



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 TOWNSHIP OF NORTH)
BRUNSWICK (MIDDLESEX COUNTY))
APPLICATION TO THE BOARD OF PUBLIC)
UTILITIES INTENT TO ENTER CONTRACT FOR)
WATER SUPPLY SERVICES VIA PUBLIC-)
PRIVATE PARTNERSHIP AGREEMENT) ORDER APPROVING A PUBLIC-
PRIVATE CONTRACT WITH THE
TOWNSHIP OF NORTH
BRUNSWICK AND VEOLIA
DOCKET NO. WO22080477

Parties of Record:

Ronald H. Gordon, Esq., Rainone, Coughlin, Minchello, LLC on behalf of the Township of North Brunswick
Jonathan Prince, Esq., on behalf of Veolia Water North America Operating Services, LLC.
Brian Lipman, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

BACKGROUND

On August 4, 2022, pursuant to the New Jersey Water Supply Public-Private Contracting Act (“Water Act”), N.J.S.A. 58:26-19 to 27, the Township of North Brunswick (“Petitioner”, “North Brunswick”, “Township”, or “Owner”), submitted an application (“Petition”) with the New Jersey Board of Public Utilities (“Board”) seeking authorization to enter into a contract with Veolia Water North America Operating Services, LLC (“Veolia” or “VWNA”), for water supply services.

The contract, titled “Public-Private Partnership Agreement for the Operation, Maintenance, Management, and Repair of the Township of North Brunswick Municipal Water System” (“Agreement”), is a 20-year agreement, set to commence on October 1, 2022, under which Veolia will manage, operate, and maintain, subject to Township approval, the Township-owned water treatment plant and water distribution system.

The Petitioner made the application in accordance with N.J.S.A. 58:26-24(f) and N.J.S.A. 58:26-25, to the 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 Township is a municipal corporation within the County of Middlesex. 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., North Brunswick provides services to its citizens. North Brunswick also 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.

On February 7, 2022, the Township Council authorized the Township to solicit proposals from qualified vendors for a public-private agreement for the operation, maintenance, management and repair services for the Township's municipal's water system in accordance with the New Jersey's Water Supply Public-Private Contracting Act, N.J.S.A. 58:26-19, et. seq. The Township received one (1) proposal from Veolia and on June 27, 2022, the Township Council adopted Resolution No. 202-6.22 and accepted the bid from Veolia and awarded a contract for the operation, maintenance, and management and repair services for the Township's water system.

Pursuant to N.J.S.A. 58:26-24(a), the Township conducted a public hearing on the proposed contract with the requisite notice provided pursuant to N.J.S.A. 48:58:26-24(b). No comments were made at the public hearing. The public was advised that the records would be kept open for a period of seven days until August 1, 2022 at 8:00 P.M. At the close of the public comment period, no statements were submitted.

TERMS OF THE PUBLIC PRIVATE CONTRACT¹

A. VWNA's Services - General

- VWNA shall provide a sufficient number of certified and qualified personnel, including management, administrative, operational, technical, laboratory, and clerical, who meet relevant State of New Jersey requirements and certifications regarding water treatment operations, maintenance and management and are capable and demonstrate experience necessary to operate the facilities.
- VWNA shall provide ongoing training and education for appropriate personnel in all necessary areas of modern water process control, maintenance, safety, and supervisory skills.
- VWNA shall develop and/or supply and utilize computerized programs for maintenance, process control, cost accounting, and laboratory Quality Assurance/Quality Control. Such programs shall be capable of readily providing historical data and trends. For software systems provided by the Owner, if Veolia provides upgrades, replacements or maintenance, the allowable mark up for these costs shall be 5%.
- Within 15 days after VWNA begins service under the Agreement, VWNA will provide Owner with confirmation of or VWNA's comments to, Owner's physical inventory of equipment in use at the Project and a general statement as to the condition of each piece of equipment.
- VWNA will provide Owner with confirmation of or VWNA's comments to the Owner's physical inventory of chemicals and other consumables on hand within 30 days of

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.

the later of the date VWNA begins services under the Agreement and the date VWNA receives the inventory from Owner. VWNA will provide Owner with the same quantity of chemicals or equivalent upon termination of the Agreement.

