



Agenda Date: 04/27/11

Agenda Item: 5A

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center, Suite 801
Newark, NJ 07102
www.nj.gov/bpu

WATER

IN THE MATTER OF THE APPLICATION OF THE)	ORDER APPROVING
TOWNSHIP OF MOUNT OLIVE IN THE COUNTY OF)	PUBLIC PRIVATE CONTRACT
MORRIS FOR APPROVAL TO FORM AN OPERATIONS)	
MAINTENANCE AND MANAGEMENT SERVICES)	
AGREEMENT BETWEEN UNITED WATER)	
ENVIRONMENTAL SERVICES INC., A DELAWARE)	
CORPORATION AND PETITIONER)	DOCKET NO. WM11030158

John H. Dorsey, Esq., Dorsey and Semrau, 714 Main Street, P.O. Box 228, Boonton, NJ 07005, for Petitioner

BY THE BOARD:

On February 11, 2011, and amended on March 28, 2011, pursuant to N.J.S.A. 58:26-19 et seq., the New Jersey Water Supply Public-Private Contracting Act ("the Water Act"), Petitioner, the Township of Mount Olive ("Mount Olive" or "Township"), filed with the Board of Public Utilities ("Board") for approval of a proposed Operation, Maintenance and Management Services Agreement and Contract Addendum (collectively the "Agreement")¹ with United Water Environmental Services, Inc. ("UWESI") for the operation and maintenance of Mount Olive's water system by UWESI through February 28, 2016. Petitioner states that approval of the Agreement is necessary in order to reduce costs and bring innovation to Mount Olive. The costs and operations of Mount Olive's water system have been difficult to control. Mount Olive does not have the resources and expertise that UWESI has to effectively operate, maintain and manage the Mount Olive water system. Neither the Township nor UWESI is a public utility subject to N.J.S.A. 48:2-1 et seq.

The Water Act authorizes public entities to enter into contracts with private firms for the provision of water supply services. Water supply services, as defined by the Water Act, mean the financing, designing, construction, improvement, operation, maintenance, administration or any combination thereof, of a water supply facility (i.e., water system). Public-Private Contracts for water supply services must be submitted to the Board for review and approval. However, N.J.S.A. 58:26-25, confines the scope of the Board's review of such contracts to four specific areas. In its review of the contract, the Board shall apply the following criteria in determining whether to approve the contract:

¹ The Agreement will be executed upon receipt of all appropriate governmental approvals. The Board's approval of the Agreement includes any ministerial modification to its terms, if agreed to by Mount Olive and UWESI, whereby the five (5) year term of the Agreement may run from the execution date of the Agreement.

- 1 The private firm entering into the contract has the financial capacity and technical and administrative expertise to ensure continuity of service over the term of the contract and that the standards and requirements contained in the application documents concerning financial, technical and administrative capacity of the private firm are necessary and sufficient to protect the public interest.
2. The terms of the contract are not unreasonable. In determining whether the terms of the contract are not unreasonable, the Board shall review the fees and charges to be charged or assessed under the contract to determine that they are reasonable to the public entity, taking into consideration all of the obligations undertaken by the private firm and all benefits obtained by the public entity. In making this determination, the Board shall not use the traditional rate base/rate of return methodology.
3. The franchised customers of a public utility participating in a contract are protected from the risks of the proposed contract and that they are not subsidizing the contract. If a private firm is not a public utility, the Board shall ensure that under the terms of the proposed contract the users of water outside of the jurisdiction or service area that will receive water supply services under the contract are also protected from the risks of the contract and that water users outside the jurisdiction or service area are not subsidizing the contract through increased charges, rates or fees for the supply of water.
4. The contract contains the provisions required by paragraph (1) (2) and (6) of subsection e. of section 5 of P.L. 1995, c 101 (C 58:26-23).

The Water Act further states that once the Board approves a proposed contract, the jurisdiction of the Board terminates until or unless the contract is amended to change the formula or other basis of determining charges.

