



Agenda Date: 10/23/24
Agenda Item: 5A

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 A CONTRACT BETWEEN)
THE BOROUGH OF BEACH HAVEN AND UTILITY) ORDER APPROVING A PUBLIC-
SERVICE GROUP WATER SOLUTIONS, LLC) PRIVATE CONTRACT
)
) DOCKET NO. WO24080614

Parties of Record:

Bruce W. Padula, Esq., on behalf of the Borough of Beach Haven
Brian Lipman, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On July 17, 2024, the Borough of Beach Haven (“Beach Haven” or “Borough”) filed a petition with the New Jersey Board of Public Utilities (“Board”), pursuant to N.J.S.A. 58:26-19 et seq., seeking approval to enter into a water supply public-private contract (“Contract”) with Utility Service Group Water Solutions, LLC (“USG” or “Company”) for full service tank management and maintenance (“Petition”). By this Order, the Board considers the requests in the Petition.

BACKGROUND

The New Jersey Water Supply Public-Private Contracting Act (“Water Act”) authorizes public entities to enter into contracts with private firms for the provision of water supply services following Board review and approval.¹ The Water Act confines Board review of such contracts to certain criteria including the financial and technical capacity of the private firm, the reasonableness of the contract terms, the degree to which franchise customers are protected from the contract’s risks, and whether the contract contains the provisions required by N.J.S.A. 58:26-23(e)(1), (2), and (6).²

Beach Haven is a municipal corporation located in Ocean County, New Jersey and the owner and operator of a water supply, transmission, and distribution system that provides services to citizens of Beach Haven pursuant to the County and Municipal Water Supply Act.³ Beach Haven has

¹ N.J.S.A 58:26-19 et seq.

² N.J.S.A. 58:26-25(c).

³ N.J.S.A. 40A:31-1 et seq.

absolute jurisdiction to set the terms and conditions under which it supplies water to customers within its municipal limits, pursuant to the County and Municipal Water Supply Act.

On April 18, 2024, Beach Haven published notice of its Request for Proposals (“RFP”) from vendors interested in providing tank maintenance services in newspapers of general circulation in Beach Haven’s service territory.

According to the Petition, USG submitted the lone bid, which was subsequently reviewed and accepted.

Following proper notice to the public in newspapers of general circulation in the Borough’s service territory pursuant to N.J.S.A. 58:26-24, Beach Haven held a public hearing regarding the proposed contract on May 30, 2024. No members of the public opposed the Contract.

On July 25, 2024, the Borough adopted Resolution No. 131-2024 authorizing the execution of a service agreement for a full-service maintenance and asset management program for water storage vessels in Beach Haven.

On July 17, 2024, Beach Haven filed applications with the Local Finance Board within the New Jersey Department of Community Affairs (“DCA”) and the Board for approval of the Contract pursuant to N.J.S.A. 58:26-24(f).⁴

On July 17, 2024, Beach Haven provided the New Jersey Department of Environmental Protection (“DEP”) with a report pertaining to its May 30, 2024 public hearing on the Contract. Pursuant to N.J.S.A. 58:26-25(a), DEP must complete its review and submit any comments to the Board and DCA within sixty (60) days of its receipt thereof. The Board received no comments from DEP.

According to the Petition, the Borough owns the water system which provides potable water service to residents and commercial and industrial establishments. Beach Haven also provides water storage, transmission and distribution services to the Borough’s residents and customers. The proper provision of such water storage, transmission and distribution services is necessary for the public health, safety and welfare of the Borough’s residents/customers and the financial well-being of the Borough. By the Petition, the Borough asks the Board to approve the Contract, which contemplates renovation, inspection, and maintenance work on two (2) separate water storage tanks located within the Borough, specifically a 500 kilogram (“KG”) concrete reservoir and a 200 KG elevated steel tank over a twenty (20)-year period. Beach Haven identified that it chose USG because the Company was deemed to have the necessary qualifications and expertise for the performance of the services.

DCA approved the Contract at its August 14, 2024 agenda meeting.

On September 16, 2024, the Borough consented to an extension of the Board’s sixty (60)-day review period to November 1, 2024, as permitted by N.J.S.A. 58:26-25(a).

