Westchester County Board of Legislators</i>
Pinto, Vito	<i>Member, Westchester County Board of Legislators</i>
Piscatella, Jr., Philip	<i>Director, New York City Courts Program, DASNY</i>
Ryan, William	<i>Vice Chair, Westchester County Board of Legislators</i>
Schechter, Annette	<i>Senior Administrative Analyst, Board of Legislators</i>
Schwartz, Lawrence	<i>Deputy County Executive, Westchester County</i>
Stewart-Cousins, Andrea	<i>Member, Westchester County Board of Legislators</i>
Swanson, Suzanne	<i>Member, Westchester County Board of Legislators</i>
Van Vleck, Douglas M.	<i>Managing Director of Construction, DASNY</i>
Vinci, Frank	<i>Former Project Manager, DASNY</i>
Weissman, George H.	<i>Associate General Counsel, DASNY</i>
Wood, Philip W.	<i>Former Deputy Executive Director, DASNY</i>
Yerawadekar, Prakash	<i>Former Chief Architect, Office of Court Administration</i>
Young Jr., Clinton I.	<i>Member, Westchester County Board of Legislators</i>

I. Introduction

At the request of New York State Chief Administrative Judge Jonathan Lippman and under his delegated authority,¹ this report analyzes the causes of significant delays and cost overruns associated with the ongoing renovation and expansion of the Westchester County Courthouse. This report, a joint product of the Inspector General and the Chief Auditor of the New York State Unified Court System, documents the history of the Westchester County Courthouse from its initial construction by the County in 1974 through the most recent developments in its ongoing reconstruction. This report further examines the performance of public and private entities involved in the approval, design, financing and implementation of what is now one of the largest public works projects in County history.

This inquiry concludes that many of the often overlapping causes of the significant delays and cost overruns were unanticipated at the time the County ratified the project in 1997. However, this inquiry also concludes—with the benefit of hindsight—that the prior County Administration’s \$140 million cost estimate by which many observers gauge project performance was never a realistic figure for the work ultimately required, largely because the Westchester County planning process that produced it was seriously flawed. This report further finds that many factors later contributing to the project’s cost overruns and the delays that exacerbated them might have been mitigated with better planning and closer coordination.

The reasons why plans were poor and coordination was deficient are many and mutually dependent. Missteps, delays and indecision by Westchester County throughout the 1980s and 1990s led to a deficient County Plan for the Courthouse in late 1997, which set the stage for the construction team to attempt a complex reconstruction job with insufficient designs and inaccurate budgets. Because of an erroneous (albeit genuine) belief that changes could be made within the initial incorrect budget, the project team failed to detect and remedy many of these glaring insufficiencies until some time later, thus compounding error with error. Further aggravating the situation were poor coordination among the project team members and unpredictable market conditions and bankruptcies that required even further delays and budgetary accommodations.

To effectively sort through these multiple causes, Part Two of this report establishes the legal background for the court facilities mandate under which Westchester County

¹ See Judiciary Law § 212(1)(h).

enacted its 1997 Capital Plan, including the history and structure of the Court Facilities Act, the Act's capital planning process, and typical court-facility financing and implementation structures. Part Three details the factual history of the Westchester County Courthouse reconstruction project from inception to the present.

Part Four assesses the multiple and overlapping causes of the delays and cost overruns themselves, including the inadequacy of the County's 1997 plan, failures of supervision and coordination, and market conditions that inflated the cost impacts of these other factors.

Part Five assesses the flow of information among the project team, the County Administration and the Board of Legislators, in response to assertions made by County officials that they were uninformed or under-informed about project developments.

Part Six sets forth this report's conclusions and recommendations for future project management.

The following analysis seeks to explain with clarity and specificity the reasons for the delays and cost overruns on this important project. It was with this goal in mind that this report was prepared and is now transmitted to the Chief Administrative Judge, the Westchester County Executive and Board of Legislators, and the People of Westchester County.

II. Legal Background

A. Framework: The Court Facilities Act

Under New York State law, the provision of trial court facilities has historically been, and remains today, a local responsibility. The State Legislature expressly requires that county and city governments provide facilities “suitable and sufficient for the transaction of the business of the courts.”² This obligation encompasses both the duty to provide new courthouses as needed, as well as the duty to maintain and repair existing courthouses.³ If a county or city fails to meet these statutory obligations, the Chief Administrative Judge is empowered to impose sanctions on the non-complying jurisdiction by calculating the dollar amount of the failure and instructing the State Comptroller to withhold that amount from any State aid for any purpose otherwise payable to that locality.⁴ Because the Westchester County Courthouse renovation project arises under this statutory mandate and its enforcement mechanism, a thorough understanding of the project requires explication of the historical background and current legislative framework of the court-facilities mandate.

Prior to 1977, before the advent of Statewide judicial administration, local governments bore most of the fiscal responsibility both for court operations and for providing and maintaining court facilities. While the State paid the salaries of Supreme Court Justices and their immediate staffs as well as the salaries of appellate judges and their staffs, cities and counties paid the salaries of all other judges and their staffs, all court-support staffs, the non-personal service operating costs of the trial courts, and all facilities-related costs.

In 1977, the New York Constitution was amended to establish central Statewide judicial administration.⁵ Soon thereafter, the State assumed the costs of operating Supreme Court and the county-and city-level trial courts, as well as the salaries and fringe benefits of all trial judges. The State also began paying the salaries, fringe benefits and non-personal service costs of all court-support functions. Since 1977, by conservative estimates, this takeover has saved Westchester County almost \$300 million and has saved the 119 cities and counties across the State almost \$8.3 billion.⁶

² Judiciary Law § 39(3)(a) (see Appendix, Exhibit A).

³ See id.

⁴ See id.

⁵ See NY Const, art VI, § 28.

⁶ See Office of Court Administration, Office of Court Facilities Planning and Management, “Savings to Local Governments from State Takeover of Court-Operations Costs” (February 2003).

Critically, however, the takeover legislation expressly provided that any responsibilities not assumed by the State would remain local obligations. Chief among these residual local responsibilities were the provision of facilities, their maintenance and operation, and—where necessary—their renovation, improvement, expansion and replacement. That obligation continues to require counties and cities to provide and maintain “suitable and sufficient” court facilities for the transaction of the business of the courts.⁷

The 1977 legislation further provided stringent monetary sanctions against non-complying localities. Under the statute, if a locality fails to provide “suitable and sufficient” goods, services and facilities to the State Judiciary, the Chief Administrative Judge “shall determine the value of such goods, services and facilities and shall notify the [S]tate [C]omptroller of such determination. During each state fiscal year in which a political subdivision ceases to provide such goods, services and facilities, an amount equal to the value of such services shall be deducted by the [S]tate [C]omptroller from any moneys payable to such political subdivision” from any source.⁸ This provision gives localities a clear choice: either finance court-facilities maintenance and construction over time, in a planned and responsible way, or face massive expenses paid all at once from current-year budgets, to the detriment of non-complying localities’ other programs and priorities.

By the late 1970s and early 1980s, it became clear that, notwithstanding the threat of sanctions, many local governments were not meeting their statutory duties to provide “suitable and sufficient” facilities for the business of the courts. In response to this crisis, the State Legislature enacted the Court Facilities Act of 1987 (see Appendix, Exhibits B and C), which reaffirmed the principle that the provision, maintenance and operations of court facilities were local obligations.⁹ To assist local governments in meeting this responsibility, the Act established a court facilities planning and approval process, created a State aid program, and authorized technical assistance to local governments. Specifically, the 1987 Act:

- established a standardized capital planning process to ensure that the State Judiciary’s facilities needs were timely and adequately identified and that plans to meet those needs were reviewed and approved by a State-level Court Facilities Capital Review Board (CFCRB) established for that purpose;¹⁰

⁷ Judiciary Law § 39(3)(a).

⁸ Id.

⁹ See L 1987, ch 825.

¹⁰ See Public Authorities Law § 1680-c; Judiciary Law §§ 39, 39-a(2). The statute provides for four voting CFCRB members—one representative each of the Governor, Senate majority, Assembly majority, and Chief Judge of the State of New York—as well as two nonvoting members representing the Senate and Assembly minority leaders, respectively (see Public Authorities Law § 1680-c[1]-[2]). The current CFCRB voting members are Edward White (Governor’s representative), Senator John DeFrancisco (R-Syracuse), Assemblymember Helene Weinstein (D-Brooklyn), and Chief Administrative Judge Jonathan Lippman.

- provided State aid in the form of a subsidy (ranging from 10% to 25% depending on the locality’s relative taxing capacity), for facilities maintenance and operations costs;¹¹
- provided State aid in the form of an interest subsidy (ranging from 25% to 33%, depending on the locality’s relative taxing capacity) for debt undertaken to finance court-facility improvements;¹² and,
- empowered local governments, at their option, to secure DASNY’s technical and financing assistance in meeting localities’ obligations under the Court Facilities Act.¹³

B. The Court Facilities Capital Planning Process

As noted above, the Court Facilities Act requires that localities develop and submit Capital Plans for approval to the CFCRB.¹⁴ The Office of Court Administration (OCA) Court Facilities Capital Plan Manual prescribes the form and content of Capital Plan submissions and Capital Plan Amendments. In addition to documenting the locality’s plan for financing court-facilities, a Capital Plan must have six parts: (1) room survey, (2) courts summary, (3) building summary, (4) analysis of current assignments and future projections of judges and non-judicial staff, (5) summary of needs and proposed solutions, and (6) plan for new construction and/or major renovations.¹⁵

The Court Facilities Capital Plan Manual allows localities some flexibility with respect to the level of detail contained in section six—the plan for new construction and/or major renovations—subject to the approval of OCA and the concurrence of the CFCRB. Typically, smaller localities provide more detail in their Capital Plans than larger governments can or do. Larger governments typically provide a Master Plan to OCA and the CFCRB and then later provide further details in a Program Plan, which may take the form of a Capital Plan Amendment subject to CFCRB approval or may be submitted directly to and approved by OCA.

The CFCRB’s decision with respect to each Plan submission, reflecting the differing level of details required by the CFCRB and OCA, is set forth in a Certificate reciting the

¹¹ See State Finance Law former § 54-j. In 1996, the State Legislature amended the Court Facilities Act to provide for 100% State responsibility for funding cleaning and minor repairs of court facilities (see L 1996, ch 686).

¹² State aid programs established by the Act, including the interest aid program and the 100% reimbursement of the costs of cleaning and minor repairs, are funded by various court user fees deposited into a special reserve fund—the Court Facilities Incentive Aid Fund—administered by the Judiciary subject to the State appropriations process (see State Finance Law § 54-j).

¹³ See e.g. General Municipal Law § 99-q; Public Authorities Law § 1680-b.

¹⁴ See id.

¹⁵ See generally New York State Unified Court System, Office of Court Administration, Court Facilities Capital Plan Manual (September 1987).

CFCRB’s findings and determinations. Such Certificates evidence the approval of the CFCRB as required under the Court Facilities Act.¹⁶

The Court Facilities Act narrowly limits the purview of the CFCRB’s review. The Act obliges the CFCRB to evaluate each Plan’s adequacy to provide “suitable and sufficient” facilities for the dignified transaction of the business of the courts, and to balance these needs against the locality’s competing capital priorities and fiscal constraints.¹⁷ By limiting the CFCRB’s review to these issues, the Act ensures that the CFCRB acts neither “in loco parentis” —as a State control board to review the fiscal prudence or management capacity of local governments—nor as a supervening agent insensitive to the needs of local governments, nor to guarantee or confirm the locality’s budget calculations or day-to-day execution of the locality’s Plan. These statutory limits on the State’s approval process accord with the Judiciary’s constitutionally-limited role in the separation of powers and vindicate the “home rule” of New York’s localities against micro-management by State government.

For these reasons, OCA and CFCRB review of localities’ cost estimates, proposed sites, schedules, financing and project feasibility generally is limited to establishing a reasonable level of comfort—not a guarantee—that the facilities proposed by a Capital Plan will, in fact, be provided on the schedule and at the cost set forth in the Plan. In all other respects, the Court Facilities Act leaves unchanged the requirement that the integrity and implementation of Capital Plans remain the responsibilities of local governments — just as they were prior to the enactment of the Court Facilities Act itself.

The Court Facilities Act provides that the CFCRB must unanimously approve Capital Plans, but that if the locality’s chief executive officer and the Chief Administrative Judge agree on the plan, only a negative vote of at least two other CFCRB members (*i.e.* from the Executive and Legislative Branches) can disapprove it.¹⁸ These rules balance the power of the Judiciary with that of the Executive Branch, the Senate and the Assembly, thus assuring that no one State political entity can alone direct a locality’s political and fiscal affairs. However, in practice all CFCRB approvals and disapprovals have been by unanimous vote since the CFCRB’s first meeting in 1988.

C. Court Facilities Project Financing

The Court Facilities Act does not require any particular form of project financing. Localities may, at their option, self-finance court facilities projects or even fund such projects out of their current-year operating budgets. However, to further assist localities, the Act offers the financing and project management services of DASNY for Capital Plan implementation purposes and gives localities special statutory powers to effectuate the

¹⁶ See Public Authorities Law § 1680-c(1).

¹⁷ See Public Authorities Law § 1680-c(3).

¹⁸ See Public Authorities Law § 1680-c(3).

transactions necessary to take advantage of these benefits.¹⁹ By design, these provisions expressly supersede contrary local law.²⁰ The Act further provides that a county’s “governing board”—here, the Board of Legislators—may itself convey title to or an interest in real property to any entity, including a public body such as DASNY,²¹ enter into contracts “for the design, construction, reconstruction, rehabilitation or improvement of facilities provided or to be provided for the purposes of the unified court system of the state,”²² and then re-acquire those facilities by leaseback agreement.²³ It was under this statutory authority and the relevant provisions of the Westchester County Charter²⁴ that the Board of Legislators approved Westchester County’s 1997 Capital Plan Amendment and authorized DASNY to finance and manage implementation of that Plan.

D. Project Implementation and Glossary

A large construction project requires close coordination of the work of many disciplines. This section identifies and summarizes the duties of the main parties to implementing a court facilities Capital Plan—the CFCRB, the Unified Court System, the local government, DASNY, the planning and architectural consultants, the Project Manager, the Construction Manager, the General Contractor, other prime contractors, and other participants. This section also explains key design and budgeting concepts, including the impact of the Wicks Law.

The Court Facilities Capital Review Board. This report has previously discussed the statutory role of the CFCRB and its voting members (representing the Governor, Chief Judge, Senate and Assembly) in reviewing, approving or disapproving Capital Plans. The current CFCRB chair is the Chief Administrative Judge himself.

The Unified Court System. The State Judiciary reviews Capital Plan submissions to ensure that the Plan will provide “suitable and sufficient” facilities for the courts, makes recommendations to the CFCRB, reviews and approves designs and plans, and assists localities in Plan preparation and implementation. The Judiciary’s role in reviewing and approving Capital Plans and designs and plans is limited generally by statute to issues related to suitability and sufficiency, and specifically with respect to Plan implementation, by the Certificates of the CFCRB. These functions are performed with input by local judges and their staff, coordination by District Administrative Judges and their staff, and provision of specialized technical services including (1) architectural and layout review by the Office of Facilities Planning, staffed by architects, and (2) capital planning, budgeting, and financing expertise. The Judiciary also administers the State interest subsidy through

¹⁹ See General Municipal Law § 99-q; Public Authorities Law § 1678(13).

²⁰ See *id.*

²¹ See General Municipal Law § 99-q(1)-(2).

²² General Municipal Law § 99-q(1).

²³ See General Municipal Law § 99-q(2).

²⁴ See Westchester County Charter § 104.11(5)(e).

the Office of Court Facilities Planning and Management. Coordination and management for the overall program is provided by a Director of Court Facilities Management.

The Local Government. The locality, here Westchester County, is the project Owner and is therefore responsible for creating and implementing the Plan, selecting the financing and project-delivery vehicle(s), operating and maintaining the facilities, and funding the project either directly or through debt service and/or lease payments. While the locality may delegate some construction-management duties to contractors and managers by private contract, the locality retains ultimate responsibility under the Court Facilities Act. Other than to require local chief executive officers to submit court facilities plans to the Judiciary on behalf of their jurisdictions,²⁵ the Act does not prescribe a specific method by which localities should develop and approve court facilities plans and instead generally leaves these procedural issues to local law. In Westchester County, the Executive Branch and the Planning Board share authority to develop and approve Capital Plans,²⁶ while the Board of Legislators retains final authority over financing and project/property disposition.²⁷

The Dormitory Authority. DASNY is a public benefit corporation of the State of New York,²⁸ with its own treasury but without independent capital, taxing capacity or source of funds other than client payments and State appropriations. DASNY is empowered to finance and construct facilities for clients ranging from universities (public and private) to local governments to health care providers.²⁹ The Court Facilities Act made DASNY's services available to cities and counties to implement court facilities Capital Plans by financing projects, taking title to them for the period during which bonds are outstanding, and providing project management services for design and construction.³⁰ Court facilities built by DASNY are subject to the requirements of the Wicks Law.³¹

The Wicks Law. The Wicks Law bars local governments from contracting with a single business to deliver a defined building at a guaranteed price. The Wicks Law requires localities that construct public buildings to hire contractors by competitive public bids and to separately award contracts for general construction and for HVAC (mechanical), electrical and plumbing work (together commonly known as MEP).³² Each successful bidder on these four contracts is known as a "prime contractor."

Interaction of the Wicks Law and the DASNY statute. The Wicks Law's multiple prime-contractor requirement also applies when any entity, including DASNY, awards construction contracts pursuant to the Court Facilities Act.³³ As a result of the multiple-

²⁵ See Public Authorities Law §1680-c(3).

²⁶ See Westchester County Charter §§ 110.11(6), 191.41(1), 191.51.

²⁷ See Westchester County Charter §§ 104.11(5)(e), 107.21(11).

²⁸ See Public Authorities Law § 1677.

²⁹ See generally Public Authorities Law §§ 1678 et seq.

³⁰ See Public Authorities Law § 1678(13).

³¹ See General Municipal Law § 99-q.

³² See General Municipal Law §§ 101, 103.

³³ See General Municipal Law § 99-q.

contractor requirement of the Wicks Law and DASNY's absence of its own capital or taxing power, DASNY is not an "at risk contractor" when it constructs a court facility on behalf of a local government. Accordingly, so long as these provisions remain in statute, DASNY has no capacity either to absorb the business risk inherent in any construction project or to shift such risk to a private business. Thus, localities that contract with DASNY to build court facilities under the Court Facilities Act continue to themselves bear that business risk.

The Project Manager. DASNY exercises its project management and supervision responsibilities through Project Managers. Project Managers act as agents for the Owners/Clients by supervising and coordinating the efforts of all parties involved in the design and construction process, including architects and planners, other consultants, the Construction Manager, and all prime contractors. On the Westchester County Courthouse project, the Project Managers were veteran DASNY employees, who drew on the assistance of DASNY's several design and construction departments.

The Construction Manager. The Construction Manager is typically a private business hired to manage the site, coordinate the on-site work of the various prime contractors, and serve as a consultant to the Project Manager and the Client/Owner in the review of the architects' plans. The Construction Manager is also generally responsible for obtaining independent cost estimates at various standard points in the design and construction process.

Planning and Architectural Consultants. Various planning and architectural firms were involved in preparing and implementing the Westchester County Capital Plan. Some of these firms specialize in project planning, others in detailed design; some offer both. The competitive bidding requirements of the Wicks Law require that detailed, complete designs be made available to all potential bidders as part of the bid solicitation process. It is the responsibility of the architects to produce these documents.

The Contractors. Contractors are typically private businesses that perform construction functions pursuant to a contract. The General Contractor coordinates the various subcontractor specialties (e.g. excavation, steel, glass, concrete, interior framing, finishes) that provide the components of a building, with the exception, on public buildings in New York, of the three non-General Contractor MEP primes required by the Wicks Law. Sometimes more than four prime contracts are let by the Owner or Owner's representative (here, DASNY), based on the judgment of the project professionals as to how to obtain the best product for the best price.

