



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF THE PETITION OF THE)	ORDER APPROVING A PUBLIC-
BOROUGH OF HO-HO-KUS TO ENTER INTO A)	PRIVATE CONTRACT WITH THE
MAINTENANCE CONTRACT WITH A PRIVATE)	BOROUGH OF HO-HO-KUS AND
FIRM SUEZ ADVANCE SOLUTIONS (UTILITY)	SUEZ ADVANCED SOLUTIONS
SERVICE CO., INC.) FOR THE PROVISION OF)	
WATER SUPPLY SERVICES)	DOCKET NO. WO21091144

Parties of Record:

Timothy J. Wiss, Esq., Wiss & Bouregy, P.C., on behalf of the Borough of Ho-Ho-Kus
Diana Riner, Esq., on behalf of SUEZ Advanced Solutions/Utility Service Co., Inc.
Brian Lipman, Esq., Acting Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On August 12, 2021, pursuant to the New Jersey Water Supply Public-Private Contracting Act (“Water Act”) N.J.S.A. 58:26-19 to 27, the Borough of Ho-Ho-Kus (“Petitioner,” “Ho-Ho-Kus,” or “Borough”), submitted an application (“Petition”) for approval of a contract with Suez Advanced Solutions (“SUEZ” or “Company”) pertaining to a maintenance contract for the provision of water supply services, specifically the maintenance and management of two (2) water storage assets. However, the Petition did not include the relevant exhibits. Thereafter, on September 29, 2021, the Borough filed the remaining exhibits as part of its complete application for approval.

The two (2) water storage vessels in Ho-Ho-Kus are as follows:

- 250,000 Gallon Welded Steel elevated tank; and
- 500,000 Gallon Welded Steel elevated tank.

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 (“DEP”) (collectively, “Agencies”). 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). 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 (4) 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 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; and
- (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).

[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. Ibid.

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, 249 (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 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 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 the Petitioner to its residents for services.

BACKGROUND/PROCEDURAL HISTORY

The Borough is a municipal corporation within the County of Bergen. 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., Ho-Ho-Kus provides services to its citizens.

Ho-Ho-Kus has absolute 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. Ho-Ho-Kus determined to enter into a contract for maintenance services pursuant to the Water Act.

On June 22, 2021 Ho-Ho-Kus notified DCA, DEP and the Board of its intent to submit an application to enter into a contract with a private firm for the provision of water supply services.

On June 26, 2021, Ho-Ho-Kus issued a public notice of its request for proposals (“RFP”) of vendors interested in providing maintenance services and published same in the Record, a newspaper of general circulation.

All proposals were received before the July 25, 2021 deadline. The proposal submitted by SUEZ was the only one received, which was reviewed shortly thereafter.

Ho-Ho-Kus negotiated a contract with SUEZ, which included the required provisions pursuant to N.J.S.A. 58:26-23e. According to the Petition, Ho-Ho-Kus chose SUEZ for the following reasons:

- SUEZ has a track record of successful performance not only in New Jersey, but in numerous states; and

- SUEZ's corporate company has the assets to provide backing in the event of an unstable economy and has the greatest amount of experience and qualifications.

Provided with the above information, Ho-Ho-Kus agreed to enter into a 20-year contract with SUEZ to provide it with a long-term tank maintenance plan on two (2) tanks.

Notice of the public hearing was published in the Ridgewood News, a newspaper of general circulation, on August 6, 2021. This notice was published pursuant to N.J.S.A. 58:26-24(b).

A public hearing on the proposed contract with SUEZ was scheduled for August 24, 2021 in the Council Chambers. There were no issues raised by the public at the public hearing.

On August 24, 2021, a resolution (No. 21-98) was adopted by the Ho-Ho-Kus Council authorizing the process for a public private contract with SUEZ for a maintenance contract in accordance with N.J.S.A. 58:26-23 et seq.