By letter dated October 7, 2024, the New Jersey Division of Rate Counsel (“Rate Counsel”) stated that it had no objection to Board approval of the Contract.

⁴ The Borough provided written notice to DCA and the Board of its intent to submit an application on May 28, 2024.

CONTRACT TERMS

Sections 4.2 and 4.3 of the Contract include the following terms:⁵

BOROUGH RESPONSIBILITIES

The Borough shall:

- A. Own the fixed assets of the Storage Tank System.
- B. Control all finances including billing for and collection of rents, budgeting, capital improvement financing and payment of any fees and charges in connection with the Storage Tank System.
- C. Promptly procure and continually maintain in full force and effect and in accordance with their respective terms those Permits that it is responsible for under the terms of the Contract.
- D. Adopt all resolutions and enact all ordinances necessary to carry out the provisions of the Contract and enforce all such resolutions and/or ordinances.
- E. Provide access to the Storage Tank System for the Company, its agents and employees at all times.
- F. Designate the Authorized Representative of the Borough to act as contract administrator and liaison with the Company in connection with the performance of Services by the Company.
- G. Refrain from enacting any ordinances and/or adopting any resolution that would impair the ability of the Borough or the Company from complying with the Contract.
- H. Promptly pay all Debt Service, when due on any bonds or notes or other obligations by or on behalf of the Borough issued with respect to the Storage Tank System.
- I. Establish any and all annual budgets, rents, rates, Borough fees and other charges to be collected from the customers of the Borough Water System, which rents, rates, Borough fees and charges shall be at least sufficient to pay all amounts due to the Company, other vendors and necessary for Debt Service hereunder.
- J. Acquire and maintain all access, rights of way and easements necessary for the Company to maintain the Storage Tank System.
- K. Shall comply with Safe Drinking Water Act, Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act (as owner), Occupational Safety and Health Administration ("OSHA"), Public Employees Occupational Safety and Health, Water Quality Accountability Act.

⁵ Although summarized in this Order, the detailed terms of the Contract are controlling, subject to the findings and conclusions in this Order. The Board notes that it is evaluating the Contract in its entirety, but has elected to summarize these sections in this Order.

("WQAA"), Local Public Contracts Law ("LPCL") and any and all other applicable local, State and Federal laws, codes, ordinances and regulations as they pertain to the Storage Tank System. The Borough shall pay all regulatory fines and penalties, without limitations, assessed against the Company and/or the Borough for the Borough's non-compliance therewith.

COMPANY RESPONSIBILITIES

- A. The Company shall maintain and repair the Storage Tank System during the term of this Contract on behalf of the Borough in compliance with all Federal, State and Local laws, regulations and permits consistent with the Contract.
- B. During the term of the Contract, the Company shall keep the Storage Tank System in good repair and working order, consistent with industry standards and shall maintain and repair the Storage Tank System in an efficient and economical manner all in accordance with the Contract.
- C. The Company shall develop and implement an approach for future rehabilitation of the Storage Tank System and ensure coordination of Storage Tank System operations with the Borough.
- D. The Company is responsible for all costs of materials, equipment and supplies in maintenance of the Storage Tank System.
- E. The materials for Minor System Repairs shall be purchased by the Company and the costs thereof in excess of \$500 per individual repair and Minor System Repairs exceeding an aggregate of \$2,500 per year, with an appropriate accounting, shall be reimbursed by the Borough as a Borough cost responsibility.
- F. The Company shall provide annual reporting to the Borough, the form of which shall be determined by the Authorized Representatives, for Services performed for the Storage Tank System.
- G. The Company is responsible for all labor and equipment costs for the Maintenance Items and Minor System Repairs.
- H. All purchases that utilize Borough funds must comply with the provisions of the LPCL, the Borough's purchasing regulations, the Business Registration Certificate ("BRC") requirements, and the Internal Revenue Service requirement for an executed W-9 all for submission to the Borough's Purchasing Agent.
- I. Materials, Labor, Vehicles. The Company shall provide, at its cost and expense, all labor, materials, machinery, vehicles, equipment, fuel, power, chemicals, supplies, spare parts, expendables, consumables, and all else necessary therefor or incidental thereto which is necessary for the, maintenance or repair of the Storage Tank System in accordance with applicable laws, regulations and ordinances and the Contract.
- J. Hazardous Substances. The Company is responsible for testing the current materials in place on the tanks for hazardous content. If, while providing the Services and/or during the course work necessary to make the Scheduled Capital

