



Agenda Date: 10/31/16
Agenda Item: 5A

STATE OF NEW JERSEY
Board of Public Utilities
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Trenton, New Jersey 08625-0350
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WATER

SERVICES AGREEMENT WITH SUEZ WATER) ORDER APPROVING A PUBLIC-
ENVIRONMENTAL SERVICES, INC. FOR THE) PRIVATE CONTRACT BETWEEN
OPERATION AND MANAGEMENT OF THE) THE TOWN OF KEARNY AND SUEZ
TOWN OF KEARNY'S WATER SYSTEM) WATER ENVIRONMENTAL
) SERVICES INC.
)
) DOCKET NO. WO16090836

Parties of Record:

Salvatore G. Roccaro, Esq., Castano Quigley LLC, on behalf of the Town of Kearny
Carla E. Hjelm, Esq., Corporate Counsel, SUEZ Environmental Services Inc.
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On September 9, 2016, pursuant to the New Jersey Water Supply Public-Private Contracting Act, N.J.S.A. 58:26-19 et seq. ("Water Act"), the Town of Kearny ("Petitioner" or "Kearny"), by a verified application, requested approval of an executory contract with SUEZ Environmental Services Inc. ("Company" or "SUEZ") for the operation and management of the Kearny water system.

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").

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

Kearny is a municipal corporation within the County of Hudson. 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., Kearny provides services to its residents. Kearny has approximately 8,300 customer accounts including residential, commercial and industrial.

Kearny 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. Kearny determined to enter into a contract for services pursuant to the Water Act.

Kearny issued a notice of its request for proposals of vendors interested in providing a service agreement for the operation and management of Kearny's water system in the Star Ledger on August 14, 2015. SUEZ was the only entity that provided a bid.

On June 28, 2016, Kearny 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 and management of Kearny's water system pursuant to N.J.S.A. 58:26-23(a).

Kearny chose SUEZ because of its financial proposal, technical criteria, financial strength as well as its experience in operating twenty 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 Kearny through a water services agreement, which will help to provide a seamless transition. Its familiarity with the system since running it on an emergency basis, and the fact that SUEZ was providing Kearny with water meter reading, billing, collections, and customer service since 2007 independently justified the award of the contract to SUEZ.

Provided with the above information, Kearny agreed to enter into a five-year contract with SUEZ for the operation and management for its water system.

A public hearing on the proposed contract with SUEZ was noticed in the Jersey Journal on July 25, 2016. This notice was published pursuant to N.J.S.A. 58:26-24(b).

A public hearing was conducted on August 9, 2016 as part of Kearny's governing body's regularly scheduled meeting. 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 and Kearny received no public comments in writing by August 16, 2016.

A resolution was introduced on August 23, 2016 (Ordinance 2016-429) by the Kearny Town Council authorizing and directing the execution of the Services Agreement with SUEZ, to provide contractor operator services in connection with Kearny's water system in accordance with the Act.

Kearny obtained a written opinion from its bond counsel, McManimon, Scotland & Baumann, LLC, on October 3, 2016, in accordance with N.J.S.A. 58:26-23(g).

TERMS OF THE PUBLIC-PRIVATE CONTRACT

Kearny established a contract with SUEZ to provide operation and management for its water system for a five year period.

In sum, SUEZ will provide Kearny with operation and management services of its water system as follows:

