



Agenda Date: 9/23/16
Agenda Item: 5A

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF DRAFT SERVICES)
AGREEMENT FOR THE OPERATION,)
MANAGEMENT, MAINTENANCE AND REPAIR)
OF THE CITY OF RAHWAY'S WATER SUPPLY)
SYSTEM WITH SUEZ WATER)
ENVIRONMENTAL SERVICES)
ORDER APPROVING A PUBLIC-)
PRIVATE CONTRACT BETWEEN)
THE CITY OF RAHWAY AND SUEZ)
ENVIRONMENTAL SERVICES INC.)
DOCKET NO. WO16070678)

Parties of Record:

Ryan J. Scerbo, Esq., DeCotiis, FitzPatrick & Cole, LLP, on behalf of the City of Rahway
Carla E. Hjelm, Esq., **Corporate Counsel**, on behalf of SUEZ Environmental Services Inc.
Stefanie A. Brand, Esq., **Director**, New Jersey Division of Rate Counsel

BY THE BOARD:

On July 19, 2016, pursuant to the New Jersey Water Supply Public-Private Contracting Act, N.J.S.A. 58:26-19 et seq. ("Water Act"), the City of Rahway ("Petitioner" or "Rahway") requested approval of an executory contract with SUEZ Environmental Services Inc. ("Company" or "SUEZ") for the operation, management, maintenance and repair of the Rahway water supply system. The undated contract is entitled "Services Agreement for the Operation, Management, Maintenance and Repair of the City of Rahway's Water Supply System By and Between City of Rahway and SUEZ Water Environmental Services Inc."

The Petitioner makes this application in accordance with N.J.S.A. 58:26-24(f) and N.J.S.A. 58:26-25 to the New Jersey Board of Public Utilities ("Board"), the New Jersey Department of Community Affairs, Division of Local Government Services, Local Finance Board ("DCA") and the New Jersey Department of Environmental Protection ("NJDEP" or "DEP"). Petitioner anticipates executing the contract in October or November 2016.

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 which services are provided pursuant to [the Water Act]." N.J.S.A. 58:26-21. 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 private firm entering into the contract has the financial capacity and technical and administrative experience to ensure continuity of service over the term of the contract and that the standards and requirements contained in the application documents concerning the 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 the benefits obtained by the public entity. In making this determination, the Board shall not use the traditional rate based rate of return methodology.
3. The franchise 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 paragraphs (1), (2) and (6) of subsection e. of section 5 of P.L. 1995, c. 101 (C. 58:26-23).

[N.J.S.A. 58:26-25(c)].

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 contained therein. N.J.S.A. 58:26-25(c)(4).

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 et seq.] 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 et seq.].

In accordance 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 contract meets the applicable criteria. Because the Legislature has carefully circumscribed the Board's 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 the Petitioner to its residents for services.

BACKGROUND/PROCEDURAL HISTORY

Rahway is a municipal corporation within the County of Union. As the owner and operator of a water supply, transmission and distribution system, pursuant to the County and Municipal Water Supply Act, N.J.S.A. 40A:31-1 et seq., Rahway provides services to its residents.

Rahway has jurisdiction, pursuant to N.J.S.A. 40A:31-1 et seq., to determine the terms and conditions under which it supplies water to customers within its municipal limits. Rahway determined to enter into a contract for services pursuant to the Water Act.

Rahway issued a notice of its request for proposals ("RFP") of vendors interested in providing a service agreement for the operation, management, maintenance and repair of Rahway's water supply system in the Star Ledger on April 30, 2015.

On May 24, 2016, Rahway notified DCA, the DEP and the Board of its intent to enter into a contract with a private firm for a service agreement for the operation, management, maintenance and repair of Rahway's water supply system pursuant to N.J.S.A. 58:26-23(a).

The RFP was requested and received by the following companies on August 7, 2015:

SUEZ Water Environmental Services Inc.
Middlesex Water Company

An evaluation team comprised of City staff and outside professionals (the "Evaluation Team") evaluated the proposals received for completeness and responsiveness. Both respondents were interviewed by the Evaluation Team on August 31, 2015, and ultimately on September 29, 2015, SUEZ was selected by the Evaluation Team to participate in negotiations for the development of a Services Agreement to be entered into by and between Rahway and SUEZ (the "Agreement"). Negotiations concerning the Agreement began in October 2015 and were substantially completed in May 2016.