- VWNA shall be responsible for maintaining all manufacturers' warranties on new equipment purchased by Owner and assist Owner in enforcing existing equipment warranties and guarantees.
- VWNA shall provide the Owner with documentation that preventive maintenance is being performed on Owner's owned equipment in accordance with industry best practices on a monthly basis. Such a maintenance program must include documentation of corrective and preventive maintenance and a spare parts inventory.
- VWNA shall operate, maintain and/or monitor the Project on a 24-hour per day, seven day per week schedule.
- Visits may be made at a reasonable time by Owner's officers so designated by the Owner's representative. Keys for the Project shall be provided to Owner by VWNA for such visits. All visitors to the Project shall comply with VWNA's operating and safety procedures.
- VWNA will implement and maintain an employee safety program in compliance with applicable laws, rules and regulations and make recommendations to Owner regarding the need, if any, for Owner to rehabilitate, expand or modify the Project to comply with governmental safety regulations applicable to VWNA's operations hereunder and federal regulations promulgated pursuant to the Americans With Disability Act ("ADA"). Nothing in the Agreement shall be construed to place upon VWNA a duty to find and report violations of either the safety laws or the ADA at the Facility.
- VWNA may modify the process and/or facilities to achieve the objectives of the Agreement, provided the modification cost is equal to or below the Maintenance and Repair Cap in Appendix A - Definitions. Otherwise, Veolia shall obtain Owner's prior written approval before proceeding.
- VWNA shall maintain at all times a toll-free 24-hour telephone number where customers of the Facilities can report any emergencies. Within two (2) hours of being notified, VWNA shall respond to emergencies and unusual circumstances in accordance with applicable regulations and requirements and with such personnel and equipment as necessary to maintain or restore the operations of the Facilities in a timely manner with the least possible disruption or inconvenience to the users of the Facilities. VWNA shall provide Owner with a log of calls and responses on a monthly basis as part of VWNA's monthly report.
- In any emergency affecting the safety of persons or property, VWNA may act without written amendment or change order, at VWNA's discretion, to prevent threatened damage, injury or loss. VWNA will provide notice to Owner as soon as possible but not later than 24 hours after the event. VWNA shall be compensated by Owner for any such emergency work notwithstanding the lack of a written

amendment. Such compensation shall include VWNA's direct Costs, excluding VWNA labor for the emergency work.

- As required by law, permit or court order, VWNA will prepare plant performance reports and submit them to Owner or its designee for signature and transmittal to appropriate authorities. These reports will include preparing Consumer Confidence Reports (CCRs) for the Owner to post online for customers of the System.
- VWNA shall maintain all documentation related to products, transactions, or services under the 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.
- VWNA will provide laboratory testing and sampling presently required by plant performance portions of the Safe Drinking Water Act, and/or any federal, state or local rules and regulations, statutes or ordinances, permit or license requirements or judicial and regulatory orders and decrees.
- The Owner is the named permittee for various permits and approvals for the potable water Facilities. VWNA shall be responsible for obtaining, including but not limited to, filling out all required applications and forms, supplying required data, and payment of required annual fees for NJ Water Allocation Permit, and maintaining all necessary existing State, Federal and local permits, licenses and other governmental approvals for the operation of the Facilities and the equipment owned by the Owner and used in connection with the Facilities, or provided by the Owner for such use.
- VWNA will manage the collection and hauling of Waste to Owner's existing or approved disposal sites. The cost for transportation and disposal of Residuals shall be paid as a pass-through in accordance with Sections 8 and 9; the cost for collection and disposal of solid waste and screenings is included in the Annual Fee. It shall be the sole right and responsibility of Owner to designate, approve or select disposal sites to be used by VWNA for Owner's waste materials. All Waste and/or byproduct treated and/or generated during VWNA's performance of services is and shall remain the sole and exclusive property of Owner. All manifests or other documentation required for disposal of Waste shall be signed by or in the name of the Owner.