TERMS OF THE PUBLIC-PRIVATE CONTRACT¹

250,000 Gallon Tank

- A. The Company will annually inspect and service the tank. The tank and tower will be thoroughly inspected to ensure that the structure is in a sound, watertight condition. Inspections will rotate between visual and ROV (robotic operate vehicle).
- B. Every four (4) years, beginning with the first washout/inspection, the tank will be completely drained and cleaned to remove all mud, silt, and other accumulations that might be harmful to the tank or its contents. After cleaning is completed, the interior will be thoroughly inspected and disinfected prior to returning the tank to service; however, the Borough is responsible for draining and filling the tank and conducting any required testing of the water. A written report will be mailed to the Borough after each inspection.
- C. The Company shall furnish engineering and inspection services needed to maintain and repair the tank and tower during the term of this Scope of Work 1 (SOW1). The repairs include: steel parts, expansion joints, water level indicators, sway rod adjustments, and manhole covers/gaskets.
- D. The Company will clean and repaint the interior and/or exterior of the tank at such time as complete repainting is needed. The need for interior painting is to be determined by the thickness of the existing liner and its protective condition. When interior repainting is needed, procedures as outlined in A.W.W.A.-D102 specifications for cleaning and coating of potable water tanks will be followed. Only material approved for use in potable water tanks will be used on any interior surface area. The need for exterior painting is to be determined by the appearance and protective condition of the existing paint. At the time the exterior requires repainting, the Company agrees to paint the tank with the same color paint and to select a coating system which best suits the site conditions, environment, and general location of the tank. When painting is needed, all products and procedures will be equal to, or exceed the requirements of the State of New Jersey, the American Water

¹ If any of the terms of the Contract differ from the summary that is provided in this order, the terms of the Contract govern.

Works Association, and the Society for Protective Coatings as to surface preparation and coating materials.

- E. A lock will be installed on the roof hatch of the tank.
- F. The Company will provide emergency services, when needed, to perform all repairs covered under this SOW1. Reasonable travel time must be allowed for the repair unit to reach the tank site.
- G. The Company will furnish pressure relief valves, if requested by Ho-Ho-Kus, so that Ho-Ho-Kus can install the valves in its water system while the tank is being serviced.
- H. The Company will furnish current certificates of insurance coverage to Ho-Ho-Kus.
- I. Chemical Clean Service - During the washout/inspections, the Company will apply an NSF 60 approved chemical cleaning agent to the interior walls and floor surfaces of the Tank to treat mineral build-up and bio-film that form on the interior tank surfaces.
- J. Mixing System Installation and Service – 1. The Company shall install an active mixing system in the Tank. a. Ho-Ho-Kus will be required to provide 120 VAC, 15 Amp GFCI – Protected, 15 Amp Circuit power supply at the tank with a disconnect switch, and will be required to supply a certified electrician to make the final connection between the PAX Mixer and the power supply during the installation. b. Ho-Ho-Kus will be responsible for all trenching, conduit, and electrical connections outside the tank, unless otherwise specified by this agreement. c. Upon completion of PAX installation, USCI will power up the PAX Active Mixing system and complete electrical system check/IAR on PAX Control Center to verify proper operation. 2. The particular unit that will be installed in the Tank is an NSF Approved PAX 100 active mixing system along with its component parts. 3. The Company will inspect and service the active mixing system each year. The active mixing system will be thoroughly inspected to ensure that the active mixing system is good working condition. The Company shall furnish engineering and inspection services needed to maintain and repair the active mixing system during the term of the Contract. 4. Every third (3rd) year, or as determined necessary by the Company due to operational problems with the mixing system, the tank will be completely drained and cleaned to remove all mud, silt, and other accumulations that might be harmful to the tank or its contents. After cleaning is completed, the interior will be disinfected prior to returning the tank to service; however, Ho-Ho-Kus is responsible for draining and filling the tank and conducting any required testing of the water. A written report will be mailed to the Borough after each inspection.
- K. In the event that the Borough will not release the tank for service or is the cause of unreasonable delay in the performance of any service herein, the Company reserves the right to renegotiate the annual fees, and the Borough agrees to renegotiate the annual fees in good faith. In addition, the Borough hereby agrees that the Company can replace a washout inspection with a visual inspection, ROV inspection, or UAV inspection without requiring modification of this Contract.
- L. Company is denied any authority to initiate, negotiate, and finalize the terms for a bulk sale of surplus water.