Rahway chose SUEZ over the other competitor because of its financial proposal, technical criteria and financial strength. Also, Rahway chose SUEZ because of its experience in operating 20 water and five wastewater facilities throughout New Jersey with 84 contracts nationwide as well as proven capability in operating water supply systems, including membrane filtration systems. SUEZ has also performed successfully in Rahway since 1999 through a water services agreement, which will lead to low transition risk and a seamless transition.

Provided with the above information, Rahway agreed to enter into a 20-year contract with SUEZ for operation, management, maintenance and repair services for its water supply system.

Rahway obtained a written opinion from its bond counsel, DeCotiis, FitzPatrick & Cole, LLP, on July 18, 2016, in accordance with N.J.S.A. 58:26-23(g).

A public hearing on the proposed contract with SUEZ was noticed in the Star Ledger, a newspaper printed and circulated weekly in the City of Rahway on May 27, 2016. This notice was published pursuant to N.J.S.A. 58:26-24(b).

A public hearing was conducted on June 13, 2016 at 6:30 pm in the library at City Hall Plaza, Rahway, NJ. A verbatim record of the hearing was produced as required pursuant to N.J.S.A. 58:26-24(d). No members of the public requested to speak at the public hearing. Also, it is noted that Rahway allowed the public to submit written comments for a period of two weeks following the date of the public hearing and no written comments or statements were received.

A resolution was introduced on July 11, 2016 (Ordinance 0-20-16) by the Rahway City Council authorizing the execution of the Services Agreement with SUEZ, to provide contract operator services in connection with the City's System in accordance with the Act.

TERMS OF THE PUBLIC-PRIVATE CONTRACT

Rahway established a contract with SUEZ to provide operation, management, maintenance and repair services for its water supply system for a 20-year period.

SUEZ will provide Rahway with operation, management, maintenance and repair services of its water supply system as follows:

Scope of Services in accordance with the Agreement

- a) On and after the Commencement Date and throughout the Term of the Agreement, SUEZ shall operate, manage, maintain and repair the water supply system at all times on behalf of Rahway and shall perform the services in a professional, efficient and economical manner. In addition, SUEZ shall perform the services in compliance with all federal, State and local laws, regulations, permits and requirements, within the design and operational capabilities of the System, as same may be amended from time to time, and based on Rahway's performance and funding of necessary capital improvements.
- b) SUEZ shall perform all maintenance and repairs of the machinery, equipment, structures, improvements and all other property constituting the System during the term of the Agreement. Rahway's approval for any such maintenance or repair shall not be required unless it constitutes a capital improvement in which event Rahway shall have the right to approve such capital improvement. Failure of Rahway to approve reasonable capital improvements requested by SUEZ, which SUEZ has documented will cause SUEZ to either fail to meet the contract performance standards, affect water quality or environmental compliance or cause SUEZ to expend additional monies to properly operate the system. SUEZ and Rahway will cooperate to anticipate annual expenditures for capital improvements to assist Rahway in its budgeting process. The obligations of SUEZ hereunder are intended to assure that the system is fully, properly and regularly maintained and repaired in order to preserve their long-term reliability, durability and efficiency.
- c) SUEZ shall develop, implement and maintain a comprehensive computer-based maintenance management program for all components of the water supply system. Such maintenance shall be performed by SUEZ in compliance with the terms and provisions of this Agreement, the O&M Plan, routine maintenance schedule,

manufacturers' recommendations, federal, State and local requirements, and industry standards. SUEZ shall maintain documentation of all maintenance activities. SUEZ shall provide to Rahway, a written O&M Plan that consists of the schedule of preventive maintenance activities for the upcoming Contract. Rahway shall have 60 days to approve such O&M Plan or provide written comments on such plan to SUEZ. If Rahway does not provide such written comments, the O&M Plan shall be deemed approved. If the O&M Plan is not approved, Rahway and SUEZ shall endeavor to resolve any concerns and if not resolved within 30 days after Rahway notifies SUEZ that it does not approve the O&M Plan, or if the O&M Plan is deemed to have not been approved, the matter shall be referred to dispute resolution pursuant to Section 10.24 of the Agreement.