The Courts have held that the Legislature has not conferred any jurisdiction on the Board to regulate water utilities operated by municipalities, as distinct from those privately owned, except in certain circumstances where such municipalities undertake to service residents in other municipalities. See Petition of South Lakewood Water Co., (61 N.J. 230 (1972)). Pursuant to N.J.S.A. 40A:31-23 (d) (1) the Board does not have regulatory oversight with respect to the setting of rates if the municipality services 1,000 customers or less outside its jurisdictional boundaries. In addition, it has been held that the sovereign powers of a municipality should not be subordinated to Board jurisdiction "by inference" or "lightly implied." Jersey City Incinerator Authority v. Dept. of Pub. Util., 146 N.J. Super. 243, 255-56 (App. Div. 1976). Rather, a grant of such power "must be firmly anchored in some clear legislative delegation of jurisdiction." Id. at 256. Furthermore, the Board's own enabling statute expressly limits the Board's jurisdiction over contracts of the type under review here to the parameters of the Public-Private Contracting Act. N.J.S.A. 48:2-13 states:

Except as provided in [N.J.S.A. 58:26-25] the Board shall have no regulatory authority over the parties to a contract negotiated between a public entity and a private firm pursuant to [N.J.S.A. 58:26-19] in connection with the performance of their respective obligations thereunder. Nothing contained in this title shall extend the powers of the Board to include any supervision and regulation of, or jurisdiction and control over, any public-private contract for the provision of water supply services established pursuant to [N.J.S.A. 58:28-19].

In accord with this legal mandate, the Board has limited the scope of its review to the four criteria set forth above and, for reasons discussed below, concludes that the Agreement meets the applicable criteria. Because the Legislature has carefully circumscribed our authority over the rates to be charged to end-use customers and other issues, the Board does not make any determination with respect to issues related to the ultimate rates to be charged by Mount Olive to its residents for services.

BACKGROUND / PARTIES TO THE CONTRACT

The Township of Mount Olive's water system, servicing approximately 2,400 customers within the boundaries of the Township of Mount Olive is currently operated by the Township. Mount Olive currently maintains three water filtration plants to provide water service to its customers.

Mount Olive entered into the Agreement with UWESI, a Delaware corporation authorized to do business in New Jersey. The main office for UWESI is 200 Old Hook Road, Harrington Park, NJ, 07640. On December 31, 2009, several related entities merged into UWESI allowing the company to streamline operations and create a flagship contract services corporation. UWESI was organized in 2009, although its predecessor companies have provided contract operations and maintenance services for over 40 years. United Water, Inc. is the parent company of UWESI, as well as certain regulated entities, including United Water New Jersey.

UWESI provides full process redesign, reengineering and facilities operations and maintenance for water and wastewater and related facilities to municipal and other government clients in the United States. UWESI also provides construction management and training and advisory services. UWESI is a wholly owned subsidiary of United Water, Inc. United Water, Inc. is a wholly owned subsidiary of Suez Environmental North America, Inc., which is itself a wholly owned subsidiary of Suez Environmental SA, a French societe` anonyme. Suez Environmental is controlled by GDF Suez SA, also a French societe` anonyme.

MUNICIPALITY'S SELECTION PROCESS

Pursuant to N.J.S.A. 58:26-23 et seq., Mount Olive issued a public notice of intent to contract for an operations and maintenance services agreement. The notice was published on January 23, 2010, in the Daily Record and on January 25, 2010, in the Star Ledger. A Request for Proposal (RFP) was available to all interested proposers at Mount Olive's Administrative Offices. Proposals were to be submitted no later than 3:00 pm on April 17, 2010.

Subsequent to the public notices, on April 17, 2010, Mount Olive received two proposals, UWESI and American Water, Inc. The Township Council reviewed both proposals determining the affect on the Township's current work force and directed the Township to proceed with negotiations with UWESI which eventually led to a proposed contract with UWESI. On November 9, 2010, after a review of both proposals, the Township passed a resolution selecting the proposal submitted by UWESI.

On December 20, 2010, the Township published notices in the Star Ledger and Daily Record indicating that it would be holding a public hearing on the proposed contract with UWESI. Copies of the final draft contract were made available to the public at the Administrative Offices of Mount Olive. The public hearing was held on January 4, 2011, at the Township Council Chambers, Mount Olive Municipal Building, 204 Flanders-Drakestown Road, Budd Lake, NJ 07828 at 7:00 pm. At the January 4, 2011, public hearing, members of the public voiced concerns regarding issues of safety, cost savings measures, the setting of rates for customers,

and acceding control over to a private affiliate firm. Pursuant to the Water Act, the public hearing was held open for written comment for the opportunity for the public to comment on the Agreement. No further comments were submitted by the public, and no written comments were received. A public hearing report has been prepared and was submitted with this application.