- a) Shall operate, maintain and manage the system at all times on behalf of Kearny in compliance with applicable law and in accordance with the terms and provisions of this agreement; subject to any uncontrollable circumstances as defined herein; and the operating and design capability of the facilities comprising the system. SUEZ shall at all times manage, operate and maintain the system in an efficient and economical manner and in accordance with prudent industry and utility practice.
- b) Will supervise all regulatory compliance, including the enforcement of Kearny's ordinances or regulations. Subject to the limitations of this section and the design capabilities. Also, shall operate the system in compliance with current state and federal regulatory requirements. SUEZ will not be responsible for process upsets or violations that are attributable to:
 - 1) Influent constituents or contaminants that are not within the design capabilities of the system or that cannot, within the design capabilities of the system, be treated to the degree required by Applicable Law, as amended from time to time; or
 - 2) The malfunction or failure of equipment except to the extent due to the negligent acts, errors or omissions of the Company.
- c) Shall pay any fines or civil penalties for violations imposed on either party by a regulatory agency having jurisdiction of the operation, maintenance and management of the system to the extent caused by the negligence or willful misconduct of SUEZ. SUEZ shall be given full authority to contest such violations.
- d) Shall provide technical advice to Kearny, utilizing on-site and/or locally based staff, on the operations impact or planning level costs associated with proposed expansions or extensions of the system. Such support is not intended to include engineering design, supervision of major projects, or services that are unrelated to SUEZ's obligations under this Agreement. Kearny may, at its discretion, negotiate with SUEZ for technical support.
- e) An inventory of all spare parts, and other equipment and tools at the system that are to be used by SUEZ shall be prepared and approved by Kearny and SUEZ within two (2) months following the commencement of the Term. Upon the termination or expiration of this Agreement, another inventory shall be taken, subject to written approval by Kearny and SUEZ. All items listed on the inventory at the time of commencement of this Agreement shall be returned to Kearny, and SUEZ shall pay to

- Kearny the replacement cost of any missing items or justify their absence due to consumption; obsolescence, breakage, sale or other legitimate reasons.
- f) Shall conduct facility performance compliance.
 - g) Shall perform all routine and non-routine operation and maintenance services required for efficient operation and maintenance of the system. SUEZ shall provide a minimum notification of six months for minor capital improvements and 12 months for major capital improvements in order to provide Kearny with adequate time for planning and execution of required capital improvements.
 - h) Shall be responsible for any and all income taxes associated with or arising from the performance of the services contemplated under this Agreement. To the extent permitted by law, Kearny shall provide SUEZ with any applicable certificates of exemption from sales tax for purchases made by SUEZ in order to fulfill its obligations under this Agreement.
 - i) Shall read residential water meters in the cycles provided under the current reading/billing structure. Commercial accounts shall be read monthly. Residential Accounts shall be read quarterly. Each cycle shall begin at or about the beginning of March, June, September and December of each year.
 - j) Will perform all "special" meter readings, including re-reads for estimated accounts and final readings for property title transfer.
 - k) Will utilize a customer information system with a computerized work order system that schedules and tracks appointments for all meter reading functions. The work order system will address the replacement of meters found not functioning properly. The system must provide reports to allow Kearny to assess water meter performance.
 - l) Meter readers assigned under this contract must be permanent employees of SUEZ that are skilled in meter reading. All employees are to be uniformed and wear identification badges with the Company logo, the employee's picture and name and the date the card was issued.
 - m) Shall provide water billing services for Kearny, which shall include transmitting bills to all of Kearny's residential water customers on a quarterly basis and to Kearny's commercial customers on a monthly basis. Where an actual reading cannot be obtained, SUEZ shall send an estimated bill.
 - n) Shall provide water bills in addition to prime bills, including final bills for property title transfers, corrected bills as a result of re-reads.
 - o) Shall accommodate any rate changes effected by Kearny, but changes shall be limited to one rate change per calendar year without cost. Should Kearny adopt additional rate changes, SUEZ shall accommodate such additional changes but shall bill Kearny for the costs thereof.
 - p) Shall respond to customer questions and complaints and make billing adjustments as necessary and appropriate for the resolution thereof. For this purpose, SUEZ shall maintain a staff dedicated to assisting customers. SUEZ's staff will be responsible for responding to customer phone calls and billing questions during the hours of 8:00 a.m. to 4:30 p.m., Monday through Friday. All of the customers will be provided with a toll free number to reach these representatives. All customer service representatives shall be trained to answer questions related to customer bills. SUEZ shall also maintain a website for customers' inquiries. SUEZ shall respond to website inquiries via telephone or e-mail.
 - q) Problems of an emergency nature such as water main breaks, sewer backups or lack of water service are to be reported by SUEZ to Kearny. After normal business hours, they shall be reported to the Kearny Police Department.