B. VWNA's Scope of Services – Water Treatment Plant

- Within the design capacity and capabilities of the water treatment plant described in more detail in **Appendix B** of the Agreement, VWNA will manage, operate, maintain, and repair the water treatment plant so that finished water produced from the plant meets the requirements specified in **Appendix C-2** of the Agreement. Maintenance and repair responsibilities are further defined by the Maintenance & Repair Cap in the Definitions section.
- VWNA shall be responsible for safety and security, utilizing the existing fences, gates, access points and doors. VWNA shall use commercially reasonable efforts to protect against losses resulting from the theft, damage, or unauthorized use of property owned

by Owner. The foregoing notwithstanding, VWNA shall be liable for property damage only to the extent such losses are directly caused by the negligent acts or omissions of VWNA, and VWNA shall have no liability for property damage caused solely by third parties.

- Owner shall pay for the cost of chemicals and Residual transport & disposal as a pass-through cost in accordance with Sections 8 and 9.

C. VWNA's Scope of Services - Water Distribution System

- The Article shall apply to VWNA's maintenance and repair services for the Owner's water distribution system, including the pump stations, and three (3) water storage tanks. The water distribution system is described in **Appendix B** of the Agreement. Any additional services or water mains will constitute a change of scope. Any change in scope, including but not limited to installation of new service taps, shall be payable in accordance with Section 8.2(c). VWNA shall consult with the Owner on an annual basis to establish the fees for new service taps.
- VWNA will maintain and repair the water distribution system. Maintenance and repair responsibilities are further defined by the Maintenance & Repair Cap in the Definitions section. VWNA's responsibility for the water distribution system shall end at the water main, and shall not include service lines.

D. VWNA's Scope of Services – Meter Testing and Replacement

- Owner shall provide all reasonable and necessary assistance to VWNA in order to expedite the installation process, including scheduling meter replacement. Owner shall notify VWNA when residential water meters up to and including 1-inch are damaged or faulty.
- VWNA shall install, at its sole cost and expense, up to 50 residential meters and meter recording devices per year as required due to damaged or faulty meters and/or transmitters. VWNA shall be responsible for purchasing and maintaining an inventory of 50 residential water meters and 50 transmitters per year. VWNA shall charge the cost of the meters and recording devices as a pass-through cost as defined in Section 8 of the Agreement- Compensation. All residential meters shall be Neptune T-10 and MACH 10.
- Within 90 days of the date of the Agreement, the parties shall meet to discuss and formulate a cybersecurity plan for the Facility. The plan shall provide for the implementation of appropriate technical and organizational measures to ensure an appropriate level of security for the computer systems and data. The plan shall include and allocate responsibility for the cybersecurity measures required under the New Jersey Water Quality Accountability Act. Throughout the term of the Agreement, the parties shall update the cybersecurity plan to address new risks, changes to the software and computer systems, and as may otherwise be necessary and appropriate.
- VWNA is responsible for implementing a large meter testing program for testing each of the approximately 108 water meters 3 inches and larger every four years (larger meter population is detailed in Appendix B of the Stipulation). The results shall be recorded and provided to the Owner. All water meter testing shall be done in accordance with the

current edition of the American Water Works Association Manual – M6, Chapter 5 “Testing of Meters, Test Procedures, and Equipment”.

- Notwithstanding anything in the Agreement to the contrary, failure to install meters and Automated Meter Reading (“AMR”) devices due to circumstances beyond the control of VWNA, including denial of access for purpose of installation, shall not constitute a default by VWNA under the Agreement.