Project Team. The core of the project team is comprised of the Project Manager, the Construction Manager, and the architects and engineers. Pursuant to the Construction Management Agreement between Westchester County and DASNY, DASNY managed the planning, design and construction of the project starting in January 1998. Decisions were made by DASNY's Project Manager, in consultation with the County as provided by the

Agreement, and based on input from the Construction Manager, architects, the County as Owner/Client, and other stakeholders (e.g. the Judiciary).³⁴

Value Engineering. Value Engineering is a process by which architects and engineers review designs for the purpose of cutting costs. Value Engineering generally takes place at standard points in a project, regimented either by phase of design or on an as-needed basis if a design is judged to exceed the project budget.

Reconciled Cost Estimates. A reconciled cost estimate is prepared at various points in the design development process. Such estimates “reconcile” the various changes and updates that have occurred since the previous overall or reconciled estimate. Each reconciled cost estimate is supposed to account for all known and reasonably foreseeable changes that would affect the project budget, as understood at the time the reconciled estimate is prepared.

Contingencies. A contingency is an amount of money reserved in a project budget to fund unexpected or unanticipated costs. Generally, separate contingencies are reserved for design, bidding, and construction. For example, a bid contingency is money reserved in the budget in the event that bids come in over the estimated amount; if acceptable bids come in at or below the budgeted amount, the bid contingency is no longer needed and can be reallocated, if needed, for other project purposes. Contingencies are usually calculated as a percentage of estimated costs (e.g. 5% or 10%).

Meeting Minutes. DASNY, the Construction Manager, the contractors and the relevant consultants held regular meetings of different kinds throughout the life of the project. In addition to these general meetings, they also held “Architects’ meetings” and “Owner’s meetings” with the architects and the Owner (here the County), respectively. Detailed minutes of these meetings were produced and circulated for review and approval after each meeting. These minutes, and the correspondence between the parties, provide a week-by-week snapshot of the project and an historical record of its progress and problems.

³⁴ See Construction Management Agreement, at 2.

III. Factual Background

A. 1974-1997: Early History of the Courthouse and Development of Westchester County's 1997 Capital Plan

The 20-story Richard J. Daronco Courthouse at 111 Grove Street and 115 Martin Luther King Boulevard in White Plains, and the adjoining low rise building, were completed and opened in 1974. Built at a principal cost of \$33.5 million, the Courthouse was at the time of its completion the tallest building in Westchester County. Soon after its opening, however, the building was plagued by construction defects, including a leaking roof, malfunctioning elevators, inadequate heating, cooling and ventilation, and leaks from the windows.³⁵

In 1990, the County performed a building assessment, as required by the 1987 Court Facilities Act, and determined that the Courthouse required a new roof, new windows, new mechanical systems, a new HVAC system and a new electrical system to address and remedy these construction defects.³⁶ However, as detailed immediately below, the County then failed — for seven years — to address these serious defects. Conditions in the building continued to deteriorate throughout the 1990s,³⁷ and in 1997 a portion of the facade detached and fell to the ground — injuring a pedestrian.³⁸ That development, and mounting pressure from the Judiciary, finally led to the development of the County's 1997 Capital Plan.

The following is a brief recitation of the seven years of indecision and inaction between the 1990 assessment that documents the many serious and dangerous conditions in the Courthouse, and the adoption of the 1997 County Plan.

³⁵ See County of Westchester, Capital Plan Update for the Westchester County New Justice Center and County Courthouse, October 30, 1997, at § III.

³⁶ See Court Facilities Capital Review Board, Certificate, December 18, 1990, at 2.

³⁷ See e.g. Tagliaferri, "Problems Seeping Into Courthouse," Gannett Westchester-Rockland Newspapers, April 22, 1997, at 2A. Partly in response to the County's ongoing neglect of the Courthouse, then-Ninth District Administrative Judge Angelo Ingrassia deemed the Courthouse "intolerable" and recommended the withholding of State aid for Courthouse maintenance (see Golding, "Judge Asks State to Stop Funding Upkeep at Deteriorating Westchester Courthouse," Gannett Westchester-Rockland Newspapers, April 15, 1997, at 1A; see also Letter from Ninth District Administrative Judge Angelo Ingrassia to County Executive Andrew P. O'Rourke, April 14, 1997 [transmitting 31-page report listing building deficiencies on a room-by-room basis]).

³⁸ See Westchester Co Bd of Legis, Act 113-2001, Minutes of June 4, 2001, at 5 (unanimously authorizing settlement of Calcagni v County of Westchester litigation for \$125,000 after witnesses saw shards of cement slab that fell from Courthouse strike plaintiff); see also Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of June 4, 2001, at 2-3.

Based on the 1990 building assessment (and under a mandate from OCA), then-County Executive Andrew P. O'Rourke submitted a Capital Plan in late 1990. That Plan called for \$18.4 million in major building systems improvements to the Courthouse and \$39.3 million to reconfigure the interior of that building and the adjoining low-rise building for the courts.³⁹ The Plan was developed by a Westchester County-based architectural firm, Fuller and D'Angelo, retained by the County for this purpose. This Plan also addressed facilities needs in Yonkers (where there was a remote location for the Family Court) and by subsequent amendment, some ancillary spaces in White Plains.⁴⁰ This initial Plan also called for a substantial investment in parking. In December 1990, the plan was preliminarily approved by the CFCRB, subject primarily to the County's further development and submission of a detailed Program Plan that would define in greater detail the elements of the proposed plan.⁴¹

In 1991, the County hired a new consulting firm, Gibbons, Heidtmann and Salvador, to "develop detailed drawings and cost estimates (final design work) for the Courthouse."⁴² During the course of this firm's engagement in 1991, the Ninth Judicial District Administrative Judge's Office raised concerns about the space layout proposed by the earlier Plan. To allow time for the new consultant to address the District Office's concerns, the CFCRB granted the County an extension to December 31 to complete the Program Plan submission. The new consultant developed two design options to achieve the goals set by the District Office's staff, and on December 23, 1991, the District Office expressed its preference for one of the two options. On December 30, 1991, the County submitted a Capital Plan Amendment letter with attachments transmitting program plans based on the new consultant's work (see Appendix, Exhibit E). The new Plan would result in "a more complicated phasing of construction and require a new time frame for completion of the project."⁴³ The new Plan would cost \$47.1 million, not the \$39.3 million previously estimated.⁴⁴

However, the same letter that transmitted the new Plan also announced that, while the County would proceed with the Yonkers project and ancillary spaces in White Plains and would relocate some County agencies out of the Courthouse to provide more space for the courts, it would not proceed with renovations of the Courthouse until State aid was increased or economic conditions improved.⁴⁵ Accompanying the letter was a Board of Legislators resolution calling on the State Legislature to "remove the requirement for Counties and local municipalities to renovate their courthouse facilities until such time as the State provides the financing necessary to cover the costs of such renovations" and to

³⁹ See Court Facilities Capital Review Board, Certificate, December 18, 1990.

⁴⁰ See id.

⁴¹ See id.

⁴² County of Westchester, Court Facilities Capital Plan Amendment letter, December 30, 1991, at 1.

⁴³ Id.

⁴⁴ Of this figure, approximately \$5 million would have been for a parking garage.

⁴⁵ See generally County of Westchester, Court Facilities Capital Plan Amendment letter, December 30, 1991.

enact a constitutional Amendment to prohibit “any new mandates” generally without providing complete funding for implementation.⁴⁶

The County maintained this posture throughout 1992, prompting the CFCRB, after several meetings and discussions, to prepare to disapprove the County’s Plan. However, before the CFCRB acted, the District Administrative Judge’s Office informed the CFCRB that the County’s economic and fiscal condition was stabilizing such that the County Administration would be willing to revisit the project and commit itself to advancing it.⁴⁷

Planning efforts proceeded through 1993 and, by letter dated January 31, 1994, the County submitted a new and complete Capital Plan that the CFCRB approved in June 1994.⁴⁸ The 1994 County Plan called for \$60 million in internal and external renovations of the tower and improvements in the low-rise building.⁴⁹ The 1994 County Plan contemplated moving all non-court functions out of the Courthouse to other, as-yet undisclosed locations. That Plan called for financing by County bonds and construction by the County, and, in accordance with the County Charter, would have required approval by County voters in a public referendum.

Notwithstanding CFCRB approval of the 1994 County Plan, the County Administration did nothing to implement it. By 1996, with the court-facilities crisis (and the condition of the Courthouse tower) worsening each month, the Judiciary again threatened to convene the CFCRB, deem the County in violation of the Court Facilities Act, and invoke financial sanctions against the County. At the same time, the owners and developers of significant vacant office space in White Plains and elsewhere in the County began offering suggestions that these existing buildings be used to address the County’s court-facilities crisis. In response, in 1996 the County issued a Request for Proposals soliciting alternatives, and then asked a real estate management firm to evaluate these proposals against the 1994 County Plan.⁵⁰ In light of the County Administration’s purported intent to develop and implement a new plan, the Judiciary, in consultation with the CFCRB, suspended the sanctions process.

Meanwhile, building conditions continued to deteriorate. The facade continued to crumble and water continued to leak through the roof and windows into the interior of the building, causing damage to ceiling tiles, walls and flooring, and promoting the growth of mold. Elevators and other building systems were continuously failing, resulting in inordinate delays. In early 1997, a portion of the facade detached and fell to the ground,

⁴⁶ Westchester Co Bd of Legis, Resolution 33-1991, February 28, 1991.

⁴⁷ See Office of the Chief Administrative Judge, “Review and Recommendation of the Chief Administrative Judge Regarding the Westchester County Court Facilities Capital Plan Amendment” (June 3, 1994).

⁴⁸ See County of Westchester, Court Facilities Capital Plan Amendment letter, January 31, 1994 (see Appendix, Exhibit F); see also Court Facilities Capital Review Board, Certificate, June 1994 (see Appendix, Exhibit G).

⁴⁹ See New York State Unified Court System, Review and Recommendation of the Chief Administrative Judge Regarding the Westchester County Court Facilities Capital Plan Amendment, June 3, 1994.

⁵⁰ See N. Federici (Office of Court Administration), “Status Report on Court Facilities in Rockland and Westchester County,” October 18, 1996, attachments.

injuring a pedestrian.⁵¹ On April 14, 1997, then-Ninth District Administrative Judge Angelo Ingrassia wrote to the County Executive concerning these deplorable conditions, transmitting a report detailing them on a room-by-room basis, and announcing that State maintenance and operations aid would be withheld until conditions improved.⁵² The County responded shortly thereafter, indicating that some of the problems were being addressed by interim steps, and that “the time to move forward on a comprehensive plan to rehabilitate, as well as add to the court facilities, is now.”⁵³

In fact, earlier in the year, the County Administration had determined that a variant of the 1994 Plan was the best approach to provide “suitable and sufficient” facilities for Westchester County’s courts and began to take steps to obtain the legislative support needed to advance that Plan. The new Plan, apparently developed by the Westchester County Departments of Public Works using the 1994 Plan as a starting point, included construction of a new annex building adjacent to the Courthouse to accommodate Family Court and County Court, and would have enabled the Westchester County District Attorney’s Office and the Probation Department to stay in the Courthouse tower rather than relocate elsewhere.⁵⁴ The County Administration estimated the cost of this new Plan to be \$140 million.⁵⁵ The County’s cost estimate was a one-page document showing estimated costs on a dollar per square foot basis, broken out by basic categories such as construction costs, soft costs, and site work, but without supporting documentation. On February 26, 1997, the County Administration submitted the proposal and the cost estimate to the Board of Legislators for its review, and then re-transmitted it in May.⁵⁶

In early summer 1997, the Board of Legislators asked DASNY to review three possible scenarios for addressing the County’s court-facilities crisis: (a) renovate the Courthouse tower while it was occupied; (b) additionally construct an annex to provide more space and provide temporary (“swing”) space for the tower occupants during the tower’s renovation; and (c) renovate the tower and lease 365,000 square feet of space at

⁵¹ See Westchester Co Bd of Legis, Act 113-2001, Minutes of June 4, 2001, at 5 (unanimously authorizing settlement of Calcagni v County of Westchester litigation for \$125,000 after witnesses saw shards of cement slab that fell from Courthouse strike plaintiff); see also Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of June 4, 2001, at 2-3.

⁵² See Letter from Hon. Angelo J. Ingrassia (Ninth District Administrative Judge) to Hon. Andrew P. O’Rourke (Westchester County Executive), April 14, 1997 (see Appendix, Exhibit H).

⁵³ See Letter from Hon. Andrew P. O’Rourke (Westchester County Executive) to Hon. Angelo J. Ingrassia (Ninth District Administrative Judge), April 23, 1997.

⁵⁴ See generally Transmittal of County Executive Andrew P. O’Rourke to the Westchester County Board of Legislators, February 26, 1997.

⁵⁵ See id.

⁵⁶ By memorandum dated May 1, 1997, the Westchester County Commissioner of Planning stated to the Deputy County Executive that the costs of moving various offices and installing data and telecommunications infrastructure were included in the County Administration’s \$140 million estimate (see Memorandum from P. Lynn Oliva, Commissioner of Planning, to Neil DeLuca, Deputy County Executive, May 1, 1997, at 1). As discussed in Part IV, despite this apparent belief that the County’s 1997 cost estimate was comprehensive, the budget did not properly or adequately account for all necessary project elements.

360 Hamilton Avenue to provide swing space during the renovation.⁵⁷ Several weeks later, DASNY transmitted to the Board of Legislators an analysis that weighed the benefits and drawbacks of each scenario, but did not recommend a course of action.⁵⁸

At the end of July 1997, the Board of Legislators defeated a proposal to put the full \$140 million plan to public referendum,⁵⁹ and then voted by an even larger majority against a scaled down version to commit \$70 million to renovate only the Courthouse tower.⁶⁰ However, at that time the Board of Legislators advanced no alternative plan. Meanwhile, the County Administration continued to negotiate with DASNY as to its potential involvement and to discuss the possible use of 360 Hamilton Avenue.⁶¹

On August 18, 1997 — after the Board of Legislators had rejected the two alternate public referenda on the Courthouse — the Board approved a resolution authorizing the chairperson of the Board of Legislators to “retain the services of the appropriate firm(s) to act as the Board’s consultant(s) and provide guidance to the Board throughout the process of developing a plan and reconstructing the Westchester County Courthouse.”⁶²

By early September 1997, still with no substitute plan poised for County implementation, the State again threatened financial sanctions. By memorandum dated September 19, 1997 to his fellow lawmakers (see Appendix, Exhibit I), the chair of the Board of Legislators summarized the arguments in favor of advancing the \$140 million proposal and hiring DASNY to finance and supervise it.⁶³ That memorandum also stated the arguments against the alternatives, including 360 Hamilton Avenue, and concluded that the \$140 million proposal (which was estimated to cost \$236 million over 30 years), was not only preferable on a land-use basis but also substantially less expensive than the three alternatives, which ranged in cost from \$327 million to \$402 million over 30 years.⁶⁴

In October 1997, under threat of sanctions, the Board of Legislators approved both the \$140 million court-renovation plan and the hiring of DASNY to finance and implement it.⁶⁵ On October 31, 1997, the County Administration formally submitted its

⁵⁷ See Dormitory Authority of the State of New York, “Analysis of Options, Westchester County Courthouse: Prepared for the Westchester County Board of Legislators,” July 16, 1997.

⁵⁸ See *id.*

⁵⁹ See e.g. Wilson, “Legislators Reject Plan for Courthouse Referendum,” *Gannett Suburban Newspapers*, August 1, 1997, at 9A; see also Editorial, “Voters Miss Out on Courthouse,” *Gannett Suburban Newspapers*, August 2, 1997, at 10A.

⁶⁰ See *id.*

⁶¹ See Wilson, “Legislators Reject Plan for Courthouse Referendum,” *Gannett Suburban Newspapers*, August 1, 1997, at 9A.

⁶² Westchester Co Bd of Legis, Resolution 172-1997; Minutes of August 18, 1997 at 15. As noted in Section V, notwithstanding this authorization, this review found no evidence that the Board ever exercised this authority and retained a consultant or otherwise sought outside technical assistance on the Courthouse project (See n 243, *infra*).

⁶³ See Memorandum from Board of Legislators Chair George Oros to the Honorable Members, September 19, 1997, at 3-4.

⁶⁴ See *id.*

⁶⁵ See Wilson, “Board Votes to Renovate Courthouse,” *Gannett Suburban Newspapers*, October 7, 1997, at 1A.

Capital Plan Amendment (see Appendix, Exhibit J), and on November 24, the CFCRB approved it as substantially meeting the needs of the courts within the meaning of the Court Facilities Act.⁶⁶

The 1997 County Plan provided for a three-phased project. Phase I was the exterior reconstruction of the Courthouse tower. Phase II was the construction of an eight-story annex totaling 165,000 square feet immediately adjacent to the tower. Finally, Phase III was the reconfiguration and renovation of the deteriorating tower interior.⁶⁷ The first phase of the financing — to pay design fees — was funded directly by the County at the end of 1997. Under the relevant legislation, DASNY was to finance the remaining \$135 million commencing in 1998. In December 1997, the County and DASNY concluded a Construction Management Agreement (see Appendix, Exhibit L). At that time, the project schedule called for design to commence in early 1998, design of the tower exterior renovation to be complete and bids to be let in June 1998; and design of the annex completed and bidding commenced by March 1999. The new annex was to be complete by January 2001, and tower renovations were to be complete by March 2003.⁶⁸

This eight-year history reveals that Westchester County's 1997 Court Facilities Capital Plan was not the result of a single systematic and comprehensive study of the County's court-facilities needs. Rather, the 1997 County Plan was the result of several studies conducted over many years by different entities for different purposes — all against a background of County resistance to meeting its obligations to comply with the Court Facilities Act and ongoing disagreement within Westchester County government as to how to proceed.

B. 1998-2003: Implementation of the Capital Plan

1. 1998 - MOBILIZATION

Beginning in January 1998, when current Westchester County Executive Andrew Spano took office, a number of key steps were taken to implement the Capital Plan, including the selection of the project team and the financing of the project:

- Selection of the architectural team. In late January, DASNY issued a Request for Qualifications (RFQ) and Request for Proposals (RFP) for architectural and engineering firms.⁶⁹ By June, Pei Cobb Freed & Partners and Fuller and

⁶⁶ See Court Facilities Capital Review Board, Certificate, November 24, 1997 (see Appendix, Exhibit K).

⁶⁷ See County of Westchester, Capital Plan Update for the Westchester County New Justice Center and County Courthouse, October 30, 1997, at 3-4.

⁶⁸ See id.

⁶⁹ See Dormitory Authority of the State of New York, Request for Proposals (Westchester County Courthouse), January 28, 1998.

D'Angelo had been selected as project architects. Pei Cobb was to design the annex and the connecting link to the tower; Fuller and D'Angelo was to design the interior tower renovations.⁷⁰

- Selection of Justice Facilities Planning Consultant. Ricci Associates, an experienced justice-facilities planning firm and also a design firm, was retained by the architects to develop the program plan in further detail.
- Selection of design team for tower exterior. DASNY selected a separate design firm, Hennington, Durham and Richardson/Lothrop Associates, to develop bid documents for the exterior reconstruction of the tower.⁷¹
- Selection of Construction Manager. By August, URS/Greiner was selected as Construction Manager for the entire project.⁷²
- Financing. Work on the financing began in spring 1998, and the bonds were sold in November 1998 and delivered in December.⁷³ The bond sale was well within County parameters: yields ranged from 4% to 5.25% compared to the County's "worst case estimate" of 6.9% and prevailing expectations as of December 1997 of between 5.65% to 5.85%.⁷⁴

After the project team was assembled, design of the tower recladding commenced. By July 1998, the scheduled completion date for the tower bid documents and the commencement of bidding was November 1998⁷⁵ — five months later than scheduled at the beginning of the year.