- d) SUEZ shall perform testing, sampling and any other analytical procedures to demonstrate compliance with the Agreement, applicable regulatory requirements, and permit provisions.
- e) SUEZ shall be responsible for operation, management, maintenance and repair of the water supply system in compliance with all permits and Memorandums of Agreement ("MOAs").
- f) SUEZ shall keep all equipment in good operating condition and maintain and operate all equipment and chemicals and perform all tests and testing. All equipment and chemicals provided by Rahway on and after the Commencement Date, including any equipment and chemicals on order shall be deemed to be owned by Rahway and shall remain a part of the water supply system upon termination or expiration of the Agreement.
- g) SUEZ shall maintain the current condition of the water supply system and maintain the facilities and facilities' structures.
- h) SUEZ shall be responsible for supplying and paying for all utilities. For the avoidance of doubt, it is acknowledged that payments for wholesale water supply to Rahway are not considered utilities, and are to be paid by Rahway.
- i) SUEZ shall be responsible for supporting Rahway's short and long-term planning for the water supply system.
- j) SUEZ shall provide all reasonable services requested by Rahway or potential developers or others regarding potential development or rehabilitation within Rahway to the extent such development or rehabilitation affects the water supply system.
- k) SUEZ shall maintain continuous compliance with all federal, State and local Permits held by Rahway related to the water supply system, and support Rahway in obtaining any permits (federal, State or local) required to operate, maintain, or enhance the water supply system over the term. For the avoidance of all doubt, Rahway may, at its sole option, require SUEZ to act on Rahway's behalf in applying for or renewing such permits.
- l) SUEZ shall perform collection and delivery of all solid waste from within the water supply system to disposal facilities.

- m) SUEZ shall operate, maintain and manage the water supply system of the Agreement, and in compliance with all Federal, State and local laws, regulations and requirements and in conformance with applicable permits.
- n) SUEZ shall perform raw water monitoring in conformance with all federal, State and local laws, regulations and requirements.
- o) SUEZ shall routinely monitor, calibrate and maintain all existing flow meters; periodically remove accumulated iron and manganese deposits from exposed equipment surfaces and unit processes; operate the solids handling and residuals disposal system in accordance with all applicable permits; and shall furnish all labor, materials, equipment and incidentals required to operate, maintain and repair the water treatment plant.
- p) SUEZ shall provide, at its sole cost and expense, all labor, materials, machinery, vehicles, storage areas, equipment, office equipment (i.e., copiers, computers, etc.), fuel, chemicals, supplies, materials, spare parts, expendables, consumables, testing and laboratory analysis, and any other items required for SUEZ to perform the services.
- q) Rahway shall have the right to and intends to exercise its right to actively participate in the review of services performed by SUEZ and any subcontractor.
- r) SUEZ shall prepare and submit Monthly Progress Reports regarding the services for submission to Rahway. Such Monthly Progress Report shall contain a section that specifically provides a status concerning the development of the Annual O&M Plan:
- Rahway and/or its authorized agents, and representatives from the governing regulatory agencies (e.g., DEP) reserve the right to visit or inspect the water supply system at any time without advance notice. Rahway and/or its authorized agents and representatives shall comply with SUEZ's safety procedures of which they have been informed during such visits.
 - Rahway and/or its authorized agents and representatives shall perform an annual inspection of the water supply system.
 - SUEZ shall maintain all records of operating data and information relevant to the water supply system, including accounting and financial records relating to the Annual Maintenance Cap and Pass-Through charges, and provide Rahway access to all such records upon request, accompanied by a SUEZ representative. SUEZ shall maintain a computerized recordkeeping system for all operation and maintenance functions performed.
- s) Rahway and SUEZ shall meet on a monthly basis to discuss performance of services, maintenance issues, equipment conditions, environmental and permit compliance, invoicing issues, public relations and other relevant issues.
- t) A complete system audit to determine the condition of the Water Supply System shall be provided by SUEZ.
- u) The O&M Plan shall dedicate a separate section to detail SUEZ's maintenance and repair program. SUEZ shall make and complete all maintenance, repairs and replacements to the water supply system that are necessary to achieve such standard of repair by performing all such listed activities within the timeframe indicated in the O&M Plan.