Annual Fees/Contract Price

The tank shall receive an exterior renovation, interior renovation, repairs and PAX active mixer installation prior to the end of Contract Year 1. The first five (5) annual fees shall be \$154,374.00 per Contract Year. The annual fee for Contract Year Six (6) shall be \$28,755.00 per Contract Year. Each anniversary thereafter, the annual fee shall be adjusted to reflect the current cost of service. The adjustment of the annual fee shall be limited to a maximum of five percent (5%) annually. All applicable taxes are the responsibility of the Borough and are in addition to the stated costs and fees in this SOW1.

500,000 Gallon Tank

- A. The Company will annually inspect and service the tank. The tank and tower will be thoroughly inspected to ensure that the structure is in a sound, watertight condition. Inspections will rotate between visual and ROV (robotic operate vehicle).
- B. Every four (4) years, beginning with the first washout/inspection, the tank will be completely drained and cleaned to remove all mud, silt, and other accumulations that might be harmful to the tank or its contents. After cleaning is completed, the interior will be thoroughly inspected and disinfected prior to returning the tank to service; however, Ho-Ho-Kus is responsible for draining and filling the tank and conducting any required testing of the water. A written report will be mailed to Ho-Ho-Kus after each inspection.
- C. The Company shall furnish engineering and inspection services needed to maintain and repair the tank and tower during the term of this Scope of Work 2 ("SOW2"). The repairs include: steel parts, expansion joints, water level indicators, sway rod adjustments, and manhole covers/gaskets.
- D. The Company will clean and repaint the interior and/or exterior of the tank at such time as complete repainting is needed. The need for interior painting is to be determined by the thickness of the existing liner and its protective condition. When interior repainting is needed, procedures as outlined in A.W.W.A.-D102 specifications for cleaning and coating of potable water tanks will be followed. Only material approved for use in potable water tanks will be used on any interior surface area. The need for exterior painting is to be determined by the appearance and protective condition of the existing paint. At the time the exterior requires repainting,

The Company agrees to paint the tank with the same color paint and to select a coating system which best suits the site conditions, environment, and general location of the tank. When painting is needed, all products and procedures will be equal to, or exceed the requirements of the State of New Jersey, the American Water Works Association, and the Society for Protective Coatings as to surface preparation and coating materials.

- E. A lock will be installed on the roof hatch of the tank.
- F. The Company will provide emergency services, when needed, to perform all repairs covered under this SOW2. Reasonable travel time must be allowed for the repair unit to reach the tank site.