Improvements or repairs and/or improvements to the Storage Tank System, hazardous or toxic waste or materials (as defined in applicable Federal and/or State laws and regulations) are discovered by the Company, it shall NOT be the obligation of the Company to remove and dispose of such hazardous substance. The Company shall immediately notify the Borough upon becoming aware of the presence of such hazardous or toxic waste or materials, and shall immediately notify such other governmental agencies as may be required by laws and shall take such further actions to assist the Borough in protecting the health, safety and welfare of the public. The Borough shall indemnify the Company for any and all costs or expenses it may incur in connection with this Section. If a hazardous substance impairs the maintenance of the Storage Tank System, the Borough shall remediate the hazardous substance so as to permit the Company to maintain the Storage Tank System pursuant to the Contract. The Borough shall pay for all costs for the removal of the hazardous substance and any clean-up activities associated with such disposal, discharge, spill or leak. The Borough shall have the right to pursue the parties legally responsible for the disposal, discharge, spill or leak for the costs of the removal of the offending materials and any clean-up activities.

- K. Response Requirements for Emergencies. The Company shall respond to Storage Tank System emergencies as soon as reasonably possible, but in any event the Company shall begin planning and staging to mobilize to respond to an emergency at least twelve (12) hours after the Company's receipt of written notice, which may be sent via email or text message, of an emergency from the Borough.
- L. Maintenance Program. The Company shall maintain a comprehensive maintenance program for the Storage Tank System. The maintenance management program shall:
1. Seek to ensure efficiency, long-term reliability and conservation of capital investment in accordance with industry standards, if any;
 2. Be otherwise in accordance with industry standards; local, State and Federal codes; manufacturer's equipment recommendations;
 3. Be documented; and
 4. Provide all warranties on new equipment purchased after the Effective Date of the Contract to the Authorized Representative of the Borough.
 5. Any modifications or major maintenance affecting the appearance of the facilities in the Storage Tank System which are visible to the public shall be performed only after receipt of the prior written approval of the Authorized Representative of the Borough.
- M. Reporting Requirements.
1. The Company shall provide comprehensive annual reports in a format reasonably satisfactory to the Borough for maintenance plans and activities including conditions of the Storage Tank Systems, and safety reports regarding accidents, injuries, and damages to Borough property and other relevant information.
 2. The Company shall maintain up-to-date financial records as they apply to the Services rendered under the terms of the Contract. All records shall be kept in a manner that shall enable the Borough to comply with State municipal accounting procedures.

3. The Company shall provide the Borough with its periodic financial reports as they apply to the Services rendered under the terms of the Contract. At a minimum, such reports shall include the following:
 - a. Monthly reports on or before the twenty-fifth (25th) Day of each month with respect to the prior month and on or before twenty-fifth (25th) Day after the end of each Contract Year a cumulative report as of the end of each prior Contract
 - b. The Company shall deliver a year-end report to the Borough consisting of a compilation of the monthly and quarterly reports set forth above
 - c. The Company shall provide such other reports as may be reasonably requested from time to time by the Borough.

N. Staffing

1. Existing Borough Employees will continue their employment with the Borough.
2. The Company shall provide a staff of qualified and experienced employees who have direct experience in maintaining systems similar in nature and character to the Storage Tank System and shall provide such additional third-party support as may be needed to perform its duties and obligations hereunder. Said third parties shall be equally qualified for the particular services to be performed and shall not have any direct claim against the Borough whatsoever. The Company shall at all times maintain the necessary number of employees, staff and/or third-party contractors to maintain the Storage Tank System in accordance with the Contract and to adequately maintain the Storage Tank System in good repair and working order.