On the annex and tower-interior renovation portions of the project, an important first step was to review and confirm the program set forth in the County's 1997 Plan. This process was led by Ricci Associates and continued throughout 1998 and into mid-1999. Throughout this time there were regular meetings among members of the project team, as well as with the County and Judiciary, as documented in meeting minutes distributed to all parties. This process, which continued through the first few months of 1999, revealed serious deficiencies and outright errors in the way the 1997 County Plan calculated the sizes of the annex and the tower. Addressing and resolving those space-calculation

⁷⁰ See Minutes of Project Meeting #3, June 16, 1998.

⁷¹ See Minutes of Architects' Meeting, July 17, 1998.

⁷² See Minutes of Architects' Meeting, August 11, 1998.

⁷³ See Dormitory Authority of the State of New York, "Lease Revenue Bonds: County of Westchester, Series 1998, \$133,007,716.75," December 17, 1998.

⁷⁴ See Memorandum of Nicholas P. Capra, Esq., December 3, 1997. The DASNY financing was successful and neither its terms nor the availability of funds was ever an issue at any time in the history of this project.

Moreover, the various transactions required for the County to convey the property to DASNY and lease it back for the term of the bonds were effectively executed without controversy as part of the closing of the bond issue.

⁷⁵ See Minutes of Architects' Meeting, July 29, 1998.

deficiencies and errors would cause approximately 22% growth in both the size of the proposed annex and the measurement of the tower space to be renovated.⁷⁶

In June 1998, the issue of contaminated soils was raised for the first time when the County informed the project team that a similar problem had arisen during construction of the Federal Courthouse adjacent to the site.⁷⁷ This revelation triggered discussions as to what steps should be taken to test the site; soil tests commissioned later in the year would become available in early 1999. During this time it was also decided to design and bid the annex and tower interior work together, a decision that would be questioned in 2000 when the bids came in significantly over budget.

By late 1998, there were harbingers of four trends to come: (a) DASNY began to assert that certain necessary project elements (e.g. furniture) were not funded in the project budget; (b) the project team estimated that the project was slightly over budget;⁷⁸ (c) the project schedule had been modified, with a number of milestone dates moved ahead by several months;⁷⁹ and (d) there were indications that construction costs were rising as the construction market overheated.⁸⁰

By the end of 1998, largely as the result of the work of Ricci Associates, the justice planning consultants retained to review the program, it became apparent that the County's

⁷⁶ The deficiencies and errors that caused the annex to grow included (a) a calculation error — the failure to provide a factor for internal circulation (hallways and other passages between work areas); (b) planning errors — failure to include spaces needed for a functional court facility, including a loading dock, central prisoner holding, court officer locker rooms, Family Court prisoner holding, and Criminal Court part clerks; and (c) various serious underestimations in the square footage needed for various functions, including courtrooms, chambers, court clerks offices and other functions. In several cases, spaces that would have been provided by the uncorrected 1997 County Plan did not comply with the Americans with Disabilities Act. As discussed in Part IV, these deficiencies and errors were remedied in the design process but only at the cost of producing a significantly larger and ultimately more expensive project, despite the removal of certain annex functions and the reduction in number of annex courtrooms. Moreover, the tower likewise “grew,” because as design progressed it was discovered that the 1997 County Plan estimates and the drawings that the County furnished to the project team did not correctly measure certain spaces in the tower. These spaces proved to be significantly larger than the Plan estimates and drawings stated. Accordingly, renovating these spaces would require more work and prove to be more expensive than the 1997 County Plan anticipated.

⁷⁷ See Minutes of Owner's and Architects' Meeting, June 28, 1998.

⁷⁸ In October 1998, the architects projected an overrun of \$3.4 million (see Minutes of Architects' Meeting #11, October 6, 1998), while the Construction Manager projected the overrun to be \$3 million (see id.). At this early stage in the project, it was reasonable for the project team to consider projected cost overruns of this magnitude (less than 3% of the project budget) as manageable during design development process.

⁷⁹ By the end of October, the schedule called for facade replacement to be bid in December and begin in March 1999, with completion in August 2000 (see Memorandum from R. Abbamont to Ralph Butler [Westchester County Department of Public Works], October 26, 1998). The corresponding changes in the schedule called for the annex and tower interior renovations to be bid together in August or September 1999, with work starting in December 1999, completion of the annex in September 2001, and completion of the interior tower renovations in September 2003 (see id.).

⁸⁰ See e.g. United States Federal Reserve Bank, Second District [New York], Federal Reserve Beige Book, December 1998 (available at <<http://www.federalreserve.gov/FOMC/beigebook/-1998/19981209/2.htm>>), at 2 (citing severe labor shortage in skilled trades such as carpenters, masons and roofers in the New York construction market).

plan was seriously deficient and that significant increases in square footage for the annex and the tower renovations would be required. Since the County's original cost estimates for both phases of work were based entirely on dollars per square foot, it logically follows that such dramatic increases in the square footage of Phase II and Phase III of the project should have been a matter of greater concern to the project team at this time. However, this development appears not to have been a matter of great concern because as design advanced, project budget estimates appeared to be only slightly over budget and thus within limits the project team thought it could manage.

2. 1999 — HINTS OF PROBLEMS TO COME

In January 1999, the Phase I (facade replacement) bids were opened and found to be within budget.⁸¹ Meanwhile, review of the program and preliminary design for Phases II and III continued. Ricci Associates submitted a Final Architectural Program Plan on March 29.

In January and February 1999, test borings were conducted on the annex site to provide information needed to design the pilings. In March 1999, a surface investigations report by Mueser Rutledge, a consulting firm retained for this purpose, was completed.⁸² Neither report seems to have caused the project team to adjust the schedule, budget, or scope of work to address potential soils contamination.

On April 5, the Board of Legislators was informed that the project team was reporting that the project was on schedule and within budget.⁸³ By April 20, however, the Construction Manager informed DASNY that it estimated the project to be \$6.7 million (i.e. 7%) over budget,⁸⁴ and on April 26, the Construction Manager requested from DASNY a fee increase reflecting the project's increasing complexity and difficulty to manage and supervise.⁸⁵

Meanwhile, construction costs nationwide continued to rise. In September, the trade publication *Engineering News* reported that "estimators face a new set of challenges. In a heated construction economy in which nearly everyone is busy, general contractors are seeing fewer numbers of subcontractors responding to bid requests. Manpower has become an item of increasing concern and inflation has made double-digit gains against several key materials. * * * Builders are encountering problems getting even subcontractors interested * * *. Where they used to get seven to eight bids in a category they are now lucky they get two."⁸⁶

⁸¹ See Westchester Co Bd of Legis, Cmte on Public Works, Minutes of February 2, 1999.

⁸² See Mueser Rutledge Consulting Engineers PC, "Subsurface Investigation and Foundation Recommendations, Westchester County Courthouse Annex, White Plains, New York" (transmitted to Fuller and D'Angelo P.C.), March 24, 1999.

⁸³ See Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of April 5, 1999, at 1.

⁸⁴ See Letter from Dominick Fickeria (URS/Greiner Project Executive) to Frank Vinci (DASNY Project Manager), April 20, 1999.

⁸⁵ See Letter from Dominick Fickeria (URS/Greiner Project Executive) to Frank Vinci (DASNY Project Manager), April 26, 1999.

⁸⁶ "Third Quarterly Cost Report," Engineering News, Vol 243, # 13, at 31 (September 1999).

On October 4, given the revelations that the size of the project was increasing, DASNY recommended revising the annex construction schedule from 24 to 30 months.⁸⁷ On October 15, the architects and the Construction Manager reviewed the reconciled cost estimates based on 100% drawings (i.e. the documents on which the contracts would be bid), and informed the County that “the base construction budget is essentially at the project budget.”⁸⁸ However, there was no bid contingency in that estimate, and thus, no margin of error in case the bids came in over the estimate. Various contingency scenarios were considered; a redesign to save \$4 million was considered but rejected as not consistent with the project schedule.⁸⁹ On October 19, a contingency of \$1.5 million was requested by making various deletions and adjustments, but as of that date, the budget documents still reflect that the project was \$6.7 million over budget.⁹⁰ Also around this time, the project team decided to bid 10 separate prime contractors (instead of the four required under the Wicks Law) to encourage more price competition within various sub-specialties.

On December 7, the Construction Manager reported a significant lack of interest from potential bidders based on the amount of other work they were getting in the heated construction economy.⁹¹ Given the concerns about the bid climate, the project team extended the bid-return date from December 14 to January 18, 2000.⁹²

During 1999, as the design was developed, the project scope increased further as the project team continued to identify and correct deficiencies in the County’s 1997 plan. Throughout the year, there also emerged a new and growing concern about the conditions in the construction market. By the time bids were solicited, the project team was aware that the project scope had grown significantly since October 1997. As experienced professionals, the project team also inevitably knew that “sellers’ market” conditions were prevailing in the construction industry, that as a result of the highly competitive market it would be difficult to generate interest within the construction community in bidding on this project, and that the bids were therefore likely to be high. Despite this competitive market condition, and despite the 22% growth in the project size, the architects and the Construction Manager both estimated throughout 1999 that the project would be, at most, \$6.7 million (i.e. 7%) over budget.

⁸⁷ See Letter from Frank Vinci (DASNY Project Manager) to Anthony Landi (Westchester County Commissioner of Public Works), October 4, 1999.

⁸⁸ Letter from Frank Vinci (DASNY Project Manager) to Anthony Landi (Westchester County Commissioner of Public Works), October 15, 1999.

⁸⁹ See Minutes of Architects’ Meeting, October 19, 1999.

⁹⁰ See URS/Greiner, “100% Reconciled Cost Estimate — Phase II/III Annex and Tower” (transmitted by letter from Dominick Fickeria [URS/Greiner] to Frank Vinci (DASNY Project Manager), October 19, 1999.

⁹¹ See Minutes of Owner’s Meeting, December 7, 1999.

⁹² See Minutes of Owner’s Meeting, January 4, 2000.

3. 2000 — BAD NEWS AND TOUGH CHOICES

On January 18, 2000, DASNY opened the bids for construction of the annex and the renovation of the tower interior. The low bids totaled \$105.9 million, or \$21.5 million over the budget target for these contracts — a 26% overrun.⁹³ Much of the balance of the year was spent dealing with the reality that the 1997 County Plan could simply not be built within the County's 1997 budget.

On January 28, DASNY instructed the architects to redesign the project to save \$24 million without cutting the program.⁹⁴ This directive was based on a review by DASNY that identified four factors contributing to the bid overrun:

- (a) market conditions (the metropolitan construction market was saturated with competing projects during the bid period, thus increasing prices);
- (b) the size and complexity of the project;
- (c) the lack of clarity of the bidding documents; and,
- (d) materials and labor costs in the fourth and fifth years.⁹⁵

On February 24, the architects responded with an analysis that generally agreed with DASNY's conclusions as to the reasons for the overbid, but also pointed to the growth in the square footage of the project as a "major factor."⁹⁶

In light of the overbid on the combined annex and tower interior work, it was decided to separate Phase II and Phase III, and to separately re-bid each phase closer to the time the work would actually be performed. This decision meant that Phase II would be rebid in the second half of 2000, and Phase III would be rebid later, when Phase II was nearing completion and occupancy. The project team then focused on the decisions that had to be made as to how to proceed with Phase II. Some of those decisions would relate to moving selected elements of Phase III into Phase II, namely, renovations of the three floors tied into the connector to be constructed between the annex and the tower.

⁹³ See Dormitory Authority of the State of New York, Westchester County Courthouse File (including price analysis of construction bids); see also Memorandum from Frank Vinci (DASNY Project Manager) to Douglas Van Vleck (DASNY Managing Director of Construction), February 25, 2000.

⁹⁴ See Letter from Frank Vinci (DASNY Project Manager) to Joseph Fuller (Principal, Fuller & D'Angelo), et al., January 28, 2000.

⁹⁵ See id.

⁹⁶ Letter from George Miller and Joseph Fuller (PCF&P/F&D) to Frank Vinci (DASNY Project Manager), February 24, 2000, attachments. Later, on May 8, the architects wrote DASNY complaining that the bid overrun was for reasons entirely beyond their control, primarily the square-footage increases unsupported by budget increases, and secondarily the bid packaging strategies (see Letter from George Miller and Joseph Fuller to Frank Vinci, May 8, 2000). The architects also requested further reimbursement for the multiple designs and redesigns of the project. Later, on February 14, 2001, the architects would request over \$2.4 million for designing the increased square footage and revising the Phase II bid documents (see Letter from George Miller and Joseph Fuller to Frank Vinci, February 14, 2001). DASNY eventually agreed to pay the architects \$855,000 for this additional design work required (see Executed Contract Amendment between the Dormitory Authority of the State of New York and Pei Cobb Freed & Partners/Fuller & D'Angelo, June 20, 2002).

The project team and the County Administration held a number of meetings to discuss strategies for reducing the project cost. At a March 22 meeting to review savings proposals, the County Administration stated that its intention was to maintain the design and the integrity of the building at a high level of quality while staying within or as close to budget as possible.⁹⁷

On April 19, the County Administration met again with DASNY and the other members of the project team to review potential savings. The minutes of the meeting state that the County Administration wished “to design [the] Courthouse by the program which is required in the long run, and therefore more money would be forthcoming in the years to come to fill in the gap for the renovation of the [t]ower, if needed, after two or three years.”⁹⁸ The minutes recount that meeting participants also reviewed a list prepared by the architects of \$20.5 million in proposed savings. Some proposed changes involved eliminating architectural features, others achieved savings by reducing the quality of finishes or eliminating amenities (e.g. concrete planters for trees), and some eliminated project elements, primarily in the tower (although the architects also proposed leaving two courtrooms and chambers in the annex unfinished) that would need to be addressed at a future time.⁹⁹ The County accepted about \$12 million of these Value Engineering recommendations, but, in consultation with the Judiciary, rejected others. All of the recommendations that achieved savings (almost \$4 million) by leaving part of the project unfinished were rejected, in part because accepting those recommendations would have resulted in an incomplete project not consistent with the County’s approved Capital Plan. The County also rejected recommendations totaling \$4.5 million that would have seriously diminished the quality of the project and/or increased maintenance costs (e.g. eliminating all interior brickwork, substituting fabric finishes for certain expanses of wall paneling, using carpeting instead of terrazzo flooring, etc.).¹⁰⁰ Other recommendations, totaling \$7 million, were accepted by the County (e.g. those related to rebidding the project in two phases, and bidding only the minimum number of Wicks prime contracts), but the proposed net cost savings associated with those steps were never realized due to subsequent changes in the cost of the project.

By May 5, even with the redesign, the Phase II (annex) budget had increased from its initial overall figure of \$49.5 million to \$54.373 million for new construction only, not including site work and soft costs. At that time, the Phase III budget was reduced to \$30.756 million without re-scoping Phase III itself.¹⁰¹

DASNY and the County Administration briefed the Board of Legislators on the project on June 26. (A copy of DASNY’s PowerPoint presentation to the Board of Legislators is included in the Appendix as Exhibit M.) At that meeting, DASNY presented

⁹⁷ See Minutes of Architects’ and Owner’s Meeting, March 22, 2000.

⁹⁸ See Minutes of Architects’ and Owner’s Meeting, April 19, 2000.

⁹⁹ See Letter from Pei Cobb Freed & Partners/Fuller & D’Angelo to DASNY, February 24, 2000, at 1.

¹⁰⁰ See Minutes of Architects’ and Owner’s Meetings, April 25, 2000.

¹⁰¹ See Letter of Frank Vinci (DASNY Project Manager) to Anthony Landi (Westchester County Commissioner of Public Works), May 5, 2000.

its explanation for the high bids. According to the legislative minutes, the County Administration stated that it would hold DASNY “accountable and responsible to rectify the situation.”¹⁰²

Meanwhile, redesign of Phase II had begun, but new problems arose. On May 8, the architects wrote DASNY arguing for an increase in its fee to redesign Phase II.¹⁰³ The fee argument would continue for some time, although redesign work continued while the fees were debated. By June 16, DASNY was recommending that the re-bid of Phase II be delayed because the Construction Manager’s review of the “90% construction documents” concluded that they were “incomplete, inaccurate and not recommended for bidding.” Review sessions for the 100% documents were scheduled for early July, and were completed shortly after July 12.

On July 17, based on those reviews, the Construction Manager informed DASNY that the cost estimate for Phase II (the annex) had risen to \$68,673,823.¹⁰⁴ The Construction Manager also informed DASNY that the cost estimate for that portion of the Phase III (the tower interior renovation) budget to be transferred to the Phase II budget was \$11,072,020, bringing the Phase II total to \$79,745,844.¹⁰⁵

On August 8, DASNY, the County Administration and the Judiciary met to discuss the project’s escalating cost. Pursuant to its Agreement with the County, DASNY reimbursed the County \$6.5 million in excess interest earnings on bond funds resulting from delays in the project. To further assist Westchester County, DASNY cut its fee by \$500,000.¹⁰⁶ In fall 2000, the architects again sought additional design reimbursement.¹⁰⁷

On October 10, DASNY again appeared before the Board of Legislators to explain the progress of the redesign and origins of the cost overruns.¹⁰⁸ On October 17, new Phase II bids were opened, and the aggregate of the lowest bids was \$77.2 million — a further \$3 million over the last reconciled estimate of \$74.2 million.¹⁰⁹ By that date, the total Phase II budget had reached \$94.8 million.¹¹⁰ The apparent low bidder for the General Contractor work was Delcon Construction Corp., a local firm.¹¹¹

¹⁰² See Westchester Co Bd of Legis, Cmte on Budget and Appropriations, Minutes of June 26, 2000, at 5.

¹⁰³ See Letter from PCF/F&D to DASNY, May 8, 2000.

¹⁰⁴ See Letter of Dominick Fickeria (URS/Greiner Project Executive) to Frank Vinci (DASNY Project Manager), July 17, 2000.

¹⁰⁵ See id.

¹⁰⁶ See Philip Wood (then-DASNY Deputy Executive Director), Meeting Notes, August 8, 2000.

¹⁰⁷ See Letter from Joseph Fuller to Hon. Andrew Spano (Westchester County Executive), September 28, 2000.

¹⁰⁸ See Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of October 10, 2000. See also Appendix, Exhibit N (DASNY’s PowerPoint presentation).

¹⁰⁹ See Letter from DASNY Project Manager Frank Vinci to Westchester County Department of Public Works, October 19, 2000.

¹¹⁰ See Dormitory Authority of the State of New York, Westchester County Courthouse Rehabilitation, Phases I and II Budget Overview, March 12, 2003.

¹¹¹ As discussed in Part IV, Delcon’s poor performance later became a major cause of project delays, and ultimately Delcon was removed from the project after it filed for bankruptcy.

In October 2000, after the new Phase II bids were received and analyzed but before the bid was awarded — and nine months after the original bids for the annex construction and tower renovation had come in 30% over budget — DASNY’s project manager sent a memorandum to the County Administration summarizing the status of the overall project budget stating that “[t]he adjusted [Courthouse] tower budget is not sufficient to fund the approved program.”¹¹² In that memorandum, DASNY specifically informed the County that:

- approximately \$9.3 million would be reallocated from the tower (Phase III) to the annex (Phase II) to cover the overbid on Phase II;
- an additional \$2.4 million would be reallocated from Phase III to Phase II to “restore recommended value engineering reductions” previously rejected by the County on the grounds that they would increase maintenance costs; and that
- these changes only “leave a total of \$13.2 million for future tower rehabilitation during [P]hase III,” even though the budget for Phase III then called for \$30.756 million (a figure which, as previously noted, had already been arbitrarily reduced to fund increased costs for Phase II without any concomitant programming changes to justify the reduction).¹¹³

In addition to informing the County of the insufficiency of funds available for Phase III, the memorandum further advised that “there are no funds in the current project budget for escalation, consultant claims, increased general conditions, District Attorney relocation, telecommunications equipment & cabling or furniture.”¹¹⁴

Shortly thereafter, awards were made to the low bidders and construction of the annex would finally begin, the first step being excavation of the site. That excavation would end the year on an ominous note: shortly after Phase II site preparation work began in December, soil tests confirmed the presence of petroleum.¹¹⁵

The 2000 chronology demonstrates that the project was in serious trouble and that the major parties (DASNY, the architects, the Construction Manager, the County Administration, and the Judiciary) knew it. To be sure, the quirky behavior of the construction market at the end of 1999 and beginning of 2000 can legitimately be considered an unanticipated surprise, though as noted below, the construction industry was well aware that these market fluctuations were affecting the labor market (and therefore, project prices). The record also shows that during 2000, monies were transferred from the Phase III budget to cover the rising estimates for Phase II. Some of

¹¹² Memorandum from DASNY Project Manager Frank Vinci to County Commissioner of Public Works Anthony Landi, October 31, 2000 (reporting budget status for Phases II and III for the Westchester County Courthouse construction and rehabilitation project) (see Appendix, Exhibit O).