- v) SUEZ shall continue to operate and maintain all of Rahway's water supply system facilities on a continuous basis, twenty-four hours a day, seven days a week and in compliance with all applicable Permits and other federal, State, and local requirements.
- w) Rahway shall be responsible for the design, construction, implementation and financing of Capital Improvements to the system. Further, Rahway, in conjunction SUEZ, shall develop a long-term Capital Improvements recommendation within the first 12 months of Commencement Date.
- x) Rahway shall notify SUEZ in writing within 30 days after the end of Rahway's fiscal year of the projects and expenditures it has undertaken to fulfill the requirements of this section concerning design, construction, implementation and financing of Capital Improvements to the system. Rahway shall complete all Capital Improvements necessary to maintain compliance with applicable federal, State or local laws. In the event that Rahway does not approve or adequately fund a Capital Improvement recommended by SUEZ as necessary to achieve environmental compliance or required by any regulatory body, Rahway shall be responsible for any fines, penalties, regulatory actions or increased operating costs arising out of such failure to implement a Capital Improvement. In such instance, SUEZ shall notify Rahway and provide Rahway with a written explanation of why Rahway should be responsible for the cost of such fines and/or civil or criminal penalties, and for contesting such fines and/or civil or criminal penalties resulting from Rahway's failure to fund the Capital Improvement.
- y) SUEZ shall be required to assist Rahway in the implementation of all Capital Improvements to the water supply system. SUEZ shall also be responsible for all repairs to the system. SUEZ, in consultation with Rahway, shall develop a long-term Capital Improvement Plan in accordance with the time frames. In the event SUEZ deems an element of work to be a Capital Improvement, SUEZ shall: (i) immediately notify Rahway or its consulting engineer of the need to perform such work; (ii) provide Rahway with an explanation of the reasons why such work is necessary; and (iii) indicate whether the Capital Improvement is included in the Capital Improvement Plan. If the Capital Improvement is not included in the Capital Improvement Plan, SUEZ shall provide an explanation of the reasons why such improvement was not included. Rahway shall determine if and how the Capital Improvement will be implemented.

The Fixed Management Fee for the Contract Year beginning on the Commencement Date shall be \$4,517,017, which shall include an annual payment of \$1,000,000 from Rahway to SUEZ to recover its Annual Concession Fee. The Fixed Management Fee shall be increased each Contract Year, excluding that portion of the Fixed Management Fee attributable to SUEZ's recovery of the Annual Concession Fee, by the Index Factor. A portion of the Fixed Management Fee includes an Annual Maintenance Cap. For the avoidance of doubt, Rahway and SUEZ acknowledge that the Annual Maintenance Cap is not an additional amount, but is part of the Fixed Management Fee. As of the Commencement Date, the Annual Maintenance Cap is \$500,100. The Annual Maintenance Cap shall be increased each Contract Year by the Maintenance Index Factor.

Beginning on the first day of the month following SUEZ's first receipt of monthly payment of the Fixed Management Fee for a period of 20 years, and provided Rahway is current in payment to SUEZ of undisputed amounts due to SUEZ under this Agreement, SUEZ shall pay to Rahway each year for the Term of the Agreement an annual Concession Fee in the amount of

\$1,000,000, payable in 12 equal monthly installments of \$83,333.33. One additional payment in the amount of \$83,333.33 shall be due on the last day of the term of the Agreement.

No current employees of Rahway will be affected by the Agreement. SUEZ (under the name United Water) is currently the contract operator for Rahway. The existing contract with SUEZ was entered into almost 20 years ago. At that time, a few municipal employees involved with the water system were hired by SUEZ (a requirement of that contracting process). Since SUEZ is already in place under the existing contract, Rahway has no current employees that will be impacted by the new contract. Furthermore, staffing levels are not expected to be reduced by SUEZ under the new contract so even the former city employees that have been working for SUEZ for almost 20 years are not expected to be impacted by the new contract.

Rahway established an Ordinance (39-13) which established the water rates through the year 2018. This Ordinance provides for a 5% annual increase through 2018. Rahway retains responsibility for setting rates and charges. SUEZ agrees to implement revised rates and charges on a date specified by Rahway within 30 days after notification from Rahway; except for structural rate changes, which shall be implemented within 60 days after notification from Rahway.

Effective on the Commencement Date and as of each annual anniversary thereafter throughout the term of the Agreement, Rahway agrees, to the extent permitted by law, to increase its rates for the supply of water services to customers of the water supply system to at least the rates required to cover the Annual Service Fee to be paid to SUEZ for services provided. Nothing herein shall be construed to restrict Rahway from establishing rates for the supply of water service to the customers of the water supply system that are in excess of the rates required to cover the Annual Service Fee.