- G. The Company will furnish pressure relief valves, if requested by Ho-Ho-Kus, so that Ho-Ho-Kus can install the valves in its water system while the tank is being serviced.
- H. The Company will furnish current certificates of insurance coverage to Ho-Ho-Kus.
- I. Chemical Clean Service.
 - 1. During the washout/inspections, the Company will apply an NSF 60 approved chemical cleaning agent to the interior walls and floor surfaces of the Tank to treat mineral build-up and bio-film that form on the interior tank surfaces.
- J. Mixing System Installation and Service.
 - 1. The Company shall install an active mixing system in the Tank.
 - a. Ho-Ho-Kus will be required to provide 120 VAC, 15 Amp GFCI – Protected, 15 Amp Circuit power supply at the tank with a disconnect switch, and will be required to supply a certified electrician to make the final connection between the PAX Mixer and the power supply during the installation.
 - b. Ho-Ho-Kus will be responsible for all trenching, conduit, and electrical connections outside the tank, unless otherwise specified by this agreement.
 - c. Upon completion of PAX installation, USCI will power up the PAX Active Mixing system and complete electrical system check/IAR on PAX Control Center to verify proper operation.
 - 2. The particular unit that will be installed in the Tank is an NSF Approved PAX 150 active mixing system along with its component parts.
 - 3. The Company will inspect and service the active mixing system each year. The active mixing system will be thoroughly inspected to ensure that the active mixing system is good working condition. The Company shall furnish engineering and inspection services needed to maintain and repair the active mixing system during the term of this Contract.
 - 4. Every third (3rd) year, or as determined necessary by the Company due to operational problems with the mixing system, the tank will be completely drained and cleaned to remove all mud, silt, and other accumulations that might be harmful to the tank or its contents. After cleaning is completed, the interior will be disinfected prior to returning the tank to service; however, Ho-Ho-Kus is responsible for draining and filling the tank and conducting any required testing of the water. A written report will be mailed to Ho-Ho-Kus after each inspection.
- K. In the event that Ho-Ho-Kus will not release the tank for service or is the cause of unreasonable delay in the performance of any service herein, the Company reserves the right to renegotiate the annual fees, and Ho-Ho-Kus agrees to renegotiate the annual fees in good faith. In addition, Ho-Ho-Kus hereby agrees that the Company can replace a washout inspection with a visual inspection, ROV inspection, or UAV inspection without requiring modification of this Contract.
- L. The Company is denied any authority to initiate, negotiate, and finalize the terms for a bulk sale of surplus water.

Contract Price/Annual Fees

The tank shall receive an exterior renovation, interior renovation, repairs and PAX active mixer installation prior to the end of Contract Year 2. The first five (5) annual fees shall be \$231,683.00 per Contract Year. The annual fee for Contract Year Six (6) shall be \$42,119.00 per Contract Year. Each anniversary thereafter, the annual fee shall be adjusted to reflect the current cost of service. The adjustment of the annual fee shall be limited to a maximum of five-percent (5%) annually. All applicable taxes are the responsibility of Ho-Ho-Kus and are in addition to the stated costs and fees in this SOW2.

On August 12, 2021, the Petitioner submitted a Hearing Report to 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 DEP and is unaware of any prevailing issues.

The municipal employees will not be affected by this water tank maintenance contract.

The Local Finance Board within the Division of Local Government Services in DCA is scheduled to review the contract at its November 10, 2021 agenda meeting.

New Jersey Division of Rate Counsel (“Rate Counsel”) Comments

By letter dated October 18, 2021, Rate Counsel advised the Board that it became aware of this matter on October 7, 2021 when Board Staff (“Staff”) forwarded Rate Counsel an e-mail that attached a two-page letter from the Borough that purportedly initiated this matter. Rate Counsel stated that that the Board has not adopted a specific regulation governing service of public private contracts. However, Rate Counsel went on to state that most regulations governing the service of filings upon the Board also require service upon the Director of Rate Counsel, citing. e.g., N.J.A.C. 14:5-12.² Rate Counsel noted that it had participated in several other similar filings and that their review was conducted within the course of the 60-day statutory time frame. Rate Counsel, therefore, objected to the approval of this matter at the October 28, 2021 Board meeting due to the lack of service.

Rate Counsel added that filings involving, public-private contracts are voluminous and complex, and that the many documents that must be analyzed in this matter cannot be reviewed prior to the October 28, 2021 public agenda meeting. However, Rate Counsel recommended that if this matter is considered at the October 28, 2021 Board meeting, it should be conditionally approved pending the opportunity for Rate Counsel to conduct a full review (including discovery) and analysis and, to the extent deemed necessary, file comments with the Board for its consideration in this matter.

The Borough did not file a response to Rate Counsel’s comments.