¹¹³ Id.

¹¹⁴ Id. In this context, it should be noted that the June 2003 independent cost estimate and associated soft cost estimate for the remaining work for Phase III would show that many of these unfunded costs contributed to the \$51 million shortfall (see Part IV).

¹¹⁵ Minutes of Owner’s Meeting, December 19, 2000.

that transfer reflected the fact that some Phase III work was moved to Phase II, namely renovations for the three floors tied into the connector. However, as DASNY informed the County, the dollar amounts that were moved into Phase II to fund the new contract amounts significantly exceeded the volume of work moved, and as a result Phase III was now seriously underfunded. As the year ended, the project team learned that soil contamination was in fact likely to be a major issue.

4. 2001 — ESCALATING PROBLEMS

In 2001, the project was beset by a variety of escalating problems as well as a continuation of trends from 2000. The primary problems were:

- (a) Delay due to soil contamination. In January, Delcon stopped work on the annex pending resolution of the soil contamination issue.¹¹⁶ By the end of March, removal of contaminated soil had begun, and the project was officially three months behind schedule.
- (b) Coordination disputes between the Construction Manager and the architects. In early 2001, the Construction Manager and the architects began debating responsibility for the mounting project delays. The Construction Manager had brought to the architects' attention the need for more timely responses to its Requests for Further Information (RFIs).¹¹⁷ It also opined to the architects that some items must be re-engineered in response to problems identified by the RFI process and that failure to timely resolve these issues could adversely affect the project schedule.¹¹⁸ The architects' response, dated March 21, rebutted these assertions and instead blamed failures by the Construction Manager and the General Contractor.¹¹⁹ These coordination problems continued throughout 2001 and into 2002.
- (c) Repeated delays on Phase I. By mid-February, the Phase I schedule was revised again, with the roof replacement to begin in April. However, by March, Premier, the roofing contractor for Phase I, was experiencing business difficulties that clearly promised to prevent it from beginning work on April 16 as scheduled.¹²⁰ By April 10, Premier defaulted and its contractual obligations were transferred to its surety, National Fire Insurance Company of Hartford.¹²¹ On April 24, further problems

¹¹⁶ Minutes of the Owner's Meeting, January 3, 2001.

¹¹⁷ An RFI is a request, generally by a contractor, for an architect to elaborate or clarify aspects of a drawing.

¹¹⁸ See Letter from Anthony Gaglianese (URS/Greiner Senior Project Manager) to Joseph Fuller (PCF&P/F&D), "15 March 23, 2001" [sic].

¹¹⁹ The architect disputed the "re-engineering" characterization, arguing that the specifications identified these matters as "coordination" issues; indicated that some items could not be resolved on the schedule set forth by the Construction Manager's letter; and described a failure by the Construction Manager to produce a Baseline Construction Schedule, a dated Shop Drawing Submission Schedule, and a set of Coordination Drawings on the proper scale as making coordination more difficult and contributing to the disputes and delays.

¹²⁰ Minutes of Owner's Meeting, March 27, 2001.

¹²¹ See Minutes of Owner's Meeting, April 10, 2001.

with Phase I were reviewed, including how the new roof would be applied (i.e. with or without the use of a torch, which would create air-quality issues for building occupants) and problems with the new exterior panels (which were not meeting testing requirements at the mock-up stage).¹²² By May 2001, it was clear to the construction team that the roof project would not begin until late June and that Phase I would not be completed until October 2001.¹²³ By June 19, the roof installation was on hold because of odor and air-quality concerns.¹²⁴ In the summer, asbestos removal became an issue, and roof installation did not in fact take place until the Fall of 2001. Phase I work continued, but completion was further delayed as the year went on.

- (d) Initial problems with Delcon, the Phase II General Contractor. As construction of the annex began, a substantial issue arose with respect to the design of the mini-piles on which the foundation of the building would rest. This issue was not resolved satisfactorily for many months; the architects and the Construction Manager had to reject Delcon's proposed re-design several times before Delcon finally performed the work in accordance with the specifications. This problem was eventually resolved satisfactorily, and by the very end of the year the foundation was completed¹²⁵ and steel erection was scheduled to begin in January 2002.¹²⁶

The 2001 chronology reveals that Phase I, already behind schedule at the start of the year, lagged even further because of the roofing contractor's default and because of problems with the roof replacement and the panels. While the Phase I delays and related problems dominated the attention of the project team in 2001, repeated disagreements between the Construction Manager and the architects as to follow-up details related to the re-design of Phase II cast shadows on the quality of the drawings and the contractors' ability to execute them in the field. The year 2001 also saw the first signs of problems with the Phase II General Contractor's performance — an issue that would grow to dominate 2002 and the first half of 2003. The year 2001 demonstrated, at least in hindsight, that the project team was entering onto the troubled economic waters — first described in the industry press in 1999 and 2000 — that would upend many of the project team's projections about project prices, the labor market and the availability of funds. Moreover, by spring 2001 the financial markets that boomed in the 1990s were retreating rapidly, a reversal exacerbated (especially in New York) by the September 11 terrorist attacks. As a result, by the end of 2001, assumptions made at the peak of the market were proving as incorrect as the market was proving weak and volatile. By that time, however, all of the Phase II contracts had been awarded, so the team could not "turn back the

¹²² See Minutes of Owner's Meeting, April 24, 2001.

¹²³ See Minutes of Owner's Meeting, May 23, 2001.

¹²⁴ See Minutes of Owner's Meeting, June 19, 2001.

¹²⁵ See Minutes of Owner's Meetings, January 30, 2001; March 27, 2001; June 19, 2001; July 3, 2001; July 17, 2001.

¹²⁶ See Minutes of Owner's Meeting, December 18, 2001.

clock” and find less costly alternatives. Finally, the economic downturn adversely affected many contractors. Project cancellations and reduced demand for work caused many contractors to become insolvent. This trend would impact the project directly in 2002.

5. 2002 — OLD PROBLEMS LINGER, NEW PROBLEMS EMERGE

The year 2002 saw a continuation of some old problems — such as the on-going disputes and lack of coordination between the architects and the Construction Manager,¹²⁷ and repeated delays on the completion of Phase I¹²⁸ — as well as the emergence of new difficulties, as will be recited below.

Throughout 2002, the project team, County Administration and Judiciary continued to discuss the budget shortfall. In February, DASNY and the Judiciary expressed concern that elements of Phase II (e.g. furniture) and much of Phase III lacked funding.¹²⁹ In March, the County Administration expressed displeasure at DASNY’s assertion that additional funds would be required for Phase III.¹³⁰ DASNY spent much of April and May answering the County’s questions about what could have been done to save money

¹²⁷ In a Wicks Law project with multiple prime contractors working on the same project, it is essential that the architects and Construction Management firm work together smoothly and effectively to coordinate the work of the various prime contractors on-site. Typically, the Construction Manager controls construction phasing (by which a contractor comes into a space at a specific time to perform a specific task), while the architects control production and certification of the drawings that guide the contractors’ work. Those drawings must be repeatedly adjusted to reflect actual field conditions (e.g. work already done on site). Throughout the project, but particularly after the redesign of Phase II in 2000, the Construction Manager and MEP contractors complained that some of the drawings, particularly those related to the connector and to build-systems layout and physical support, were missing, inadequate or wrong (see Minutes of URS/Owner’s Meeting, January 3, 2001; Letter from Anthony Gaglianese [URS/Greiner Senior Project Manager] to Joseph Fuller [PCF&P/F&D], “15 March 23 2001” [sic]; Minutes of Progress Meeting, July 30, 2001; Minutes of URS/Owner’s Meetings, October 23, 2001, December 5, 2001; Minutes of Progress Meetings April 17, 2002, June 11, 2002, June 25, 2002, September 19, 2002; Minutes of URS/Owner’s Meeting, December 17, 2002; Minutes of Progress Meetings of January 7, 2003, February 4, 2003). The architects, in turn, complained that the Construction Manager failed to notify them on a timely basis as to the actual progress of the project so they could produce coordination drawings when needed (see Letter from Joseph Fuller [PCF&P/F&D] to Dominick Fickeria, [URS/Greiner] March 21, 2001; Minutes of Progress Meetings, June 25, 2002; January 7, 2003). The minutes of the Progress Meeting of June 25, 2002 reflect an extensive discussion of these coordination issues (see generally Minutes of Progress Meeting, June 25, 2002). While determining and/or allocating responsibility for these coordination difficulties is beyond the scope of this inquiry, the record indicates that such problems existed and clearly impeded the progress of the project.

¹²⁸ For example, exterior panels were originally due to be put up in March, but installation was not completed until June (see Minutes of Owner’s Meetings, January 2, 2002; February 11, 2002; March 12, 2002; March 26, 2002; April 9, 2002; April 23, 2002; and June 4, 2002). Subsequently, the installation of lights to permit airplane pilots to see and avoid the tower at night became an issue for the rest of the year (see Minutes of Owner’s Meetings, July 2, 2002; July 16, 2002; July 30, 2002; September 24, 2002; October 8, 2002; October 22, 2002; November 6, 2002; December 3, 2002; December 17, 2002). Only at the end of 2002 was Phase I finally deemed substantially complete (see Minutes of Owner’s Meeting, December 3, 2002).

¹²⁹ See Minutes of Owner’s Meeting, February 11, 2002.

¹³⁰ See Minutes of Owner’s Meeting, March 27, 2002.

and what could still be done to reduce the cost of Phase III.¹³¹ In April, the County Administration stated that it wanted to save money on Phase III by re-using the tower's duct work (HVAC).¹³² By July, DASNY and the County Administration estimated that the total cost of "non-funded items" in the project budget was \$6.6 million, including furniture, data cabling, moves of building occupants, and temporary relocation of the District Attorney during the tower renovation.¹³³ In September, DASNY submitted a new schedule for Phase II completion to the County Administration, calling for completion by May 2004.¹³⁴ The County Administration responded by letter dated September 17 stating that only a three-month extension to November 2003 was acceptable to account for the three-month delay caused by the need to remove contaminated soils in 2001.¹³⁵ The County advised that any extension beyond that date was unacceptable and that the County would not be liable for any costs incurred as a result of delay past November 2003.¹³⁶

Meanwhile, as these old issues continued to plague the project, a major new problem (the first signs of which had begun to emerge in 2001) became paramount: the poor performance of Delcon, the Phase II General Contractor. There arose recurring and escalating concerns that basic building components, such as steel and bricks, for which Delcon was responsible, were repeatedly flawed and unacceptable — thus requiring replacement and resulting in project delays. Indeed, the year began with the Construction Manager complaining that Delcon had yet to complete a brick mock-up, which was needed so that the parties could select the brickwork,¹³⁷ and the year ended with the rejection of Delcon's third brick mock-up and Delcon looking for a new brick subcontractor. Other key developments with respect to Delcon in 2002 were as follows:

- On April 17, DASNY expressed concern over Delcon's failure to produce a detailed and reliable schedule for steel and masonry work.¹³⁸
- On May 21, the Construction Manager stated that it was not pleased with Delcon's progress in constructing the annex.¹³⁹ At a subsequent Owner's Meeting, Delcon's lack of progress prompted serious discussion about DASNY terminating Delcon for non-performance and invoking the completion bond to

¹³¹ See Minutes of Owner's Meeting, April 9, 2002; see also Letter from Frank Frasco (DASNY Project Manager) to Lawrence Schwartz (Westchester Deputy County Executive), April 29, 2002; Letter from Frank Frasco to Lawrence Schwartz, May 31, 2002.

¹³² See Minutes of Owner's Meeting, April 9, 2002.

¹³³ See E-mail from William Feigel (DASNY Field Representative) to Frank Frasco (DASNY Project Manager) et al., July 1, 2002.

¹³⁴ See Letter from Frank Frasco (DASNY Project Manager) to Ralph Butler (Westchester County Commissioner of Public Works), September 6, 2002.

¹³⁵ See Letter from Ralph Butler (Westchester County Commissioner of Public Works) to Frank Frasco (DASNY Project Manager), September 17, 2002.

¹³⁶ See id.

¹³⁷ See Minutes of Owner's Meeting, January 15, 2002.

¹³⁸ See Minutes of Progress Meeting, April 17, 2002.

¹³⁹ See Minutes of Owner's Meeting, May 21, 2002.

require the surety (Hartford) to replace Delcon with a performing contractor.¹⁴⁰ At that meeting, DASNY stated that though it was putting pressure on Delcon by threatening termination, terminating Delcon would likely trigger a substantial delay until Hartford completed its due diligence and hired another contractor.¹⁴¹

- On June 13, DASNY informed Delcon that DASNY would no longer make mid-month progress payments, ostensibly owing to Delcon's slow progress.¹⁴²
- On June 18, Delcon stated that it would complete steel erection by August 30.¹⁴³
- On August 6, Delcon reported that the steel had been delivered but was incorrectly fabricated, causing steel erection to stop.¹⁴⁴
- On August 13, it was again reported that the mock-up for the bricks had not met specifications.¹⁴⁵
- On August 14, DASNY advised Delcon to make management changes due to lack of progress in steel erection, and indicated that Delcon would be terminated for cause on September 10 unless the required changes were made.¹⁴⁶
- On August 30, DASNY agreed that Delcon's "drop dead" date would be extended to October 9 after Delcon and Hartford offered to bring in a new contractor, Plaza Construction, to assist Delcon.¹⁴⁷
- On September 10, the architects again rejected the Delcon brick mock-up.¹⁴⁸
- On September 17, the Construction Manager questioned why Delcon had no steel erector on site, and DASNY questioned why Delcon was not providing enough workers.¹⁴⁹
- On October 8, DASNY announced that it had sent a termination notice to Delcon.¹⁵⁰ However, on October 11 DASNY agreed to suspend the termination, conditional on Delcon's successful completion of required corrective actions.¹⁵¹ On October 22, DASNY announced that the Delcon termination was suspended

¹⁴⁰ See Minutes of Owner's Meeting, June 4, 2002.

¹⁴¹ See id.

¹⁴² See Letter from Frank Frasco (DASNY Project Manager) to the Delcon Corporation, June 13, 2002.

¹⁴³ See Minutes of Owner's Meeting, June 18, 2002.

¹⁴⁴ See Minutes of Progress Meeting, August 6, 2002.

¹⁴⁵ See Minutes of Owner's Meeting, August 13, 2002.

¹⁴⁶ See Letter from Philip Piscatella (DASNY Director of NYC Courts Program) to Delcon Corporation, August 13, 2002.

¹⁴⁷ See id.

¹⁴⁸ See Minutes of Owner's Meeting, September 10, 2002.

¹⁴⁹ See Minutes of Progress Meeting, September 17, 2002.

¹⁵⁰ See Minutes of Owner's Meeting, October 8, 2002.

¹⁵¹ See Letter from Douglas Van Vleck (DASNY Managing Director of Construction) to the Delcon Corporation and the Hartford Companies, October 11, 2002.

for 30 days and that Delcon had engaged Plaza Construction to assist.¹⁵² At an October 30 meeting, the Construction Manager complained that Delcon's schedule continued to change and warned that Delcon would be held responsible if the delays led to claims for additional compensation.¹⁵³

- By November, DASNY had sent two letters to Delcon regarding missed milestones; the steel still had not yet arrived, and DASNY had not been given a copy of the contract between Plaza and Delcon.¹⁵⁴
- At the November 19 Owner's Meeting, Delcon was informed that the third brick mock-up needed corrections, and that there were still problems regarding the steel.¹⁵⁵
- By that date, DASNY had met with Plaza Construction; Plaza had promised to produce an acceptable construction schedule.¹⁵⁶
- The minutes of the December 17 Owner's Meeting report that the third brick mock-up was officially rejected, Delcon was looking for a new brick subcontractor, and Plaza and Delcon were addressing the steel deficiencies.¹⁵⁷

The 2002 chronology shows that contractor problems as well as coordination problems between the Construction Manager and the architects persisted and worsened throughout the year. Presumably, these problems were adversely affecting various contractors. One obvious problem was that Phase I continued to lag — the Phase I completion date repeatedly moved from spring to summer to fall and finally to the end of the year. Repeated Phase I delays continued to demand attention even as Phase II was becoming increasingly problematic. By summer 2002, the magnitude of Phase II problems was even more clear and DASNY was trying to resolve the problems by compelling Delcon to perform under threat of termination. However, basic Phase II building components — steel and bricks — were repeatedly flawed on delivery and/or unacceptable on review. By the time Delcon and Hartford sought assistance from Plaza, Phase II was far behind schedule and over budget. Questions as to Delcon's solvency and ability to continue as a business were being openly discussed in 2002. Other contractors were expressing displeasure with Delcon's performance, raising the issue of whether the Phase II budget would be further adversely affected by these contractors' "damages due to delay" claims. Beyond the problems Delcon was experiencing and creating, the Phase

¹⁵² See Minutes of Owner's Meeting, October 22, 2002.

¹⁵³ See Minutes of Progress Meeting, October 30, 2002.

¹⁵⁴ See Letter from Philip Piscatella (DASNY Director of NYC Courts Program) to the Delcon Corporation and the Hartford Companies, October 31, 2002; Letter from Philip Piscatella to the Delcon Corporation and the Hartford Companies, November 8, 2002. In November, it was also reported that DASNY would speak with Delcon's attorney regarding a rumor that Delcon was filing for bankruptcy, a rumor that Delcon denied (see Minutes of URS/Owner's Meeting, November 6, 2002). Delcon would later file for bankruptcy protection in June 2003.

¹⁵⁵ See Minutes of Owner's Meeting, November 19, 2002.

¹⁵⁶ See id.

¹⁵⁷ See Minutes of Owner's Meeting, December 17, 2002.

II budget was rising throughout the year, continuing the 2001 trend of drawing funds from the Phase III budget.

6. 2003 — TOWARD A SOLUTION

The year 2003 has been marked by efforts to come to grips with two chronic problems: (a) Delcon's inadequate performance, and (b) the need for additional funds to complete the project.

The year began with more Delcon-related problems. In January, the Construction Manager urged Delcon to enclose the annex building as rapidly as possible; Delcon assured that the annex would be enclosed by February 20.¹⁵⁸ By mid- January, Delcon decided to continue working with the same brick subcontractor but to "improve quality control."¹⁵⁹ Also by mid-month, the fourth brick mock-up was underway and the County was concerned about whether the building would be completed by March 15, 2004 — the then-current Delcon date.¹⁶⁰ Meanwhile, various Phase I completion items were still in progress.¹⁶¹

By mid-February, the fourth brick mock-up was due to be completed by March 3; however, by late February, it was announced that the March 3 date would not be met, and that problems with the structural steel were continuing.¹⁶² The architects asked the Construction Manager to consider looking at an "outside source" to address the steel problem.¹⁶³ The Construction Manager again wrote to Delcon regarding Delcon's poor performance.¹⁶⁴

At an early-March Progress Meeting, Delcon/Plaza and the mechanical contractor argued about schedules, compliance with schedules, and responsibilities for delays.¹⁶⁵ In mid-March, DASNY prepared a spreadsheet for meetings with the County and the Judiciary demonstrating that the completion of Phase II, accounting for so-called unfunded costs and settling of contractor delay claims, would together leave little or no money for Phase III.¹⁶⁶ On March 25, the fourth disapproved brick mock-up was taken down and Delcon was working on modifications.¹⁶⁷

On April 4, in response to DASNY's briefing, Chief Administrative Judge Lippman wrote the County Administration and Board of Legislators urging the County to commit

¹⁵⁸ See Minutes of Progress Meeting, January 7, 2003.