On July 18, 2016, the Petitioner submitted a Hearing Report to the DEP, which, pursuant to N.J.S.A. 58:26-25(a), must complete its review and submit its comments to the Board and DCA within 60 days of its receipt thereof. To date, the Board has received no comments from the DEP and is unaware of any prevailing issues.

By letter dated September 1, 2016, Petitioner consented to an extension for the Board to act on its application through October 3, 2016.

By letter dated September 2, 2016, the New Jersey Division of Rate Counsel filed comments and advised the Board that it did not object to the Public-Private contract and was not opposed to the Board's approval of the Petition.

DISCUSSIONS AND FINDINGS

After review of the record herein, the Board **FINDS** that the statutory criteria listed hereinabove have been met.

1. Suez Water Environmental Services Inc. (formerly named United Water Environmental Services Inc.) has the financial capacity, technical and administrative experience to ensure continuity of service over the terms of the contract (N.J.S.A. 58:26-25(c) (1)). SUEZ Water Environmental Services, Inc. is a wholly owned subsidiary of SUEZ Water, Inc., ("Parent Company") which in turn owns SUEZ Water Resources, a Delaware Corporation, of which certain of its subsidiaries are Board regulated entities. SUEZ Water, Inc. is a wholly owned subsidiary of SUEZ North America Inc.,

which is itself a wholly owned subsidiary of SUEZ Groupe SAS, a French corporation which is a wholly owned subsidiary of SUEZ SA, a French limited liability company. SUEZ 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 SUEZ. N.J.S.A. 58:26-25(c)(2). The Board believes that under the circumstances of this matter and as set forth in the contract, a 20-year term is appropriate.
3. N.J.S.A. 58:26-25(c)(3) is intended to protect franchise customers outside of Rahway. Ninety-nine percent of Rahway's customers are located within Rahway's boundaries.¹ Thus, there is no subsidization of customers outside the municipal 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 fees to be charged by the public entity for the water supply services to be provided.
 - N.J.S.A. 58:26-23(e)(2): The allocation of the risks of financing and constructing planned capital additions or upgrades to existing water supply facilities are incorporated.
 - N.J.S.A. 58:26-23(e)(6): The employment of current employees of the public entity whose positions of employment will be affected by the terms of the contract are addressed.

Therefore, based upon the above, the Board **HEREBY APPROVES** the Public-Private Contract between the City of Rahway and SUEZ Water Environmental Services Inc. subject to the following provisions:

1. Rahway, 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. Rahway shall obtain the final opinion of Bond Counsel, pursuant to N.J.S.A. 58:26-23(g) and submit the same to the Board within 30 days of closing on the proposed Public-Private Contract.
3. Rahway shall notify the Board if the proposed Public-Private Contract is not executed within 45 days of the date of this Order and advise as to why such contract has not been executed.

¹ Rahway has 8,259 customers located within Rahway's boundaries. In addition, 79 customers are located outside of Rahway's boundaries. All of these customers will be affected by the draft services agreement and are billed individually at the same rates applied to customers located within Rahway's boundaries. The customers located outside of the boundaries of Rahway are located in the following communities: Avenel (22), Clark (5), Colonia (46), Linden (5), and Woodbridge (1).

4. Any extension of the contract beyond the 20-year term pursuant to N.J.S.A. 58:26-25(c)(4), and any amendment of the contract to change the formula or other basis of determining charges contained therein, shall be subject to Board review and approval.

This Order shall be effective on October 3, 2016.

DATED: 9/23/16

BOARD OF PUBLIC UTILITIES
BY:

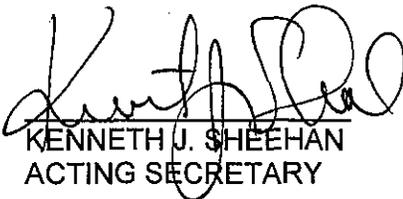

RICHARD S. MROZ
PRESIDENT


JOSEPH L. FIORDALISO
COMMISSIONER

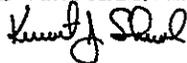

MARY-ANNA HOLDEN
COMMISSIONER


DIANNE SOLOMON
COMMISSIONER


UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST: 
KENNETH J. SHEEHAN
ACTING 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 DRAFT SERVICES AGREEMENT FOR THE OPERATION,
MANAGEMENT, MAINTENANCE AND REPAIR OF THE CITY OF RAHWAY'S WATER
SUPPLY SYSTEM WITH SUEZ WATER ENVIRONMENTAL SERVICES
BPU DOCKET NO. WO16070678

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