- O. Licenses. The Company, its employees and/or its contractors shall acquire and hold, all required Federal, State and local approvals, licenses and certifications necessary maintain the Storage Tank System required to be obtained by the Company in accordance with the Contract.

P. Compliance with Laws, Regulations and Permits.

1. After the Effective Date, the Company shall comply with all applicable local, State and Federal laws, codes, ordinances and regulations as they pertain to the Services. The Company shall pay all regulatory fines and penalties, without limitation, assessed against the Borough, and/or the Company for the Company's non-compliance therewith.
2. The Company shall, where applicable, comply with, satisfy, and pay all costs or fees (but not remediation) associated with, all regulatory requirements pertaining to the Services.
3. All repairs and/or improvements to the Storage Tank System made by the Company shall be in accordance with existing Borough ordinances.
4. The Company shall comply with the provisions of all Borough Contracts. The Borough reserves the right to enter into future agreements in connection with the Storage Tank System provided those agreements

- Q. Safety and Security. The Company shall provide, be responsible for and maintain security and safety for the Storage Tank Systems while providing the Services as is reasonably appropriate. The Company shall be responsible for initiating,

maintaining and supervising all safety precautions in connection with its performance of the Services and shall take all reasonable precautions for safety of, and shall provide protection to prevent damage, injury or loss to the property and all materials; employees; subcontractor employees, agents, servants and invitees; and the premises where work is performed and all occupants or other persons at the premises. Security of all access points to the Storage Tank System, including fences, when reasonably required, shall be maintained in neat order and structural integrity. Gates, access points and doors, when reasonably required, shall be kept locked, structures shall be protected from unauthorized entry and security alarms, when reasonably required, shall be maintained. The Company shall conduct all maintenance of any facilities in compliance with applicable health and safety regulations, including, but not limited to: OSHA, general industry regulations, including requirements for confined space entry, respiratory protection and hazard communication. Notwithstanding the foregoing, the Borough and the Company agree that the intent of Section 4.3(Q) is to ensure that the Company secures its project sites while it is performing the Services on the Storage Tank System. Section 4.3(Q) is not intended to shift responsibility to the Company for the overall security of the Storage Tank System during the Term of the Contract.

- R. Notwithstanding Section 4.3(K) of the Contract, the Company shall immediately notify the Borough of any activity, problem or circumstances in connection with the Storage Tank System that it becomes aware of that threatens the health, safety and welfare of the users of the Storage Tank System or the residents of the Borough.
- S. The Company shall maintain the Storage Tank System in accordance with all applicable laws and regulations.
- T. The Company shall dispose of all sludge, scum, grit, screenings, trash and refuse generated by or resulting from the maintenance of the Storage Tank System in accordance with applicable regulations pertaining thereto.
- U. The Company shall cooperate with and assist police, emergency management and fire personnel in times of fire or other emergencies. Notwithstanding the foregoing, the Company is not responsible or liable for the operation of the Storage Tank System or the Borough Water System, and events that are impacted by low water pressure (e.g., firefighting activity, etc.) or other operational issues shall be addressed by the Borough. However, the Company is willing to cooperate and assist the Borough in such emergencies to the best of its abilities.
- V. Maintenance Items and Minor System Repairs of the Storage Tank System shall include, but not be limited to: those items identified in Exhibit B, routine painting and repairs of structures, both interior and exterior; inspection services and maintain and update the Asset Management Plan for the Storage Tank System.
- W. Water Quality Standards. The Company shall comply with all Federal, State and local regulations concerning safe drinking water standards in the provision of Services during the term of the Contract.
- X. The Company shall prepare, maintain and update, with input from the Borough, an Asset Management Plan for the Storage Tank System as required by the WQAA

Shall pay all regulatory fines and penalties, without limitations, assessed against the Company and/or the Borough for the Company's non-compliance therewith.