¹⁵⁹ See Minutes of Owner's Meeting, January 14, 2003.

¹⁶⁰ See id.

¹⁶¹ See id.

¹⁶² See Minutes of Owner's Meetings, February 11, 2003; February 24, 2003.

¹⁶³ See Minutes of Owner's Meeting, February 24, 2003.

¹⁶⁴ See id.

¹⁶⁵ See Minutes of Progress Meeting, March 5, 2003.

¹⁶⁶ See Minutes of Owner's Meeting, March 11, 2003 & attachment (spreadsheet).

¹⁶⁷ See Minutes of Owner's Meeting, March 25, 2003.

the additional funds needed to complete Phase III (then estimated at about \$35 million in County funds) so DASNY could proceed with updating and revising the documents, and then seeking bids.¹⁶⁸ After meeting with County lawmakers, some of whom expressed concerns about the reliability of that figure, Judge Lippman asked DASNY to hire an outside firm to prepare an independent cost estimate for Phase III.¹⁶⁹

By April 8, DASNY had again updated its phasing schedule,¹⁷⁰ and the Construction Manager had reported that completion of Phase II was now scheduled for July 8, 2004.¹⁷¹ The Construction Manager also reported that the steel deficiencies had been repaired and inspected.¹⁷² On April 17, DASNY again wrote to Delcon and the surety stating that Phase II delays other than the three-month delay to remove contaminated soil would be Delcon's responsibility.¹⁷³ The letter also raised issues related to Delcon's continuing failure to meet deadlines and pay subcontractors.¹⁷⁴ On April 22, the fifth brick mock-up was "approved as noted" (i.e. with certain continuing reservations or concerns). On April 28, DASNY made a presentation to the Board of Legislators on the status of the project and the need for additional funds.¹⁷⁵

With the County now openly discussing the need for additional funds, May found DASNY seeking to move the project along. On May 13, DASNY wrote Delcon and the surety directing them to attend a May 22 meeting to address their failure to advance the brick work, as well as the filing of liens by subcontractors whom Delcon had not paid.¹⁷⁶ As of May 20, the Construction Manager was still working with the bonding company for the Phase I contractor to resolve the last punch-list items. On May 29, DASNY again wrote Delcon and the surety directing them to attend a June 4 meeting, expecting a "rescue plan" by which (a) Delcon would withdraw from substantive involvement (other than as a contractual party) in the project; (b) Plaza would be designated as the new de facto General Contractor; and (c) Hartford would commit the additional funds needed to

¹⁶⁸ See Letter from Hon. Jonathan Lippman (New York State Chief Administrative Judge) to Hon. Andrew Spano (Westchester County Executive) and Hon. Lois Bronz (Chair, Westchester County Board of Legislators), April 4, 2003 (see Appendix, Exhibit P).

¹⁶⁹ See Letter from Hon. Jonathan Lippman (New York State Chief Administrative Judge) to Hon. Andrew Spano (Westchester County Executive) and Hon. Lois Bronz (Chair, Westchester County Board of Legislators), et al., May 30, 2003.

¹⁷⁰ See Minutes of Owner's Meeting, April 8, 2003.

¹⁷¹ See id.

¹⁷² See id.

¹⁷³ See Letter from Philip Piscatella (DASNY Director of NYC Courts Program) to the Delcon Corporation and the Hartford Companies, April 17, 2003.

¹⁷⁴ See id.

¹⁷⁵ See Dormitory Authority of the State of New York, Westchester Courthouse Project Review Report, April 28, 2003.

¹⁷⁶ See Letter from Philip Piscatella (DASNY Director of NYC Courts Program) to the Delcon Corporation and the Hartford Companies, May 13, 2003.

finish the annex and settle subcontractor liens and contractor claims.¹⁷⁷ At that meeting, Hartford asked for a delay to review the status of Phase II and determine additional funding needs.¹⁷⁸ Shortly thereafter, Delcon filed for bankruptcy¹⁷⁹ and sent a letter to DASNY regarding its intent to terminate the contract, making various claims that blamed others for Delcon's failures.

On May 30, Chief Administrative Judge Lippman transmitted to the County Administration and Board of Legislators the independent cost estimate ordered in April; that analysis valued the remaining work at \$51 million.¹⁸⁰ In his May 30 letter, the Chief Administrative Judge offered to help defray the additional costs by proposing to grant the County over \$9 million in State funds, the maximum available by statute from programs administered by the Judiciary, if the County promptly authorized the remainder of the necessary financing.¹⁸¹ Such aid would reduce the County's additional borrowing to \$41.77 million (exclusive of financing costs and any program adjustments the County might request). Judge Lippman's letter also announced this independent review and reminded the County of its obligation under the Court Facilities Act to provide the additional funding authority needed to advance Phase III.¹⁸² Shortly after, ostensibly at the request of several County legislators, State Comptroller Alan Hevesi announced that his office would also conduct a review of the Westchester County Courthouse project.

By June 17, DASNY had requested the Federal Bankruptcy Court to allow DASNY to terminate Delcon and transfer the project to the surety, Hartford. On July 17, the Bankruptcy Court signed a Stipulation and Consent Order, in effect removing Delcon from the project and permitting Hartford to sign the Takeover Agreement.¹⁸³ Hartford and Plaza Construction then began preparing a "rescue plan" to complete the annex.

On July 22, the architects wrote DASNY to summarize the results of their latest analysis of change orders. The letter also recapitulated their view of problems that plagued the project (ranging from inaccurate construction documents for the tower to 108,000 square foot growth in the overall project size) caused in their opinion "by the original inaccurate" plan presented by the County in 1997.¹⁸⁴

¹⁷⁷ See Letter from Philip Piscatella (DASNY Director of NYC Courts Program) to the Delcon Corporation and the Hartford Companies, May 29, 2003.

¹⁷⁸ See Dormitory Authority of the State of New York, Meeting Notes of June 4, 2003.

¹⁷⁹ See In re Delcon Corp. (Pet.No. 03-23018 [SD NY Bankr, June 9, 2003] [Hardin, J.]).

¹⁸⁰ See Letter from Chief Administrative Judge Jonathan Lippman to County Executive Andrew Spano, Board of Legislators Chair Lois Bronz, Budget and Appropriations Chair Richard Wishnie and Minority Leader James Maisano, May 30, 2003, at 2-3, transmitting Baer and Associates, "Independent Cost Estimate for Phase II/III Westchester County Courthouse Rehabilitation Project," May 2003 (see Appendix, Exhibit Q).

¹⁸¹ See id.

¹⁸² See id.

¹⁸³ See Eddings, "Court Builder Replaced," The Journal News, July 18, 2003, at A1.

¹⁸⁴ See Letter from George Miller and Joseph Fuller (Pei Cobb Freed & Partners) to Philip Piscatella (Director of the New York City Courts Program, DASNY), July 27, 2003, at 2.

The 2003 chronology to date continues to reflect the trends of prior years. Although Phase I was substantially completed by mid-year, final completion still lagged. Delcon's failures persisted despite DASNY's attempts to remedy them, leading to Delcon's removal at mid-year. DASNY's success in removing Delcon set the stage for Hartford and Plaza Construction to take over completion of Phase II. This development offers the prospect that Phase II can advance to orderly and successful conclusion, with additional funds required to complete Delcon's contractual obligations. However, Hartford's liability does not extend to Phase III. Accordingly, Hartford's participation in rescuing Delcon does not affect the \$51 million projection (based on the Independent Cost Estimator's work, plus associated soft costs) of the additional funds required for Phase III.

IV. Analysis of Causes of Project Delays and Overruns

The cost of the project has increased from \$140 million in 1997 to about \$191 million as of May 2003. In addition, the estimated completion date for Phase II is now July 2004 and work on Phase III has not yet begun.

These project delays and cost increases are explained as follows:

- The prior County Administration's 1997 \$140 million estimate for the project was never correct because the 1997 plan was not complete. The post-1997 design process found many deficiencies that required the tower and annex programs to "grow" significantly. Moreover, it was determined that the 1997 Plan did not provide for necessary items like furniture, equipment, and data cabling.
- The cost estimation process underestimated construction costs, partly because of severe changes in the market.
- There were numerous design errors and omissions, requiring an excessive number of change orders.
- The extensive design and redesign process increased architect and engineering costs.
- The budget did not provide for soil testing or remediation.
- Contractor bankruptcies and performance issues further delayed project progress. These and other project delays also increased construction management costs.

This report now analyzes these interrelated causes in turn.

A. Project Growth to Correct the Inadequate 1997 Capital Plan

The project started with the premise that the 1997 County Plan was viable and complete. It was not. The usual post-approval plan-validation process, initiated in 1998, demonstrated that the 1997 County Plan did not provide for necessary internal spaces (e.g. hallways), excluded key non-court functions and provided some unworkable court spaces. As a result, the annex and tower had to "grow" by tens of thousands of square feet, thus increasing costs. Moreover, the 1997 County Plan did not provide funding for necessary items such as furniture, equipment and data cabling.

1. DEVELOPMENT OF THE 1997 PLAN

The largest single factor that increased the cost of the Courthouse project was the inherent inadequacy of the County's 1997 Capital Plan and the necessary resulting changes in project scope. To be sure, the 1997 Plan may have been conceptually sound in that reconstructing and refurbishing the Courthouse tower and building a Justice Center annex may well be the best way to meet the needs of the courts in Westchester County. However, the County did not prepare its square footage calculations and cost estimates in a complete and careful manner, and thus greatly underestimated the cost of implementing its Plan.

The inadequacies of the 1997 County Plan stemmed from the inadequacy of the planning process itself. The planning studies that the former County Administration commissioned in the 1980s and early 1990s did not accurately measure the space to be renovated in the Courthouse tower, did not provide workable courtrooms, failed to comply with then-existing guidelines, and failed to provide for essential non-courtroom space. These errors were then incorporated into the 1994 County Plan, which in turn became the basis for the 1997 County Plan — all seemingly without a review that could have prevented the repeated mistakes.

The budget information included in the County 1997 Plan was also inadequate. As noted, the County's cost estimate was a single-page document that provided a \$140 million estimate, on a dollars per square foot basis, to build a new building and parking facility and rehabilitate the existing tower. The cost estimate for the latter apparently did not include roof replacement. Otherwise, due to the lack of detail or justification in the cost estimate, it is impossible for this inquiry to discern whether the cost estimate included or excluded any specific cost.

2. GROWTH OF THE ANNEX

Between October 1997 (when Westchester issued its 1997 County Plan) and November 1999 (when the design team completed the "Final Approved Annex Bid Set"), the size of the annex increased significantly. This section details the process by which the annex program was developed and reviewed, and then analyzes the reasons for the increase in the size of the annex.

a. Program review and development

The 1997 County Plan called for a 223,000 gross square foot annex comprised of 165,000 gross square feet in primary program space, a 48,000 gross square foot parking facility and a 10,000 gross square foot central heating/chiller plant. Following the hiring of Pei Cobb Freed and Fuller & D'Angelo as project architects in 1998, one of the first steps in the pre-design phase of the project was to review and verify the 1997 Plan. For this purpose, the project architects retained Ricci Associates, an architectural and planning firm specializing in courthouses and other "justice" facilities with a recognized expertise in the programming and planning of courthouses.

The starting point for the annex programming study was the three-page “Macro Program for Courthouse Addition,” dated July 16, 1998. The July 1998 Macro Program provided for a structure of 207,000 gross square feet, consisting of the annex proper (165,000 square feet), the central boiler and chiller plant (10,000 gross square feet), and the parking facility (32,000 square feet).¹⁸⁵

Between July 1998 (when the Macro Program contemplated an annex of 207,000 gross square feet) and November 1999 (with the issuance of the Final Approved Annex Bid Set, which specified an annex of 260,945 gross square feet), the project progressed through the standard phases of pre-design/programming, schematic design, design development, and finally, preparation of construction documents. As demonstrated below, the record shows extensive meetings, discussions and sharing of information throughout this process among the County, the project team and the Judiciary, and a full opportunity for all to comment on and approve or object to changes in the program and plans.

The program review and development consisted, in part, of interviews of representatives of various building occupants, completion of questionnaires by both Judiciary and County officials (including the District Attorney and Department of Probation), as well as the regular Architects’ Meetings attended by both County and Judiciary officials. The objective of the programming exercise was to ensure that, prior to the start of design development, the architects would fully understand the needs of the building’s users and occupants and how the building would function.

The first formal product of these efforts was the December 1998 program for both the annex and the tower, along with a set of Schematic Drawings.¹⁸⁶ In contrast to the cursory Macro Program of July 1998, the December 1998 document was a “Detail Program.” The December 1998 Program and the accompanying set of Schematic Plans were distributed for review and comment, and both County and Judiciary officials had an opportunity to comment on these documents in writing. The Program and the Schematic Plans were also discussed extensively at the regularly scheduled Architects’ Meetings.¹⁸⁷

Based on the written comments as well as the continuing discussions and meetings, in March 1999 the architects issued a Final Design program along with a Design Development set of drawings. Again, the parties had an opportunity for review and written comment, as well as further discussion of the evolving program and plans at the scheduled meetings.¹⁸⁸ This process of refining the building program, with extensive review and input by all interested parties, continued until the Final Bid Set was prepared in late 1999.

¹⁸⁵ See “Macro Program for Courthouse Addition” (July 16, 1998).

¹⁸⁶ See Pei Cobb Freed & Partners/Fuller & D’Angelo, Preliminary Program and Schematic Plans (December 1998).

¹⁸⁷ See Minutes of Architects’ Meetings, January 13, 1999; January 14, 1999; January 26, 1999; February 9, 1999; March 9, 1999; March 23, 1999.

¹⁸⁸ See Minutes of Architects’ Meetings, March 23, 1999; April 6, 1999; April 20, 1999; May 5, 1999.

b. Reasons for Increase in Annex Program

The changes in the annex program identified during the programming and design phases of 1998-1999 fall into four categories, one of which tended to reduce the annex program and three of which expanded it. The net effect of these factors was an increase of 37,945 gross square feet as compared to the County's October 1997 Plan, and 53,945 gross square feet as compared to the July 1998 Macro Plan. Those factors responsible for the change in the annex program were that:

- i. *The July 1998 Macro Program included functions that were later deleted.* Three functions were included in the Macro Program that were later removed from the annex: (a) the New Rochelle and Yonkers Family Courts, because those courts were ultimately not relocated to White Plains; (b) the Criminal Calendar Clerk offices, because these functions were relocated to the tower; and (c) robing rooms for the Criminal and Family Court Judges, which were eliminated as unnecessary because of the placement of the Judges' chambers immediately adjacent to the courtrooms. As a result, a total of 39,980 gross square feet were eliminated from the annex program.
- ii. *The July 1998 Macro Program failed to include a circulation factor.* The Macro Program significantly understated the total square footage required for the annex because of a fundamental calculation error. The Macro Program included Net Square Footage (NSF) (i.e. space required to perform each function to be housed in the building) as well as a Grossing Factor (accounting for stairwells, elevator shafts, mechanical rooms and other building systems spaces, and wall thicknesses). However, the Macro Program did not account for interior circulation — the hallways and other passages between work areas. As a result of this failure, the July 1998 Macro Program understated the size of the annex by 36,422 gross square feet.
- iii. *The July 1998 Macro Program failed to include necessary functions.* The programming and design process identified a number of critical functions that were not included in the July 1998 Program. The inclusion of these functions added 31,000 gross square feet to the annex. The functions omitted from the July 1998 Program were (a) a loading dock;¹⁸⁹ (b) the Department of Corrections and central prisoner holding;¹⁹⁰ (c) court officer locker rooms;¹⁹¹ (d) Family Court prisoner holding;¹⁹² and (e) Criminal Court part clerks.¹⁹³

¹⁸⁹ The July 1998 Macro Program did not include a loading dock because loading was to occur off the former Brookfield Street. The project architects were later directed to include the loading area within the building, with the entrance off of Quarropas Avenue, thus yielding an increase of 8,100 gross square feet.

¹⁹⁰ These critical elements were added at the request of the Department of Corrections, which was concerned about "prisoner backup" in the absence of sufficient prisoner holding. The Judiciary was also concerned about this possibility. The result was an increase of 12,000 gross square feet.

¹⁹¹ The July 1998 Macro Program did not include space for court officers' locker rooms, an operations office, and other functions. At the direction of the County and the Judiciary, these elements were added, yielding an increase of 6,814 gross square feet.

¹⁹² This necessary element was added with a resulting increase in 2,680 gross square feet.

¹⁹³ The required space for these nonjudicial employees was added with a resulting increase of 1,406 gross square feet.

- iv. *The July 16, 1998 Macro Program underestimated the space needed for some functions.* The final category of changes that affected the size of the annex were increases in certain functions identified in the July 1998 Program:
- Criminal courtrooms. The July 1998 Program provided for 20 Criminal courtrooms, in three different sizes, ranging from 854 NSF to 1,000 NSF to 1,740 NSF. By the time of the Final Approved Annex Bid Set, the number of courtrooms was reduced to 15, while the size of each courtroom was set at 1,800 NSF, with a resulting total increase of 13,908 gross square feet. The size of the courtrooms increased because the programming and design process made clear that the smaller courtrooms could not be made to comply with the Americans with Disabilities Act, could not hold the 60-70 public seats needed for jury selection, and could not accommodate a 16-person jury. In addition, the smaller courtrooms did not comply with the Guidelines of the Chief Judge,¹⁹⁴ which were crafted precisely to ensure that courtrooms would be sized and designed to be fully functional.
 - County Criminal Judges' chambers. Between the July 1998 Macro Program and the November 1999 Bid Set, the aggregate size of the Criminal Judges' chambers was increased by 3,656 gross square feet. The increase was the result of two factors. First, the chamber size provided in the July 1998 Program would not accommodate the furniture layout necessary to give effect to the plan to re-use much of the Judges' furniture from the tower. Second, some additional space was needed to accommodate a fax/work area in the reception part of the chamber suites.
 - Family Court courtrooms. The July 1998 Macro Program provided for seven Family Court courtrooms at 750 NSF and three hearing rooms at 500 NSF. The Final Bid Set provided for five courtrooms at 900 NSF, and two hearing rooms at the same 900 NSF size. The 750 NSF size originally specified for the courtrooms fell below the applicable Guidelines, which reflects the reality that such courtrooms are too small to fully accommodate a Family Court proceeding.¹⁹⁵ The hearing rooms were also sized at 900 NSF so they would be interchangeable with courtrooms. The result is that each courtroom/hearing room will be fully functional, while the interchangeability of courtrooms and hearing rooms allowed for a decrease in the number of adjudication spaces for Family Court. These objectives were achieved at an increase of 4,312 gross square feet.
 - Family Court clerks. The Final Bid Set reflected an increase of 2,801 gross square feet to provide the space that the programming study documented was necessary for Family Court clerk functions.

¹⁹⁴ See generally Rules of the Chief Judge (22 NYCRR) Part 34 (see Appendix, Exhibit D).

¹⁹⁵ The 750 NSF size is particularly inadequate in light of the policy that now provides that Family Court proceedings are open to the public, thus requiring additional seating.

- Domestic Violence program space. The July 1998 Program provided only 100 NSF for an Abused Spouse Office. During the programming study, the Judiciary and the County agreed that this critical service should be expanded and that 1,826 gross square feet would be added for this purpose.