DISCUSSIONS AND FINDINGS

After review of the record herein, the Board **FINDS** that the statutory requirements listed above have been met. Specifically, the Board **FINDS** as follows:

² Rate Counsel used the incorrect citation. The correct citation is N.J.A.C. 14:1-5.12.

1. SUEZ has the financial capacity, technical and administrative experience to ensure continuity of service over the term of the contract [N.J.S.A. 58:26-25(c)(1)]. SUEZ provides a suite of additional global solutions, technologies, information systems and approaches to real-life challenges facing U.S. water and wastewater utilities.
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 Ho-Ho-Kus. All of Ho-Ho-Kus's customers are located within Ho-Ho-Kus's boundaries.
4. The contract contains provisions addressing the following:

N.J.S.A. 58:26-23(e)(1): There is no subsidization of customers outside the municipal boundaries.

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; and

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.

Turning to Rate Counsel's comments, the Board acknowledges Rate Counsel's concerns regarding the lack of service of the Petition by the Borough. While there is no statutory requirement that the Borough serve copies of these types of filings upon Rate Counsel, the Board notes that Rate Counsel has fully participated and filed comments in other matters involving the approval of public private contracts. See, e.g., I/M/O the Petition of SUEZ Water New Jersey, Inc. for Approval of an Affiliate Contract to paint the Hampton Storage Tanks in Hampton, New Jersey, Docket No. WO20100664 (February 17, 2021); I/M/O the Petition of the Merchantville-Pennsauken Water Commission for Approval of a Water Main Asset Management And Maintenance Services Agreement Pursuant to the New Jersey Water Supply Public Private-Contracting Act, N.J.S.A. 58:26-19 et seq. and N.J.S.A. 58:26-25, Docket No. WO21020617 (April 27, 2021). Nonetheless, it appears that the Borough inadvertently, rather than intentionally, failed to provide Rate Counsel with a copy of its filing. Further, the Local Finance Board within the Division of Local Government Services in DCA rescheduled their review of the contract to November 10, 2021. Moreover, the Borough advised Staff that the cost of the contract at issue will increase due to a price escalation clause if it is not approved within the 60-day statutory time frame set forth in the Water Act.

Therefore, based upon the above, the Board **HEREBY CONDITIONALLY APPROVES** the Public-Private Contract between the Borough of Ho-Ho-Kus and SUEZ Advanced Solutions., Inc. in order to review DCA's determination of their November 10, 2021 agenda meeting and to provide Rate Counsel with the opportunity to review the Petition and file any comments that it deems necessary, and subject to the following provisions:

Any extension of the contract beyond the 20-year term or, pursuant to N.J.S.A. 58:26-25(c)(4), 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.

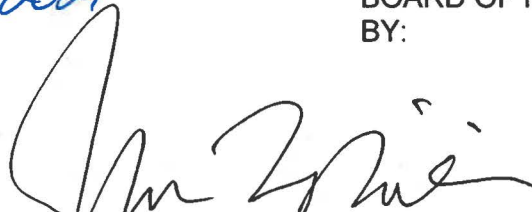
The Board **FURTHER DIRECTS** the Borough to serve future petitions upon the Director, Division of Rate Counsel.

Additionally, Rate Counsel is **HEREBY ORDERED** to file any additional comments in this matter on or before November 29, 2021, which will be reviewed by the Board for a further determination, if necessary.

This Order shall be effective on November 4, 2021.

DATED: *October 28, 2021*


BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER



DIANNE SOLOMON
COMMISSIONER



UPENDRA J. CHIVUKULA
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST: 
AIDA CAMACHO-WELCH
SECRETARY

IN THE MATTER OF THE PETITION OF THE BOROUGH OF HO-HO-KUS TO ENTER INTO A MAINTENANCE CONTRACT WITH A PRIVATE FIRM SUEZ ADVANCE SOLUTIONS (UTILITY SERVICE CO., INC.) FOR THE PROVISION OF WATER SUPPLY SERVICES

BPU DOCKET NO. WO21091144

SERVICE LIST

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