On November 9, 2010, the Township approved the proposed Agreement, subject to approval by the Department of Community Affairs ("DCA") Local Finance Board ("LFB") and the Board, and comments by the Department of Environmental Protection ("DEP").

The LFB tentatively approved the Agreement between the Township and UWESI, subject to approval by the Board. The DEP has not provided any comments with respect to the Agreement.

PROVISIONS OF THE PUBLIC-PRIVATE CONTRACT

Pertinent provisions of the Agreement between the Township and UWESI are as follows:

1. The base term of the Agreement shall be for a five (5) year period, ending on February 28, 2016. There shall be one (1) option to renew by the Township and UWESI for an additional five (5) year extension of this Agreement on mutually acceptable terms and conditions.
2. The annual service fee ("Annual Fee") for year one (1) shall be \$682,815. Mount Olive shall make monthly payments on the first day of each month for which services will be rendered in an amount equal to 1/12 of the Annual Fee.
3. Any capital repairs that are subcontracted by the private firm are included in the base annual service fee up to a maximum of \$50,000. The public entity will be responsible for any capital costs in excess of \$50,000.
4. The Township and UWESI have agreed to use two ("2") component indices to most accurately reflect and project the annual increase in the service fee: (a) Labor Cost Component, representing 34% of the Base Fee shall be escalated each year based upon the Employment Cost Index, Northeast Region, as published by the U.S. Department of Labor, Bureau of Labor Statistics ("ECI"), for price-level changes up to a maximum escalation of three percent ("3%") in any given year; and (b) Non-Labor costs Component, representing 24% of the Base Fee shall be escalated each year based upon the Consumer Price Index, Northeast Region, as published by the U.S. Department of Labor, Bureau of Labor Statistics ("CPI"), for price level changes up to a maximum escalation of three percent ("3%") in any given year.
5. The Annual Adjustment to the Annual Fee shall be exclusive of electricity, heating fuel and chemical costs adjustments: adjustments for electricity, heating fuel and chemicals shall be calculated separately as follows:
 - a. The Annual Fee for Services will be adjusted to compensate for any published rate increases or decreases in electrical cost and/or heating fuel costs that occur during any Agreement year. The Annual Fee for Services will also be adjusted to compensate for any increase or decrease in the cost of chemical expenses that occur during any Agreement year. Both of these adjustments shall take effect on

January 1st of each Agreement year but shall be retroactive to the date of the published rate increase.

6. For this fee, the Agreement proposes that UWESI shall provide the following services:
 - a. UWESI shall be responsible for complete operation and administration of the Mount Olive water system (the "System") and shall perform all maintenance services required for efficient operation and maintenance of the System. UWESI's obligations under this Agreement are predicated on Mount Olive making necessary capital improvements to the System.
 - b. UWESI shall be responsible for any and all income taxes associated with or arising from the performance of the services contemplated under the Agreement. To the extent provided by law, Mount Olive shall provide UWESI with any applicable certificates of exemption from sales tax for purchases made by UWESI in order to fulfill UWESI obligations under the Agreement.
7. The Annual Fee includes a budgeted amount of funds ("Annual Maintenance Cap") to provide for necessary Maintenance required for the continued operations of the System. In the first year of the Agreement, the Annual Maintenance Cap is \$50,000; which is to be paid to UWESI in equal monthly installments. UWESI shall furnish all materials, supplies, consumables, equipment rental and subcontracting to perform all Maintenance up to the Annual Maintenance Cap. Once the Annual Maintenance Cap is reached, Mount Olive is financially responsible for the cost of all Maintenance for the remainder of the year. All services performed by UWESI once the Annual Maintenance Cap has been exceeded, shall be deemed "Additional Maintenance Services," and will be paid by Mount Olive to UWESI on a time and expense basis, including overtime, at the rates set forth in Appendix C of the Agreement. In the event that the entire budgeted amount of \$50,000 is not expended in an Agreement year, and any such monies which are not expended at the end of the Agreement shall be returned to Mount Olive.

The proposed Public – Private contract does not have a concession fee provision.

CONCLUSIONS

After review of the record herein, the Board FINDS that the statute-imposed criteria listed hereinabove have been met.