The foregoing demonstrates that the inadequacy of the 1997 County Plan led directly to the “growth” of the annex. As the design team quickly found as soon as it started fleshing out the 1997 County Plan, the County’s submission did not provide a circulation factor, or key functional spaces, or even workable courtroom spaces. The design process that crafted specific designs out of the Macro Program corrected these deficiencies, and thereby made necessary modifications that ultimately increased the size of the annex, and therefore the Phase II budget.

Some observers have attributed the growth of the annex to the need to comply with OCA Guidelines. The record demonstrates that the majority of the growth of the annex was to correct such omissions as the failure to provide for hallways and other circulation-factor spaces, prisoner holding space, and the loading dock. The growth needed to address these omissions was not based on the OCA guidelines. Moreover, since these failures primarily impacted non-court space, they were beyond the Court Facilities Act jurisdiction of the Judiciary and the CFCRB. Accordingly, these failures could not justify CFCRB rejection of the County’s 1997 submission.

As for the growth in court-function spaces, the primary consideration was that the 1997 County Plan’s courtroom schemes simply proved unworkable, not that they failed to comply with the applicable Guidelines. During the early phase of the design process, the justice planning consultants advised the County and Judiciary that many of the spaces provided for in the County’s 1997 plan were not practicable. For example, the spaces were not adequate to permit compliance with the federal Americans with Disabilities Act, or to accommodate the number of jurors needed for jury selection.

In the course of the dialogue between the new County Administration and the Judiciary, facilitated by the design consultants, there were compromises on both sides. The Judiciary agreed to reduce the number of courtrooms to assist the County in making its Capital Plan work. The new County Administration likewise agreed to increase the size of some courtrooms for which the layout was proving unworkable. This process resulted in sequentially more detailed designs that ultimately approximated the OCA model guidelines for Criminal Court and Family Court facilities. (In fact, in some cases, the agreed-upon size of the courtrooms exceeded the OCA guidelines, because the parties agreed that additional space was required to make the spaces work.)

To the extent that the courtroom spaces provided in the 1997 County Plan did not comply with the applicable Guidelines, that Plan presented the Judiciary and the CFCRB with an inherently problematic and difficult choice. CFCRB disapproval of the plan on that basis would have exposed Westchester County to immediate and crippling financial sanctions because of the outgoing County Administration’s prior 10-year failure to provide

“suitable and sufficient” court facilities. As a result, 10 years of stop-and-start planning would have come to nothing. On the other hand, based on the County’s preceding decade of inaction, there was little evidence that the County could promptly develop and implement a better plan. Given these constraints and in view of the Court Facility Act’s balance-of-power considerations, the CFCRB approved the 1997 County Plan and the Judiciary worked with the new County Administration during the design phase — ultimately reducing the number of courtrooms and making other space concessions — to assist Westchester County to finally achieve a functional Courthouse that complied with the Court Facilities Act.

3. GROWTH OF THE TOWER

During the 1998-1999 design process, the size of the tower space to be renovated “grew” by almost 33,000 square feet. This “growth” was necessary because the County’s 1997 Plan estimates and the drawings that the County furnished to the project team significantly understated the space in the existing tower. When the correct square footage was identified, the costs associated with project completion increased proportionately.

The 1997 County Plan stated that the tower space to be renovated was 293,000 square feet. The RFP for design consultant services issued by DASNY in early 1998 listed the square footage at 300,000 gross square feet. Both documents appear to have been based on figures provided by the County Department of Public Works, some or all of which were also developed and/or recapitulated in prior County Capital Plan submissions, including the 1990 and 1991 Plan submissions prepared by the architectural firm of Fuller and D’Angelo.

The design consultant team chosen for the Courthouse project consisted of Pei Cobb Freed and Partners, in a joint venture with Fuller & D’Angelo, with Cosentini Associates as the engineering firm. Pei Cobb Freed was to design the new annex, Fuller & D’Angelo was to design the tower renovations, and Cosentini was to provide engineering services for the entire project. Among the team’s qualifications were that Fuller & D’Angelo had previous familiarity with the tower by virtue of having worked on the original Capital Plan, and Cosentini had previous knowledge of the tower by virtue of having been the engineering firm associated with the original construction of the building.

Notwithstanding the County’s data and the design team’s previous familiarity with the building, the 1997 County Plan 293,000 square-foot statement of the tower’s size was 67,388 square feet (or over 20%) too small. Some of that unstated space, however, would not require redesign and reconfiguration but would only require an HVAC system upgrade and a sprinkler system (i.e. the third, fourth and fifth floors and the low-rise bridge). Accordingly, the additional tower space to be renovated is now estimated to total 32,839 gross square feet.¹⁹⁶ This growth directly impacted the project cost on a square footage basis, impacts further compounded by the necessary addition of soft costs and other costs associated with the project delays.

¹⁹⁶ DASNY documents carry this total as 32,939 gross square feet, apparently due to a 100 GSF arithmetic error.

4. “UNFUNDED” ITEMS

The County’s 1997 cost estimate gives no detail as to what specific project elements are accounted for. As the project progressed, it became apparent that not all of the necessary project costs were included in the project budget. Furniture, equipment, data cabling, and moves of building occupants were not funded in the project budget. These essential expenditures added an estimated additional \$3.4 million for Phase II and \$3.5 million for Phase III, for a total of approximately \$6.9 million.

Soon after the project commenced in 1998, DASNY informed the County that the project budget did not allocate monies for certain essential elements, including furniture and moving building occupants as needed during construction. There is some evidence that at least one County official believed in 1997 that the \$140 million cost estimate was comprehensive. For example, a May 1, 1997 memorandum from the County Commissioner of Planning to the Deputy County Executive expressly stated that the proposed County plan did provide for funding for such necessary expenses as telecommunications and data cabling, and various moves and relocations.¹⁹⁷

However, an examination of the 1997 cost estimate reveals that funds for these types of project expenses are not identified where and in the manner one would expect to find them. The County’s 1997 cost estimate provides no detail as to the specific project elements included. It further appears from the Capital Plan line item description that the cost estimate for the tower rehabilitation did not include roof replacement, which was later determined to be necessary.¹⁹⁸

Thus, despite the assumption of at least one County official that the project estimate was comprehensive, it is now apparent that the document did not fully identify and account for all necessary project elements and their cost. Project elements not funded in the 1997 cost estimate add \$3.4 million to the cost of Phase II and \$3.5 million for Phase III, for a total of approximately \$6.9 million.

5. REDUCTION OF ANNEX HEIGHT FROM EIGHT TO THREE STORIES

The “redesign” of the annex has been cited as a factor contributing to the cost increase. In fact, there was no “redesign” because the decision to build a three-story structure was made prior to significant design work. Additionally, the three-story structure did not contain more gross square footage than the originally proposed eight-story structure. This review therefore found no basis for concluding that the decision to build a three-story rather than eight-story annex contributed significantly to the cost increases.

Unlike the programmatic “growth” of the annex, the evidence shows that the change of the annex from eight stories to three had, at most, a negligible impact on the cost of the

¹⁹⁷ See Memorandum from P. Lynn Oliva, Westchester County Commissioner of Planning, to Neil J. DeLuca, Deputy County Executive, May 1, 1997, at 1.

¹⁹⁸ See Westchester County Capital Plan Update, October 1997, at 5.

project. After the Board of Legislators had considered numerous alternatives,¹⁹⁹ the 1997 County Plan called for an eight-story annex immediately adjacent to the existing Courthouse tower.²⁰⁰ In addition to housing Westchester County's Probation Department and space for administration and other public uses, the "Justice Center" annex would include 100,000 square feet for County Court (comprising the top five floors of the annex), and 48,000 square feet for Family Court (operating on the lower three floors).²⁰¹ Under the plan, both County Court and Family Court would additionally operate in space in the adjacent tower.²⁰²

The three-story annex design appears to have derived from the DASNY RFP seeking annex designs. That RFP called for not one but three alternative designs for the annex.²⁰³ The submissions by the project architects included a schematic design of a three-story structure sweeping around the existing Courthouse and with a larger footprint than the eight-story alternative.²⁰⁴ This three-story design was considered aesthetically superior both by members of the design team and by various outside stakeholders.²⁰⁵ Upon reviewing the three alternatives, the County Administration is recorded as having preferred the shorter and broader annex,²⁰⁶ and the design team then proceeded to implement that decision.

However, because the change from eight stories to three occurred prior to the commencement of substantial design work, the refashioning of the annex does not appear to have resulted in significantly increased design costs. Moreover, because the County's cost estimate did not meaningfully break out costs, there is no evidence to suggest whether the shorter, broader building truly would have entailed other increased costs, especially given that the refashioned annex was not larger on a gross square foot basis than the original eight-story structure.

Nevertheless, the Construction Manager has argued that the original eight-story concept would have been less expensive because it is generally cheaper to build "up" (over a smaller footprint) than "out" (over a larger footprint). Regardless of the accuracy of this perception, this inquiry found no evidence of a cost analysis of the eight-story

¹⁹⁹ See e.g. Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of June 30, 1997, at 2-5; July 16, 1997, at 1-4.

²⁰⁰ See County of Westchester, Capital Plan Update for the Westchester County New Justice Center and County Courthouse, October 30, 1997, at 3-4.

²⁰¹ See id.

²⁰² See id.

²⁰³ See Dormitory Authority of the State of New York, Request for Proposals (Westchester County Courthouse), January 28, 1998.

²⁰⁴ See Pei Cobb Freed & Partners/Fuller & D'Angelo, "Proposal for Design Services for the Westchester County Courthouse Project," submitted to Frank Vinci (DASNY Project Manager), February 28, 1998.

²⁰⁵ See Letter from George Miller (PCF&P/F&D) to Frank Vinci (DASNY Project Manager) and Anthony Landi (Westchester County Commissioner of Public Works), July 21, 1998.

²⁰⁶ See Minutes of Architects' Meeting #11, August 18, 1998 (recording that County Executive Spano "expressed his opinion that he prefers the low 3-story high scheme").

versus three-story design, nor that the new County Administration considered such cost differentials as part of its decision process.

B. Impact of Construction Market Conditions

The Courthouse project was whipsawed by the construction market. The project was bid at the height of the region's late-1990s construction boom, with the result that bids came in very high. After construction commenced, however, the construction industry rapidly declined, with the result that many contractors experienced financial difficulties that adversely affected their ability to perform and fueled delays that added to the cost of the project.

1. CONSTRUCTION BOOM OF THE LATE 1990s

The Westchester County Courthouse project was put out to bid at a peak in the construction market. The results of this “seller’s market” were that it was difficult to get already busy contractors interested in bidding on this project and that the bids ultimately received were very high.

At the time the County developed its Capital Plan Amendment and \$140 million project budget in 1997, construction prices in the metropolitan area had been stable or declining for six years. History would later prove that by then, the County had lost the opportunity to capitalize on favorable market conditions in the early 1990s as a result of the County’s long delay in implementing a capital plan during that decade. By the time the project was finally designed and bid at the end of 1999 — and then repackaged and rebid in 2000 — the construction market in the metropolitan area had overheated significantly, thus adding millions of dollars to the cost of this project.

2. CONSTRUCTION BUST OF 2001-2003

Unfortunately, the construction market then turned against the project a second time. The region’s economic fortunes declined rapidly from the end of 2000 onward. In 2001, the national economic decline was exacerbated, particularly in the New York City metropolitan area, by the aftermath of the September 2001 attacks.

This economic downturn caused many projects to become delayed, halted or cancelled.²⁰⁷ The resulting downturn in the construction market created serious financial problems for many regional contractors, and in some cases made it impossible for them to fulfill their contractual obligations. This economic burden could well have contributed to the April 2001 bankruptcy of the Phase I project roofing contractor and the June 2003 bankruptcy of the Phase II general contractor.

²⁰⁷ See United States Federal Reserve Bank [Second District, New York], “Beige Book” Reports of October 24, 2001; November 28, 2001; January 16, 2002; March 6, 2002; April 24, 2002.

It is beyond the scope of this report to evaluate the specific effect that the economic downturn had on these particular contractors, but it appears that, just as the “boom” of 1999-2000 contributed to high bid prices, the “bust” of 2001-2003 contributed to the difficulties that overwhelmed some key contractors on this project. As these contractors experienced financial problems — leading to bankruptcy in the case of two contractors on this project — they were unable to perform, resulting in project delays and, in turn, increases in project cost.

C. Project Contingencies and Change Orders

Project contingencies and change orders added significantly to the cost of the project. Many of these appear to have resulted from the fact that the design documents for the annex and the connecting link to the tower contained an excessive number of design errors and omissions.

As of July 9, 2003, DASNY and the Construction Manager had identified a total of 195 design errors and omissions for Phase II totaling 8.2% of the current construction contract amount.²⁰⁸ Many of the design errors and omissions associated with the link resulted from an incomplete survey of the existing tower, design drawings that were not coordinated with existing conditions, and reliance on existing drawings that were incorrect.

Most construction budgets provide an allowance for contingencies — unexpected costs occurring during construction. The contingency amount is typically based on historical experience and the expected difficulty of a particular project. Items usually considered in establishing the contingency amount include design development changes, schedule adjustments, and unanticipated site conditions. DASNY’s Procedures for Monitoring Design Errors and Omissions states in part: “Design error and omission costs may be excessive if they exceed five percent of the contract amount for new construction.”²⁰⁹

The original budget provided for a Phase II contingency of 5% of that phase’s construction budget.²¹⁰ During the course of the design, DASNY’s Project Managers expressed concern that the amount was too low. The allocation as of March 12, 2003 for contingencies for Phase II was approximately tripled from the initial contingency allocation.²¹¹ According to the DASNY Project Manager, the amount was increased due to the large number of design error and omission change orders.²¹²

²⁰⁸ As demonstrated below, this figure reflects \$6,337,170 in actual and anticipated costs.

²⁰⁹ Dormitory Authority of the State of New York, “Cost Control Procedural Manual — Procedures for Monitoring Design Errors and Omissions,” at 1.

²¹⁰ This figure reflects a 5% Phase II contingency of \$2,564,198.

As of July 9, 2003, there were a total of 221 completed and anticipated change orders for Phase II totaling \$8,263,740.²¹³ Of this amount, 195 were for design errors and omissions, comprising 77% of this total (\$6,337,170).²¹⁴ Thus, the change orders arising from design errors and omissions for Phase II account for 8.2% of the current construction contract amount. Since Phase II is primarily new construction, this amount is excessive under DASNY's own guidelines, which sets a maximum 5% target for such change orders.

The current Project Manager corroborated that the reported number of design errors and omission change orders is unusually large.²¹⁵ He also reported that the architects/engineers relied on the County's drawings for the tower and that many errors and omissions resulted from limited survey work.²¹⁶ DASNY's contract with the architects/engineers requires that they perform any needed survey work as part of basic services rendered. Notwithstanding this requirement, the architects sought approval to conduct additional survey work, which DASNY denied.²¹⁷ It should be noted that the architects have asserted that some of these problems stem from redesigns after the initial bid opening in 2000, these redesigns having been undertaken as part of the value engineering process at the design team's expense.²¹⁸

As a limited test of the Project Manager's analysis, this inquiry reviewed the change descriptions for the design errors and omissions and was able to identify 34 change orders accounting for \$1,021,336 in design errors and omissions that resulted from incomplete surveys, design drawings that were not coordinated with existing conditions, or reliance on existing as-built drawings that were incorrect. These findings lend further credence to the Project Manager's assertions. It is beyond the scope of this review to conduct a complete analysis of all change orders associated with Phase II, but it seems reasonable to conclude, given the circumstances and the limited review, that significant problems with

²¹¹ This adjustment resulted in a Phase II contingency of \$7,860,451.

²¹² See Letter from Philip Piscatella (DASNY) to George Miller and Joseph Fuller, August 11, 2003 (transmitting eight-page spreadsheet entitled "Modified Design Error/Design Omission Change Proposal Request Log"); Dormitory Authority of the State of New York, "Westchester County Courthouse Phase I and II Budget Overview," March 12, 2003 (spreadsheet).

²¹³ This figure does not include two change orders for contaminated soil that together totaled \$3,360,000

²¹⁴ The architects wrote on July 22, 2003 to DASNY's Program Director regarding the classification of design errors and omissions. The architects stated that the value of legitimate error and omission change orders is \$3,223,118.21. This amount is 4.18% of the \$77,204,777.00 original construction cost. DASNY responded in a letter dated August 11, 2003, that it had reviewed all the existing Phase II design error and design omission designations. DASNY concluded that the errors and omissions were designated in a fair and unbiased manner based on the site conditions and the contract documents, and thus it declined to re-designate them.

²¹⁵ See Interview: Frank Frasco (DASNY Project Manager), July 9, 2003; Interview: Philip Piscatella (DASNY Director of NYC Courts Program), July 9, 2003.

²¹⁶ See id.

²¹⁷ See Letter from George H. Miller (PCF) and Joseph Fuller (F&D) to Phillip J. Piscatella, Jr. (DASNY), July 22, 2003, at 2.

²¹⁸ See id.

the design documents affected project contingencies, resulted in change orders, and increased overall project costs.

D. Contaminated Soil on the Annex Site

Soil contamination on the site of the proposed annex, coupled with the failure to test for and more timely clean up contaminants, increased the Phase II budget by \$3.36 million. Removal of petroleum- and PCB-contaminated soil, likely caused by leaking drums buried on an adjacent parcel where a gas station once operated, added approximately \$3.36 million to the cost of Phase II and delayed its completion by approximately three months. Based on prior discovery of contamination on that adjacent site during construction of the Federal courthouse, County officials and the local community were aware in 1997 that the Phase II annex site might also be contaminated. However, the project team did not budget for proper testing or remediation. Given the costs of the project alternatives pending before County lawmakers in late 1997, the record provides no evidence that the County would have decided against building the annex on that site or in any other way altered its proposed Capital Plan had the extent of the soil contamination been known at the time. Accordingly, the remediation costs were unavoidable and inherent in the project once the County decided to construct the annex on the site.

The early-2001 discovery that 30,000 cubic feet of soil was contaminated with petroleum and PCBs below the site of the annex ultimately cost the project \$3.36 million and delayed Phase II by approximately three months. The soil contamination issue presents two related questions: whether and to what extent the cost and delay were avoidable, and whether there was a breach of responsibility in failing either to properly test for soil contaminants or to budget for the remediation.

The corner of Grove Street and Quarropas Avenue, immediately adjacent to the annex site, was previously the site of a gas station that closed and was torn down years before the Courthouse renovation project began. Below that site were buried several steel drums that contained petroleum, which leaked and contaminated the surrounding soil. In 1994, a branch of the United States District Court for the Southern District of New York was built on the site of the former gas station. During construction of the Federal Courthouse, contractors discovered that the soil was contaminated by petroleum and metals pollutants.²¹⁹ However, this inquiry found no evidence that soil testing and remediation extended beyond the Federal site to the adjacent property. Thus, even though the County and the local community knew that the Federal site had been contaminated,²²⁰ there is no evidence that anyone knew the extent of any contamination on the adjacent (annex) property.

²¹⁹ See Minutes of Owner's and Architects' Meeting, June 28, 1998.

²²⁰ See *id.*

Precisely because the scope of potential soil contamination was unknown, it is arguable that the County should have tested the soil on the annex site prior to submitting a 1997 Capital Plan calling for the construction of a Justice Center on that potentially-contaminated site. The failure to do so, and the subsequent failure to budget for testing or remediation, led to a \$3.36 million remediation cost paid from Phase II funds and a delay of approximately three months in the progress of Phase II.

This report concludes, however, that these costs were largely unavoidable and inherent in the project once the County decided to build the annex on the site. While this report found no evidence that the Board of Legislators was aware of the contamination, the evidence does show that even if lawmakers were fully aware of the \$3.36 million remediation cost, that cost would not have induced lawmakers to change their plans for the annex site. In considering the 1997 County Plan, the chair of the Board of Legislators advised lawmakers that the difference between the project's estimated \$140 million cost and the next least expensive alternative was \$86 million — far more than \$3.36 million that removing the contaminated soil would ultimately cost.²²¹ Thus, the contamination issue would not have presented any economic basis for the Board of Legislators not to proceed with the annex as proposed. Neither does the evidence demonstrate any environmental reason that the County would not have proceeded — the annex site had already been developed and could be remediated safely. Accordingly, the soil remediation costs were inherent (albeit hidden) in the project from the day the Board of Legislators approved the 1997 County Plan.