- r) Will implement a lock box for use by the customers, which lock box will be placed in a location mutually agreed upon by Kearny and SUEZ.

The base compensation in the first agreement year paid to SUEZ is \$1,808,206. The annual fee consists of a labor cost component, a non-labor cost component, and an energy/chemicals component. The annual fee for years two and beyond shall be increased through the application of a set of readily available and national cost indices, as follows:

- a) Labor Cost Component, representing 33% of the Base Fee shall be escalated each year based upon the "ECI Index" for price-level changes.
- b) Non-Labor Costs Component, representing 67% of the Base Fee shall be escalated each year based upon the "CPI Index" for price-level changes.
- c) Escalation for Growth of Services. Each year, the Total Annual Cost shall be increased based upon the percentage of new customers added to the system.

The costs for non-routine services provided by SUEZ as described previously herein shall be paid by Kearny to SUEZ separately on a time and expense basis, including overtime. Materials and subcontractors will be invoiced to Kearny by SUEZ at cost, plus 10% on the actual cost of materials to reimburse SUEZ for administrative expenses. For labor not regularly assigned to the system, Kearny shall pay SUEZ actual wages plus benefits at 35% plus 20% for overhead and administration. There will be no additional charge for SUEZ labor regularly assigned to the system performing non-routine services during the course of their normal working shift; however, if such employee performs services on an overtime basis, Kearny shall pay SUEZ actual wages plus 50% for overtime plus 20% for overhead and administration.

Three employees (Teddy Ferraioli, James Neibug, Paula Cavalier) of Kearny were transferred within Kearny and had position changes that were lateral transfers. There was no change to their civil service status and/or pensions. The following three employees (Arthur Bacrick, David Yogg, and Russell Murray) were laid off by Kearny and hired by SUEZ.

Kearny does not regularly increase its water rates except for when capital improvements require it to do so. Also, it is noted, the rate schedule for Kearny will not be affected due to the contract with SUEZ.

On September 9, 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 October 13, 2016, the New Jersey Division of Rate Counsel filed comments and advised the Board that based on its review of the application and discovery responses provided by both Kearny and SUEZ, it "has no objection to Board approval of the Agreement." Id. at 1.

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 five-year term is appropriate.
3. N.J.S.A. 58:26-25(c)(3) is intended to protect franchise customers outside of Kearny. Kearny does not have any customers outside the municipal boundaries, but it does supply bulk water to East Newark, a neighboring municipality. East Newark pays a bulk rate as per an agreement with Kearny.
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.

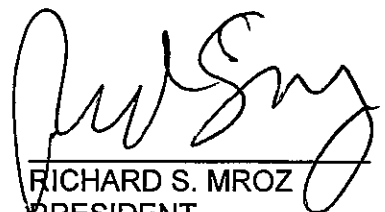
Therefore, based upon the above, the Board **HEREBY APPROVES** the Public-Private Contract between Kearny and SUEZ Water Environmental Services Inc. subject to the following provision:

Any extension of the contract beyond the five-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 November 10, 2016.

DATED: 10/31/16

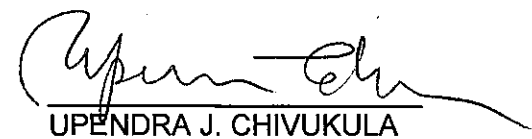
BOARD OF PUBLIC UTILITIES
BY:


RICHARD S. MROZ
PRESIDENT


JOSEPH L. FIORDALISO
COMMISSIONER

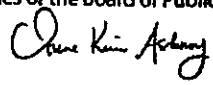

MARY ANNA HOLDEN
COMMISSIONER


DIANNE SOLOMON
COMMISSIONER


UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST: 
IRENE KIM ASBURY
SECRETARY

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



SERVICES AGREEMENT WITH SUEZ WATER ENVIRONMENTAL SERVICES, INC. FOR
THE OPERATION AND MANAGEMENT OF THE TOWN OF KEARNY'S WATER SYSTEM
BPU DOCKET NO. WO16090836

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