- 1 United Water Environmental Services, Inc. has the financial capacity and technical and administrative experience to ensure continuity of service over the contract term. United Water Environmental Services, Inc. is a wholly owned subsidiary of United Water, Inc., ("Parent Company") which in turn is a wholly owned subsidiary of United Water Resources, a New Jersey Corporation, of which certain of its subsidiaries are Board regulated entities. United Water, Inc. is a wholly owned subsidiary of Suez Environmental North America, Inc., which is itself a wholly owned subsidiary of Suez Environmental SA, a French societe` anonyme. Suez Environmental is controlled by GDF Suez SA, also a French societe` anonyme. United Water Environmental Services, Inc. (and its predecessors) has demonstrated over the years that it has the financial capacity, and technical and administrative expertise to meet all the demands of the proposed contract.

2. The terms of the contract are not unreasonable given the services that are to be performed by UWESI. (N.J.S.A. 58:26-25 (c) (2)). The overall cost of operating the System under this Agreement will be less than the current cost. UWESI will also be providing additional value added services not currently provided.
3. N.J.S.A. 58:26-25 (c) (3) is intended to protect franchise customers outside the Township of Mount Olive. All of Mount Olive's customers are located within Mount Olive's boundaries.
4. The contract contains provisions addressing the following:

N.J.S.A. 58:26-23 (e) (1); the charges, rates, fees or formulas to be used to determine the charges, rates, or fee to be charged by the public entity for the water supply services to be provided are incorporated. Mount Olive fixes the rates for the water service pursuant to N.J.S.A. 40:14B-21. The service agreement does not fix rates for the Mount Olive customers. There is no subsidization of customers outside the municipal boundaries. Pursuant to the Contract Addendum, rates are set by municipal ordinance. These rates are not expected to increase prior to 2012.;

N.J.S.A. 58:26 (e) (2); the allocation of the risks of financing and constructing planned capital additions or upgrades to existing water supply facilities are incorporated. Pursuant to the Contract Addendum, no capital improvements are planned during the contract period.; and

N.J.S.A. 58:26-23 (e) (6); the employment of current employees of the public entity whose positions or employment will be affected by the terms of the contract are addressed. Pursuant to the Contract Addendum, UWESI will discuss employment with affected employees, but is not required to hire such employees. Affected employees will have the opportunity to pursue available municipal opportunities. It is estimated that two employees of Mount Olive are tentatively affected by the Agreement.

Therefore, based upon the above, the Board HEREBY APPROVES the Public-Private Contract between Mount Olive and UWESI, subject to the following provisions:

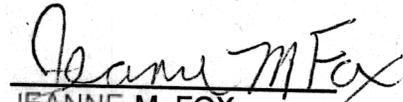
1. The Township of Mount Olive, within ten (10) days of receipt of this Order, shall submit the approval of the Local Finance Board within the Division of Local Government Services in the Department of Community Affairs, as required by N.J.S.A. 58:26-25 (a).
2. The Township of Mount Olive shall notify the Board of any comments made by the New Jersey Department of Environmental Protection, based upon its review, in accordance with N.J.S.A. 58:26-25 (a), within ten (10) days of receipt of any such comments.
3. The Township of Mount Olive shall obtain the final opinion of Bond Counsel, pursuant to N.J.S.A. 58:26-23 (g) and submit it to the Board within ten (10) days of closing of the Agreement.
4. The Township of Mount Olive shall notify the Board if the Agreement is not executed within forty-five (45) days of the date of this Order and advise as to why such Agreement has not been executed.

5. Any extension of the Agreement beyond the initial 5-year term shall be subject to Board review and approval.
6. This Order shall be effective as of the date of this Order.

DATED: 4/27/11

BOARD OF PUBLIC UTILITIES
BY:


LEE A. SOLOMON
PRESIDENT


JEANNE M. FOX
COMMISSIONER

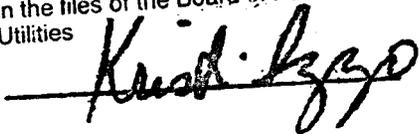

JOSEPH L. FIORDALISO
COMMISSIONER


NICHOLAS ASSELTA
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF MOUNT OLIVE, IN THE COUNTY OF MORRIS FOR APPROVAL TO FORM AN OPERATIONS, MAINTENANCE AND MANAGEMENT SERVICES AGREEMENT BETWEEN UNITED WATER ENVIRONMENTAL SERVICES, INC. A DELAWARE CORPORATION, AND PETITIONER - BPU DOCKET NO. WM11030158

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