A further question is whether more timely testing could have reduced the cost and delay that subsequent discovery would cause. While the County and the community apparently knew of the soil contamination just next door, and despite evidence that the White Plains Department of Public Works raised the issue of soil contamination as early as October 1998,²²² the extent of contamination was not discovered until after contractors broke ground on Phase II in December 2000. Arguably, had more detailed tests been conducted and the contamination discovered in 1998 or 1999, the contamination could have been cleaned up before Phase II began, thus perhaps reducing the ensuing delays. However, inasmuch as earlier revelation of the contamination would neither have changed the decision to build the annex nor directly increased the cost of doing so, this report concludes that late discovery of the soil contamination had only a marginal impact on cost.

Accordingly, the soil-contamination issue is best characterized as “bad luck” and not mismanagement.

²²¹ See Memorandum from Board of Legislators Chair George Oros to the Honorable Members, September 19, 1997, at 3-4.

²²² See Minutes of Architects' Meeting, October 20, 1998.

E. Increased Architectural, Engineering and Management Costs

As a result of the changes in scope, the redesign, the repackaging of the bids, and the multi-year delays now associated with completion of the project, there have been significant increases in architect, engineer and Construction Manager fees and costs. Almost \$2 million in fee increases have been approved to date, and the Phase III budget now calls for an additional \$6.6 million in such costs, bringing the total projected impact of these cost increases to \$8.6 million.

As detailed in earlier sections, the scope of the project increased significantly during the 1998-1999 design phase. In addition, after the Phases I and II were put out to bid and the low bids exceeded the budget by over \$24 million, proposals were advanced to redesign the project to reduce costs by up to \$20 million. The design team originally claimed \$2,421,516 in additional architectural and engineering fees based on additional work performed as a result of the increase in square footage, as well as the redesign and the repackaging of the bids so that Phase II and Phase III could be bid separately.²²³ DASNY, however, determined that the additional fees should be \$738,449 (\$511,410 for the annex and \$227,039 for the tower) for the increased scope of the work and \$114,544 for the corresponding revision of the bid documents, for a total of \$852,993.²²⁴ The design team and DASNY negotiated a settlement of \$855,000.²²⁵

The Construction Manager claimed that it needed an additional \$2,264,734 for services associated with completion of Phases II and III and to cover its staffing needs for an additional 22 months through October 2005. According to the Construction Manager, this situation arose from numerous construction delays, including:

- A six-month extension of the construction schedule from 24 months to 30 months as the design became finalized and architectural decisions were made;
- The nearly three-month delay arising from the discovery and remediation of soil contamination; and
- An additional 12-month delay after informal value engineering and rebidding of Phase II at the direction of the County. (DASNY agreed to fund an additional \$900,000 for construction management for an additional nine months through May 2004.)

With respect to the pending Phase III, the current budget as of June 2003 calls for additional fees of \$1.1 million in architect/engineer services, \$2.6 million in construction management labor (staffing needs), and \$2.9 million in construction management general

²²³ See Letter from George Miller and Joseph Fuller (PCF&P/F&D) to Frank Vinci (DASNY Project Manager), February 14, 2001.

²²⁴ See Minutes of Architects' Meeting, December 11, 2001.

²²⁵ See Executed Contract Amendment between DASNY and PCF&P/F&D, June 20, 2002.

conditions (work to be performed by the Construction Manager to enable completion of Phase III).²²⁶

F. Other Factors Impacting Project Progress and Cost

Numerous other factors impacted project progress, including delays in awarding the contracts for Phase II, contractor difficulties encountered throughout the project and especially during Phase II, and the project team's failure to manage these problems effectively — an inability compounded by the multiple prime contract requirements of the Wicks Law. While this inquiry is unable to quantify all of these adverse effects, this inquiry found no evidence to question the validity or sufficiency of the June 2003 DASNY estimate of \$7.7 million as reserve for additional costs that may be associated with completion of Phase II to date.

1. EFFECT OF DELAYS AND CONTRACTOR PROBLEMS

The original schedule for Phase I, as contained in the approved Capital Plan of late 1997, called for completion of design for the exterior tower renovations and commencement of the bid process by June 1998.²²⁷ Design was to be complete in October 1998 and construction was to begin in March 1999, with completion by October 2000. Phase I was substantially completed in July 2001, about nine months later than originally projected. DASNY attributes the delays mainly to adverse weather conditions and construction delays caused by the bankruptcy of the roofing contractor (Premier). The scope of this review did not include evaluation of Phase I progress. However, the minutes of numerous owner's meetings do document delays incurred as a result of Premier's bankruptcy.²²⁸

The original schedule for Phases II and III called for the annex and the tower interior renovations to be bid together in March 1999, with annex completion scheduled for January 2001 and interior tower completion schedule for mid-March 2003.²²⁹ After many delays, Phase II completion is now scheduled for July 2004 and work on Phase III has not yet begun. Factors contributing to the delays for these phases include significant redesign after original bids were rejected as excessive in January 2000, a problematic bid process,

²²⁶ See Dormitory Authority of the State of New York, Soft Costs Estimate Summary (May 20, 2003).

²²⁷ See County of Westchester, Capital Plan Update for the Westchester County New Justice Center and County Courthouse, October 30, 1997.

²²⁸ Minutes of Owner's Meetings, March 27, 2001; April 10, 2001; April 24, 2001; May 8, 2001; May 23, 2001; June 5, 2001; June 19, 2001; July 3, 2001; July 17, 2001; July 31, 2001; August 14, 2001; October 9, 2001; October 23, 2001; November 11, 2001; November 20, 2001; January 2, 2002; January 15, 2002; January 29, 2002; February 11, 2002; February 26, 2002; March 12, 2002; March 26, 2002; April 9, 2002; April 23, 2002; May 21, 2002; June 4, 2002; June 18, 2002; July 2, 2002; September 24, 2002; October 8, 2002; October 22, 2002; November 6, 2002; and November 19, 2002.

²²⁹ See County of Westchester, Capital Plan Update for the Westchester County New Justice Center and County Courthouse, October 30, 1997

the processing of numerous change orders due to design errors and omissions, and serious problems with the general contractor's performance.

Phase II construction began in December 2000, about a year later than originally anticipated, for a number of reasons. The first delay encountered was in the time frame for letting the bid. This delay arose from deficiencies found in the 1997 County Plan, which required extensive correction during the design process.

The next delay occurred in the bidding process itself. Initial bids were taken in January 2000 but — because of the growth in the project and market conditions — these bids came in significantly over the estimated cost. As a result, a value engineering process was commenced in February 2000. This process delayed award of the Phase II contracts, and thus Phase II construction did not start until December 2000, about a year later than originally planned.

Once construction began, several further factors impeded progress. Almost immediately after construction began in December 2000, the soil-contamination issue emerged. In January 2001, Delcon stopped work on the annex pending resolution of the soil issue. By the end of March, the removal of contaminated soil had begun, and Phase II was officially three months behind schedule.

Other problems arose as the project progressed. For example, delays occurred in the installation of the mini-piles because Delcon's request for a design change was repeatedly denied. It was also found that basic Phase II building components — the steel and the bricks — were repeatedly flawed on delivery and/or unacceptable on review. In addition, as already discussed, numerous change orders related to design errors and omissions would delay progress. The construction schedule was also adjusted from 24 months to 30 months as a result of other architectural decisions.

A further major factor impacting the work progress was Delcon's performance. Delcon was unable to meet milestone dates, and as the project proceeded, remediation of the resulting problems became more difficult. Delcon's performance was discussed in various project meetings. For example, in June 2002, minutes of the Owner's Meeting reveal concerns about Delcon's problems, and lack of progress prompted serious discussion about DASNY terminating Delcon for non-performance and invoking the completion bond to require the surety (Hartford) to replace Delcon with a performing contractor.²³⁰ DASNY explained that it was putting pressure on Delcon by threatening termination, and that if termination had actually been carried out there would have been a substantial delay — five months — until Hartford had completed its due diligence and hired another contractor.²³¹ As a result, rather than terminate Delcon in June 2002, DASNY attempted to induce Delcon to perform by involving Hartford more directly and encouraging Hartford and Delcon to bring in a more experienced general contractor (Plaza) as a consultant to assist Delcon.

²³⁰ See Minutes of Owner's Meeting, June 4, 2002.

²³¹ See *id.*

Unfortunately, these efforts were unsuccessful. Performance problems with Delcon persisted, and in May 2003 DASNY wrote Delcon and the surety directing them to attend a June 2003 meeting, at which a “rescue plan” would be discussed. Shortly thereafter, however, Delcon filed for bankruptcy and sent a letter to DASNY expressing its intent to terminate the contract. In June 2003, DASNY requested the Bankruptcy Court to allow DASNY to terminate Delcon and transfer the project to Hartford. On July 17, the Bankruptcy Court issued an order effectively removing Delcon from the project and permitting Hartford to sign the Takeover Agreement. Hartford and Plaza Construction then began preparing a “rescue plan” to complete the annex. As of the date of this report, progress in constructing the annex has resumed and the “rescue plan” calls for substantial completion and initial occupancy beginning in late July 2004.

It is difficult, especially at this time, to quantify the overall impact of Delcon’s performance problems on the total project cost. Hartford, as Delcon’s surety, will be responsible for paying additional costs associated with Plaza’s completion of the responsibilities and tasks originally assigned to Delcon, and will bear the brunt of the financial impact of Delcon’s failures. However, DASNY is currently reserving \$7.7 million from the original bond proceeds and earnings to pay additional costs that may be associated with completion of Phase II,²³² all of which arguably stem from Delcon’s failed performance.

2. AWARD OF THE DELCON CONTRACT

Though the precise economic impact of Delcon’s failures is beyond the scope of this review, this inquiry did evaluate information and decisions relating to the award of the Delcon contract.

Delcon was the low bidder for the General Contractor work, which was competitively bid as required by law. Rejecting Delcon would have required a finding that Delcon was not a responsible low bidder, and may have resulted in litigation had Delcon contested that finding. Thus, the issue is whether Delcon was, in fact, the lowest responsible bidder.

Though Delcon would later be criticized as being too small to do the job effectively — a point that experience would later painfully illustrate — that assertion was not made on the record while Delcon’s bid was under consideration. Moreover, Delcon presented a performance bond backed by Hartford, one of the most reputable firms in the business.²³³ This bond not only guaranteed Delcon’s work but also evidenced that Hartford had vetted Delcon as the proposed General Contractor prior to issuing the policy. From these

²³² See Dormitory Authority of the State of New York, “Westchester County Courthouse Phase I and II Budget Overview,” March 12, 2003; see also Dormitory Authority of the State of New York, “Westchester County Courthouse Project Review” (presented to Westchester County Board of Legislators), April 2003.

²³³ See Letter from George Miller and Joseph Fuller (PCF/F&D) to Frank Vinci (DASNY Project Manager), at November 2, 2000 (“re: Westchester County Courthouse, DASNY Project DA61257, Phase II, CR #28, General Construction & Asbestos Abatement, [Review of] Apparent Low Bidder...”).

perspectives, the record provides support for DASNY's determination that Delcon was a responsible bidder.

Nevertheless, further examination raises questions about Delcon's qualifications. Delcon's responses on the Uniform Contractors' Questionnaire it submitted revealed no prior experience in building a court facility or any facility the size or scope of the Courthouse annex. However, at its October 24, 2000 post-bid interview with DASNY, the architects and the County Administration, Delcon claimed that it had built a \$14 million court facility in Greenburgh.²³⁴ In fact, Delcon had merely built additional holding cells for a then-existing Greenburgh court facility, and was paid only \$1 million for its work.²³⁵

Nevertheless, the architects deemed Delcon to be the "lowest responsible bidder," even as the architects explicitly reported to DASNY that "Delcon Construction has not completed the [sic] project of the magnitude of the Westchester County Courthouse."²³⁶ Apparently addressing Delcon's lack of experience in the construction of court facilities, the architects emphasized to DASNY that Delcon had completed other projects that were "similar" in scope,²³⁷ noting in particular Delcon's \$20 million renovation and expansion of a Kraft food-processing facility.²³⁸ In no way, however, could that project be fairly characterized as "similar" to a project in which Delcon would serve as general contractor of a \$75 million construction of a courthouse annex adjacent to an occupied and busy court facility.

Moreover, though the architects purported to find that Delcon had satisfactorily completed "several" projects in the range of \$20 million, their analysis identified only the Kraft project and not "several" of them. If the architects included among these "several" projects the Greenburgh court facility for which Delcon claimed credit in its interview, then they relied on incorrect and obviously unverified information. If the architects did not credit Delcon with having constructed the Greenburgh court facility, then they had no evidence of "several" projects supporting Delcon's purported sufficient experience to construct the Courthouse annex.

Ultimately, however, this inquiry found insufficient basis to conclude whether a more thorough probing of Delcon's qualifications would have established sufficient grounds on which to disqualify Delcon. Yet, even if Delcon should have been awarded the contract, there were obvious signs that doing so carried with it real risks. Under these circumstances, DASNY— as it has done on other projects and as the architects expressly recommended²³⁹ — could have taken an earlier and more aggressive approach to supervising Delcon's work. This could well have led to more expeditious recognition of,

²³⁴ See Minutes of Apparent Low Bidder Interview, November 2, 2000, at 2.

²³⁵ See Interview: Al Regula (Commissioner of Public Works, Town of Greenburgh), July 9, 2003.

²³⁶ See Letter from Pei Cobb Freed & Partners to Frank Vinci, DASNY Project Manager, November 1, 2000, at 3.

²³⁷ *Id.*, at 2-3.

²³⁸ See *id.*, at 3.

²³⁹ See *id.*, at 3.

and more effective response to, the problems that Delcon experienced and created on this project.

Despite Hartford's liability for Delcon's direct failures, the subsequent history of the project suggests that had sufficient grounds been found to disqualify Delcon in October 2000 and a more competent contractor capable of serving as General Contractor for Phase II been selected instead, the net financial position of the overall project today might be significantly better. Even so, this inquiry cannot reach a final conclusion as to how much Delcon's participation cost the project. First, as noted, the effects of Delcon's performance on other Phase II contractors will not be known until Phase II is complete and outstanding claims are resolved. Second, Delcon was the low bidder. By definition, the other General Contractor bidders bid higher prices for the project, and whether the next lowest bidder(s) would have been deemed responsible bidders and/or encountered difficulties on the job are questions beyond the scope of this review. What is clear is that the fee for any other contractor would have been higher by some unknown amount, and that this amount would reduce the savings DASNY and the County might otherwise have secured. Given these uncertainties, this inquiry withholds further conclusions about Delcon's "cost" to the project.

3. COMPOUNDING EFFECTS OF THE WICKS LAW

Originally enacted in the 1920s, ostensibly to reduce costs by promoting competition and ensure that mechanical, electrical and plumbing subcontractors were paid for the work they performed, the Wicks Law has long been recognized as having the unfortunate effect of making it legally impossible for local governments and the State to purchase the design and construction of a new building or building renovation for a guaranteed price.²⁴⁰ As previously noted, State law requires State and local governments to separately bid and award contracts for general contracting, mechanical (HVAC), engineering and plumbing ("MEP") work in excess of \$50,000.²⁴¹ Though State-level public authorities are generally exempt from the Wicks Law requirement, this multiple-bid requirement is commonly imposed by statute on a program-by-program basis to specific authority-funded undertakings. DASNY-constructed court facilities fall under this category of Wicks Law projects.²⁴²

The economic effects of the Wicks Law are to require State and local governments to bear business and project-coordination risks inherent in major projects, and to prohibit them from hiring a single firm to bear those risks for a defined price. The interaction of at least four prime contractors — each independent of the other three — inherently creates the possibility that project developments that impact the work of one contractor will

²⁴⁰ Many studies detail the history and malefic effects of the Wicks Law (see e.g. New York State Division of Budget, "Fiscal Impacts of the Wicks Law Mandate," May 1987; New York State School Boards Association, "Impact of the Wicks Law" [Final Report], March 1991).

²⁴¹ See e.g. General Municipal Law §§ 101, 103.

²⁴² See e.g. General Municipal Law § 99-q.

impact the work of the other three. This is particularly so because in practice, the Wicks Law requirement that DASNY separately bid the four Wicks prime contracts requires the prior completion of detailed designs, drawings and plans for the entire project that must be far more detailed than for non-Wicks projects. This necessary level of detail arises from the need to provide complete plans for separately bidding the mechanical, electrical and plumbing contracts. Such detail — achieved by the work of architects — inherently increased the design costs for the Courthouse project.

These Wicks Law restrictions then impacted management of the project in several ways that further increased expenses not found to the same extent on non- Wicks projects. First, because the level of detail in pre-bid plans had to be sufficiently complete to allow separate bids for the MEP work, adjusting those plans during implementation required architects and other consultants to adjust already-complete plans — an inherently more time-consuming (and thus, more costly) task than adjusting schematics or otherwise less-complete plans typical of non-Wicks projects. Thus, design problems encountered during Phase II spread further across the project than would have been the case in a non-Wicks environment. Second, adjusting the plan for one of the Wicks primes may affect the plan for another Wicks prime, and coordination between two separate contractors is often less efficient than coordination by a single contractor. Thus, problems associated with Delcon during Phase II inevitably affected the other Wicks primes.

V. Information Exchange and Decision-Making

Largely distinct from the causes of delays and cost overruns associated with the Courthouse project, a separate category of concerns relates to the manner in which various agencies and personnel exchanged information and made decisions pertinent to the project. Some members of the Board of Legislators have expressed frustration with DASNY and the County Administration for allegedly failing to apprise the Board about project developments. Some legislators have professed surprise at revelations about cost overruns and delays associated with the project, and claimed that legislators' more complete and timely knowledge could have resulted in different decisions that limited taxpayer expense. Similarly, the County Administration has criticized DASNY's performance in timely informing it of relevant project developments, and opined that DASNY's ostensible failure to timely advise the County bears on the effectiveness of DASNY's management of the project.

This section reviews the evidence of the flow of communication generally, with emphasis on the flow of information from DASNY to the County Executive and the Board of Legislators. The review concludes that, in general, there appears to have been regular and appropriate communication throughout the project, and specifically, that DASNY kept the County Executive and the Board of Legislators, as appropriate, informed of the progress of the project. Most importantly, this inquiry found no evidence that communication issues between DASNY and the County government or between the Executive and Legislative Branches of County government had any impact on the delay or cost of the project. Once the 1997 Plan was put forward and approved, better communication would have done little to avoid the costs necessary to make up for the errors and omissions in the County's 1997 plan. Similarly, once project implementation problems arose, better communication would not have avoided the increased costs resulting from the dramatic changes in the construction marketplace, the soil contamination, and the bankruptcy of various contractors.²⁴³

With respect to communication between DASNY and the County, the Construction Management Agreement between DASNY and the County set the parameters. That

²⁴³ However, in this regard, it appears that an opportunity for meaningful input and communication was lost in 1997, when the Board of Legislators authorized, but apparently did not implement, the retaining of a technical consultant on the Courthouse project. Specifically, in August 1997, the Board of Legislators approved a resolution authorizing the Chairperson of the Board of Legislators to "retain the services of the appropriate firm(s) to act as the Board's consultant(s) and provide guidance to the Board throughout the process of developing a plan and reconstructing the Westchester County Courthouse" (Westchester Co Bd of Legis, Resolution 172-1997; Minutes of August 18, 1997, at 15). This review found no evidence that the Board exercised this authority to retain a consultant or otherwise sought outside technical assistance on the Courthouse project. Had the Board done so at that early point in this project, the Board arguably would have had an independent source of expertise and data that would have assisted it with respect to its role in reviewing and approving the Plan, as well as its subsequent oversight of the project.