- Y. Access to and Maintenance of Records. The Company shall ensure the maintenance of all records of information relevant to the maintenance of Storage Tank System during the term of the Contract. The Company shall cause to be maintained a computerized recordkeeping system for all maintenance functions performed, which shall be backed up offsite at a secure facility. The Company shall maintain all documentation related to products, transactions or services under this contract for a period of five (5) years from the date of final payment. Such records shall be made available to the New Jersey Office of the State Comptroller upon request. The Borough shall maintain ownership of all records and data maintained in connection with the Storage Tank System which shall be provided by the Company to the Borough, in a format agreed to by the Borough, upon request of the Borough.
- Z. Operations Review by Borough. The Borough shall have the right to and intends to exercise its right to actively participate in the review of the Services performed by the Company and any subcontractor throughout the term of this Contract.

DISCUSSION AND FINDINGS

The Water Act authorizes public entities to enter into contracts with private firms for the provision of water supply services ("Public-Private Contracts"). N.J.S.A. 58:26-20. Such Public-Private Contracts may include services related to financing, designing, construction, improvement, operation, maintenance, administration or any combination thereof, of a water supply facility (i.e., water system). Ibid. 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(c) confines the scope of the Board's review to the following criteria:

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 paragraphs (1), (2), and (6) of subsection e. of section 5 of 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. N.J.S.A. 58:26-25(c).

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 that Board jurisdiction should be “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 (4) 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.

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

1. USG has the financial capacity, and technical and administrative experience, to ensure continuity of service over the term of the Contract pursuant to N.J.S.A. 58:26-25(c)(1). USG provides a suite of additional global solutions, technologies, information systems, and approaches to real-life challenges facing United States water and wastewater utilities.

2. The terms of the Contract are reasonable given the services to be performed by USG pursuant to N.J.S.A. 58:26-25(c)(2). Given the circumstances of this matter, the terms set forth in the Contract for each tank are appropriate.
3. N.J.S.A. 58:26-25(c)(3) is intended to protect franchise customers outside of Beach Haven. In this instance, all of Beach Haven's customers are located within Beach Haven's boundaries and, therefore, this portion of the statute is not applicable. 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 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(e)(2): The allocation of risk 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): Current employees of the public entity whose positions of employment will be affected by the terms of the Contract are adequately addressed.

The Board acknowledges the Borough's initial failure to serve the Petition on Rate Counsel. While there is no statutory requirement that the Borough serve copies of Public-Private Contracts upon Rate Counsel, the Board notes that service of filings upon the Board also require service upon the Director of Rate Counsel pursuant to N.J.A.C. 14:1-5.12. Additionally, Rate Counsel has fully participated and filed comments in other matters involving the approval of Public-Private Contracts. Nonetheless, it appears that the Borough inadvertently, rather than intentionally, failed to provide Rate Counsel with a copy of its filing. Rate Counsel has since been served and taken the opportunity to file comments in this matter, which the Board has considered

Therefore, based upon the above, the Board **HEREBY APPROVES** the Contract, subject to the following:

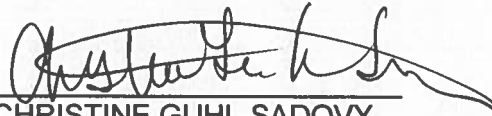
Any extension of the Contract beyond the scope of work for each tank or, pursuant to N.J.S.A. 58:26-25(c)(4), any amendment of the Contract to change the formula or other basis of determining charges contained therein shall be subject to Board review and approval.

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

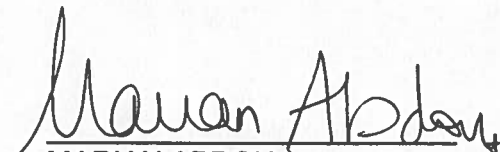
This Order shall be effective on October 30, 2024.

DATED: October 23, 2024

BOARD OF PUBLIC UTILITIES
BY:


CHRISTINE GUHL-SADOVY
PRESIDENT


DR. ZENON CHRYSOSTODOULOU
COMMISSIONER


MARIAN ABDOU
COMMISSIONER


MICHAEL BANGE
COMMISSIONER

ATTEST: 
SHERRI L. GOLDEN
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 A CONTRACT BETWEEN THE BOROUGH OF BEACH HAVEN AND UTILITY SERVICE
GROUP WATER SOLUTIONS, LLC.

BPU DOCKET NO. WO24080614

SERVICE LIST

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