Agreement provided that the County was obligated to “[i]dentify high level contact persons from the County to act as liaison with the Authority and participate in job progress meetings. Such persons shall be empowered to make decisions as required to effectively and expeditiously aid in the progress of the work to be performed with respect to the Project and carry out the [County’s] responsibilities.”²⁴⁴ Pursuant to that provision, the County identified persons from the County Administration to act as points of contact with DASNY on the project.²⁴⁵ Throughout the project, those persons have been in close and regular contact with DASNY, attending the regular project meetings and receiving copies of correspondence, meeting minutes and other appropriate project documents.

Questions about communication have been raised in particular with respect to information sharing about cost estimates and the project budget in 1999, prior to the solicitation of bids on the then-combined Phase II and Phase III. At that time, the project team was fully aware that the project scope had grown significantly since October 1997. In addition, the project team, as experienced construction industry professionals, must have been aware of the “sellers’ market” conditions that then prevailed in the construction industry, that as a result of the highly competitive market it would be difficult to generate interest within the construction community in bidding on this project, and that the bids were therefore likely to be high.²⁴⁶ Despite this competitive market condition, and despite

²⁴⁴ Construction Management Agreement, § II.C.3, at 3.

²⁴⁵ See e.g. Memorandum from Lawrence S. Schwartz to Frank Vinci, October 1, 1998.

²⁴⁶ Labor-constrained market conditions prevalent in the construction industry generally (and New York especially) were known to the regional construction industry as early as 1998, and therefore should have been known to the project team before bids were solicited in late 1999. At the time cost estimates were being prepared in 1998, the New York Federal Reserve Bank had expressly noted a severe labor shortage in skilled trades (e.g. carpenters, masons, roofers, etc.) (see United States Federal Reserve Bank, Second District [New York], Federal Reserve Beige Book, December 1998, at 2 (available at <<http://www.federalreserve.gov/FOMC/beigebook/1998/19981209/2.htm>>). This impact was apparent in changes in various relevant construction indices published at the time. For example, the Turner Construction Index (an industry-standard measure of construction price changes based on firms’ cost experience with respect to labor, material prices, competitive conditions, productivity, etc.) had risen from 97 in 1995 to 113 in 1999 — thus reflecting significant price hikes in the construction market (see U.S. Census Bureau, Statistical Abstract of the United States: 2002, Table 912 (“Price and Cost Indexes for Construction: 1980 to 2001”). Likewise, the industry-standard Engineering News was reporting in its September 1999 Third Quarterly Cost Report that:

“* * * estimators face a new set of challenges. In a heated construction economy in which nearly everyone is busy, general contractors are seeing fewer numbers of subcontractors responding to bid requests. Manpower has become an item of increasing concern and inflation has made double-digit gains against several key materials * * * . [B]uilders are encountering problems getting even subcontractors interested * * * . Where they used to get seven to eight bids in a category they are now lucky they get two” (“Third Quarterly Cost Report,” Engineering News, vol 243, # 13, at 31 [September 1999]).

Notwithstanding the labor shortages reported in the industry press and measured by the Federal government, it appears that the cost estimates failed to take these market forces into account. For example, the pre-schematic cost estimate of November 1998 did not factor in premia for constrained labor supply and scarce capital, and instead relied on historical figures that, by definition, did not reflect these emerging market forces (see Letter from URS/Greiner to Frank Vinci [DASNY Project Manager], November 17, 1998 [transmitting Phase II pre-schematic cost estimate]). Accordingly, cost estimates that could have accounted for the construction-industry labor shortage apparently failed to do so, as became glaringly apparent when the bids were opened in 2000.

the 22% growth in the project size, DASNY wrote the County in October 1999 that “the base construction cost estimate is essentially at the project budget,” and suggested that an additional \$1.5 million for contingencies would be sufficient.²⁴⁷

Thus, neither the design team, the Construction Manager, nor DASNY adequately accounted for the market conditions and project growth, and as a result did not effectively communicate to the County the developing mismatch between the project and the budget. However, the record does not indicate that DASNY or any member of the project team withheld information from the County. Rather, the most likely explanation is that DASNY and the project team failed to appreciate the true scope of the budget problem in 1999 and thus failed — by definition — to advise the County about what they did not see.

Apart from the failure in 1999 of DASNY and the project team to fully appreciate the known forces affecting the project cost, and then to communicate that to the County, the evidence shows that DASNY did otherwise keep the County Administration informed about project developments on a timely basis. The project representatives identified by the County were invited to and did attend scores of project meetings, and received all correspondence to the County relating to the project — including notices and minutes of the project meetings. These meetings discussed in great detail the developments, progress and problems associated with each aspect of the project as they occurred.

The records of those meetings, especially those from 2000 and forward, show the County Administration actively involved with the project team in attempting to keep the project within budget. The record shows that in response to the overbid on the combined annex and tower interior work, the project team and County Administration took a number of immediate steps. First, in consultation with the County Administration, the project team decided to separate Phase II and Phase III, and to bid the latter phase closer to the time the work would actually be performed.²⁴⁸ Second, DASNY asked the architects to propose modifications that would save \$24 million without cutting the program (i.e. without eliminating or reducing functional space within the project).²⁴⁹

With respect to reducing the project cost, the County Administration set two goals for the project team — maintain the design and the integrity of the building at a high level of quality while staying within or as close to budget as possible.²⁵⁰ In response to a directive from DASNY, the architects prepared a list of proposed project modifications, totaling \$20.5 million in possible savings.²⁵¹ Some proposed changes involved eliminating architectural features, and were accepted.²⁵² However, many of the proposals

²⁴⁷ Letter from DASNY Project Manager Frank Vinci to Westchester County Commissioner of Public Works Anthony Landi, October 15, 1999.

²⁴⁸ See Minutes of Owner's and Architects' Meeting, April 19, 2000.

²⁴⁹ See Letter from Frank Vinci (DASNY Project Manager) to Joseph Fuller (PCF&P/F&D), January 28, 2000.

²⁵⁰ See Minutes of the Owner's and Architects' Meeting, April 19, 2000.

²⁵¹ See Letter from George Miller and Joseph Fuller (PCF&P/F&D) to Frank Vinci (DASNY Project Manager), February 23, 2000.

²⁵² See id.

were rejected on the grounds that they either eliminated project elements, primarily in the tower, that would need to be addressed at a future time, or they reduced the level of project quality (e.g. substituting cheaper floor materials), which would reduce the capital cost of the project but increase maintenance and replacement costs over the life of the building.²⁵³

At the same time that the County Administration was directing the project team to proceed with Phase II without substantial reduction in scope or quality, the County Administration was clearly signaling that DASNY was responsible for managing the project and reducing, if not entirely eliminating, the cost overrun. For example, at a Board of Legislators meeting in 2000, the County Administration is recorded as stating to County lawmakers that DASNY was “accountable and responsible to rectify the situation.”²⁵⁴ From early 2000 onward, the County Administration continuously pushed DASNY to take all necessary steps to control project cost, and proposed a variety of cost savings measures, such as repairing and re-using, rather than replacing, the air conditioning duct work in the tower. The County Administration also obtained a fee reduction from DASNY, and discussed with the Judiciary how to maximize any State financial contributions to the project.

At a meeting held on April 19, 2000, the County Administration cautioned DASNY and the rest of the project team that savings should not be judged in the short term, and the County Administration wished “to design the Courthouse by the program which is required in the long run, and therefore more money would be forthcoming in the years to come to fill in the gap for the renovation of the [t]ower, if needed, after two or three years.”²⁵⁵ It may be that some County lawmakers, hearing the County Administration hold DASNY accountable for the cost overruns while also state that money would be forthcoming “if needed,” were then unclear as to DASNY’s and the County’s respective project oversight and funding responsibilities.

However, under the Judiciary Law, the Court Facilities Act and the DASNY statute, these responsibilities are clear: DASNY is not an “at-risk” developer and has no independent source of project funds; the County remains responsible both for the project’s completion and the cost of achieving that goal. Within that statutory context, the County Administration urged DASNY to aggressively manage the project in order to minimize, if not eliminate, the need for additional County monies, but without resorting to cost saving measures that were penny wise and pound foolish. Clearly, at that time, the parties to this project were anticipating that additional funds would only be a fraction of the amount that has since been determined as necessary.

The evidence also demonstrates that DASNY officials appeared before the Board of Legislators to apprise it of relevant project developments. Consistent with the DASNY-

²⁵³ See id.; Minutes of Architects’ Meeting, April 25, 2000.

²⁵⁴ See Westchester Co Bd of Legis, Cmte on Budget and Appropriations, Minutes of June 26, 2000, at 5.

²⁵⁵ See Minutes of Owner’s and Architects’ Meeting, April 19, 2000.

County Agreement, pursuant to which the Administration was the liaison for the project, the legislative briefings were less frequent and in less detail than DASNY's coordination with the County Administration.

In April 1999, before significant problems on the project arose, DASNY, the County Administration, the architects and the Construction Manager jointly appeared before the Board's Committee on Budget and Appropriations to give lawmakers a progress report. The legislative minutes of that meeting record that the DASNY Project Manager at that time detailed the scope, cost and projected timing of the three phases of work, and that the County Administration advised the Committee — accurately at that time — that “the project is on schedule and within budget.”²⁵⁶ In response to legislative questioning about the cost of the project, the Project Manager is recorded as having advised the Committee that “the \$135 million [authorized by the Board of Legislators] is the true cost of the project.”²⁵⁷

Once the scope of cost overruns began to become apparent to DASNY and the County Administration in 2000, the legislative record shows that DASNY timely and clearly advised legislators of the source and projected amounts of those overruns. For example, on June 26, 2000, DASNY appeared before the Committee on Budget and Appropriations and stated that DASNY estimated the project to be 30% over budget.²⁵⁸ In addition, DASNY informed that Board that:

- The low bid for Phase II had come in at approximately \$106 million, or \$21.5 million over budget;
- The reasons for the overbid included market conditions, complexity of the work, and “program growth that added square footage to the job”;
- DASNY was “simplifying” the project, identifying “ways to rebid the project,” and “revisit[ing] tower design and scope;” and,
- The delay associated with redesigning and rebidding the project would account for nine months of the project's 19-month delay, which would “account for some escalation in cost.”²⁵⁹

In October 2000, DASNY again appeared before the Board of Legislators and reminded lawmakers that the bid had come in \$24 million over budget owing to “extremely competitive market conditions, size and complexity of the project, clarity of the construction documents, cost escalation and program growth.”²⁶⁰ Notably, these are many of the same reasons for the delays and cost overruns identified in this report. The

²⁵⁶ Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of April 5, 1999, at 1.

²⁵⁷ *Id.*, at 4.

²⁵⁸ *See* Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of June 26, 2000, at 5-6.

²⁵⁹ *Id.*

²⁶⁰ Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of October 10, 2000, at 4.

legislative record further indicates that at its October 2000 presentation to the Board of Legislators, DASNY:

- detailed to lawmakers a series of approved value-engineering changes valued at \$11.6 million, as well as other changes rejected by the County;
- explained that the estimated construction budget for Phases II and III had risen by \$8.4 million;
- summarized the adjusted Phase II and Phase III schedule, which then extended to May 2005; and
- advised legislators that the County’s choices were either “to reduce the program and/or increase the funding.”²⁶¹

Questions have also been raised with respect to communication within Westchester County government. It is not appropriate that this report evaluate and comment on communications between the County Administration and the Board of Legislators. That concern is best addressed by the County itself.

It is, however, appropriate to note that this inquiry found no evidence that any communication issues between the branches of County government had an impact on the cost or schedule of the project. It is also appropriate for this report to make certain recommendations to enhance communications as this project moves forward. Those recommendations, set forth in Section VI below, include more regular and thorough briefings to the Board of Legislators by DASNY and the County Administration, and the selection, by the Board of Legislators, of a person to serve as a point of contact on the courthouse project.²⁶²

²⁶¹ *Id.*, at 4-5.

²⁶² The latter recommendation is made in light of the large number of legislative committees that would, from time to time, inquire of developments on the Courthouse project. During the first five years of project implementation beginning in 1998, the Board of Legislators repeatedly discussed the project in the Committee on Budget and Appropriations, which exercised primary legislative jurisdiction. *See e.g.* Westchester Co Bd of Legs, Cmte on Budget & Appropriations, Minutes of January 12, 1998; February 23, 1998; June 1, 1998; September 14, 1998; October 19, 1998; January 25, 1999; April 5, 1999; November 19, 1999; June 26, 2000; October 10, 2000; November 21, 2001; September 23, 2002. In addition, there were five standing committees that inquired about the Courthouse project: the Committees on Minority and Cultural Affairs (*see e.g.* Westchester Co Bd of Legis, Cmte on Minority Affairs, Minutes of April 18, 1998; September 29, 1998; January 26, 1999; March 28, 2000; October 10, 2000; March 13, 2001; February 25, 2002); Labor (*see e.g.* Westchester Co Bd of Legis, Cmte on Labor, Minutes of October 28, 2002); County Officers and Departments (*see e.g.* Westchester Co Bd of Legis, Cmte on County Officers and Departments, Minutes of February 23, 1998; January 25, 1999); and Public Works (*see e.g.* Westchester Co Bd of Legis, Cmte on Public Works, Minutes of February 2, 1999; April 4, 2000). Moreover, County lawmakers met as a Committee of the Whole on several occasions to discuss Courthouse-related issues. Finally, in 1998, the Board of Legislators created a “Courthouse subcommittee” within the Committee on Budget and Appropriations (*see e.g.* Westchester Co Bd of Legis, Cmte on Minority Affairs, Minutes of September 29, 1998, at 1 [recording chair of that Committee as announcing his appointment as chair of the Courthouse subcommittee]) and directed the County Administration to coordinate with the Courthouse subcommittee chairperson as “the Board’s liaison with regard to the courthouse project.” (*See e.g.* Westchester Co Bd of Legis, Cmte on Budget & Appropriations, Minutes of April 5, 1999, at 5.)

VI. Conclusions and Recommendations

This report has demonstrated that though the causes of the significant delays and cost overruns on the Westchester County Courthouse project were largely unanticipated at their inception, their sources are now clear. Delays, indecision and inadequate planning by the former County Administration led to a deficient 1997 County Plan and a \$140 million budget estimate that was inadequate to fund the necessary program. In attempting the subsequent complex reconstruction effort, DASNY and other project team members relied on a flawed plan, a deficient cost estimate, and incorrect site drawings inherited from the County. Because of the erroneous (albeit genuine) belief that changes could be made within the initial incorrect budget, the project team failed to detect and remedy many glaring insufficiencies until some time later, thus compounding error with error. Further aggravating the situation were poor coordination among the project team members, unfavorable market conditions and contractor bankruptcies that required even further delays and budgetary accommodations.

The remaining issues relate not to the past but to the future. Particularly after decades of indecision and mishaps, the People of Westchester County are entitled to safe, efficient and dignified court facilities. The People are also entitled to reasonable assurances that the long-delayed completion of the Westchester County Courthouse will not repeat the problems of the past. Further delays may only increase the cost necessary to complete the project. To that end, effective mechanisms should be implemented to ensure the expeditious and on-budget completion of the remaining construction and rehabilitation work on the Courthouse.

Several steps have already been taken to those ends. First, the Judiciary, in consultation with the Board of Legislators, directed the preparation of an in-depth and independent cost estimate by Baer and Associates to calculate the remaining Phase III costs. That independent cost estimate was transmitted to the County Administration and Board of Legislators in May 2003.²⁶³ In addition, at the Judiciary's request, DASNY performed — in consultation with the Construction Manager — a complete re-estimate of the remaining "soft costs" associated with the Phase III work.²⁶⁴ In contrast to earlier project estimates, these detailed and specific assessments ensure that no key items are omitted and that all of the work to be done is properly accounted for.

²⁶³ Baer and Associates, "Independent Cost Estimate for Phase II/III Westchester County Courthouse Rehabilitation Project," May 2003.

²⁶⁴ This analysis was transmitted to the County as part of the independent cost estimate (see Baer & Associates, *supra*).

Second, consistent with the independent cost estimate, the Judiciary offered to contribute approximately \$9 million in State aid — the maximum authorized by law — to assist Westchester County to complete Phase III, provided that Westchester County timely approves the funding for the remainder of the project.²⁶⁵ Under the terms of the independent cost estimate, this aid grant would reduce Westchester County's Phase III principal cost to approximately \$42 million.

Third, beyond its previous reduction of its project-management fee, DASNY agreed to make several million dollars in interest income from the original 1998 bond proceeds available to Westchester County to support the increased project costs.²⁶⁶

RECOMMENDATIONS

In addition to the foregoing steps, this report recommends as follows:

- 1. Promulgate a new project management agreement.** If Westchester County decides to continue with DASNY as the project manager,²⁶⁷ the County and DASNY should develop a more specific project management agreement than the now-lapsed agreement that previously governed the project. The new agreement should include procedures that provide for better protection for the County, akin to the agreements governing DASNY's execution of the New York City Courts Program. For example, the agreement should require mandatory value engineering exercises to keep the project within budget.
- 2. Commit to the budget.** The parties should adopt the May 2003 independent cost estimate and its soft-cost assessment as a formal project budget that will not be exceeded. To that end, the parties should commit to using all necessary project management tools to control project cost, including — in consultation with the Judiciary — the adoption of any reasonable value-engineering reductions necessary to conform Phase III to the existing budget.
- 3. Vigorously manage outstanding claims.** DASNY should make every effort to recover additional costs associated with the completion of the annex by aggressively pursuing its contractual rights with respect to the performance of various consultants

²⁶⁵ See Letter from Chief Administrative Judge Jonathan Lippman to County Executive Andrew Spano, Board of Legislators Chair Lois Bronz, Committee on Budget and Appropriations Chair Richard Wishnie and Minority Leader James Maisano, May 30, 2003, at 2-3.

²⁶⁶ Since project completion has been further delayed since the time of DASNY's initial estimate that \$6.5 million would be available for this purpose, DASNY should revisit this calculation and estimate how much in additional interest earnings might reasonably be expected to be available to reduce the County's additional capital contribution.

²⁶⁷ Even if the County decides not to continue with DASNY as project manager, DASNY should be used to finance the remainder of the project. DASNY's financing of the project to this point has been successful, and neither the terms of such financing nor the availability of funds was ever an issue at any time in the history of this project.

and contractors. DASNY should also seek to preserve project funds by aggressively defending against various claims that have or may be asserted.

- 4. Establish a legislative point of contact.** Regardless of the identity of the project manager, the Board of Legislators should select an individual legislator to serve as a point of contact for the Courthouse project. The Board of Legislators should require that this individual timely receive all relevant communication, minutes, updates, agreements and other materials relating to the project.
- 5. Implement regular and thorough inter-branch coordination.** For the duration of the Courthouse project, the County Administration and Board of Legislators should jointly commit to high-level and transparent consultation and collaboration both between the branches of government and together with the project manager. Such consultation should include regular reports to the Board of Legislators in such form and at such times as the Board may require. The County Administration and Board of Legislators should also consider whether to formalize such expanded consultation in any new project management agreement the County may choose to adopt, whether with DASNY or with a private project-management firm.
- 6. Solicit a continuing fiscal-control mechanism.** To further assist in performing the outstanding construction on time and on budget, Westchester County should consider seeking an ongoing fiscal-control presence to periodically review cost performance and promote project completion according to the schedule and budget set forth by the parties.



In evaluating its options, Westchester County should be cognizant of its unconditional obligation under the Judiciary Law and the Court Facilities Act to provide and fund required court facilities. This inquiry revealed nothing that relieves the County of that responsibility. Thus, the County should not be distracted or delayed by suggestions that there may be other sources of funding for this project. Under current law, there are no other such sources: funding remains the legal obligation of the County.

Accordingly, this report concludes that Westchester County, with the benefit of the foregoing recommendations, should expeditiously proceed to complete its Courthouse by enacting all necessary financing and project-management approvals.