E. OWNER’s Duties

- The Owner shall fund all necessary Capital Expenditures, which may be performed by VWNA under a written change order to the Agreement. The Owner shall develop the Capital Plan in consultation with VWNA. Priority shall be given to safety and the ADA related expenses described in Section 2.10. Any loss, damage, or injury resulting from Owner’s failure to provide capital improvements when reasonably requested by VWNA shall be the sole responsibility of Owner. Large Meter replacements and lead service line replacements shall be considered Capital Expenditures.
- The Owner shall keep in force all Project warranties, guarantees, easements and licenses that have been granted to Owner and are not transferred to VWNA under the Agreement.
- The Owner shall pay all sales, excise, *ad valorem*, property, franchise, occupational and disposal taxes, or other taxes associated with the Project other than taxes imposed upon VWNA’s net income and/or payroll taxes for VWNA employees. In the event VWNA is required to pay any sales tax or use taxes on the value of the services provided by VWNA hereunder or the services provided by any subcontractor of VWNA, such payments shall be reimbursed by the Owner unless the Owner furnishes a valid and properly executed exemption certificate relieving the Owner and VWNA of the obligation for such taxes. In the event the Owner furnishes an exemption certificate which is invalid or not applicable to services by VWNA, the Owner shall indemnify VWNA for any taxes, interest, penalties, and increment costs, expenses or fees which it may incur as a result of VWNA’s reliance on such certificate.
- The Owner shall provide VWNA, within a reasonable time after request and on an “as available” basis, assistance in the form of labor and equipment (which equipment shall only be operated by Owner’s operators) within Owner’s control so that VWNA may discharge its obligations under the Agreement in the most cost-effective manner.
- The Owner warrants that during the interim period between the initial Project inspection by VWNA and the Commencement Date, the plants, facilities and equipment have been operated only in the normal course of business, all scheduled and proper maintenance have been performed and there are no issues known to Owner regarding the condition of the Project, and facilities composing the Project and/or any equipment used by the Project. Owner warrants and agrees that it will turn over the plants, facilities and equipment to VWNA in working order and in compliance with all permit(s) and all other applicable laws, rules and regulations.
- The Owner shall continue to be responsible and pay for the general administration and enforcement of (i) the water distribution systems, (ii) new water connections unless VWNA is retained to perform such functions as a Change in Scope, and (iii) long-term System

and Service Area planning. Typical administration costs associated with the above activities include costs such as the services of the auditor, lawyer, and liability insurance, and each party shall pay the costs of its own consultants, auditors, accountants, attorneys and the like.

F. Annual Fees/Contract Price

- VWNA's compensation under the Agreement shall consist of an Annual Fee and Pass-Through costs, as further detailed in the Agreement. The Annual Fee for the period October 1, 2022, through September 30, 2023, shall be as follows:

a) Annual Fee: \$1,635,500.

The Annual Fee includes VWNA's Scope of Services as defined in Sections 2, 4, 5, and 6.. The Annual Fee covers, but is not limited to, the following items:

- salaries including overtime and benefits for VWNA staff,
 - laboratory fees for water quality sampling,
 - preventative maintenance, the cost of which is to be borne by VWNA hereunder,
 - emergency response team costs, if and where necessary,
 - administrative oversight including office supplies, and
 - internet and phone service costs.
- Pass-Through Costs Plus Markup:
 - a) Chemicals: Cost plus 5% markup.
 - b) Residual Transport & Disposal: Cost plus 5% markup.
 - c) Maintenance & Repair: Cost plus 12.5% markup (in accordance with Maintenance & Repair Cap described in Section A9).
 - d) Residential Meter Replacements: Cost plus 5% markup.
 - Pass-Through Costs Administration:
 - a) Items above shall be paid for by VWNA and submitted to the Township for reimbursement, at cost plus the specified markup above.
 - b) Before the beginning of each contract year, VWNA and Owner shall establish the budgeted amount for each Pass-through category related to chemicals, Residuals, and residential meters. VWNA will notify Owner when actual expenditures plus markup equal eighty percent (80%) of the budgeted amount.

- c) For costs related to Maintenance and Repair, the following administrative approach shall apply:
- (1) On a quarterly basis, VWNA, Owner, and Owner's engineering consultants shall meet to review the status and cost of completed and upcoming Maintenance and Repair activities.
 - (2) For each Maintenance and Repair activity estimated to have a cost at or above the Maintenance and Repair cap, Veolia shall prepare and submit to the Township a written request for authorization, and the Township shall in turn provide a purchase order as authorization.

The Local Finance Board within the Division of Local Government Services in DCA approved the public-private contract at its September 7, 2022 agenda meeting.

New Jersey Division of Rate Counsel ("Rate Counsel") Comments

By letter dated September 21, 2022, Rate Counsel stated that it had no objection to the Board approving the contract. When submitting this Petition, the Township of North Brunswick did not serve Rate Counsel. While the Board has not adopted a specific regulation governing service of public private contracts, 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. 14:1-5.12. Rate Counsel has participated in several other similar filings and their review was conducted within the course of the 60-day statutory time frame.

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"). 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 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.

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

[N.J.S.A. C 58:26-23.]

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

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 (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.

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

1. Veolia 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)]. Veolia 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 Veolia [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, the term is appropriate.

3. N.J.S.A. 58:26-25(c)(3) is intended to protect franchise customers outside of North Brunswick. All of North Brunswick's customers are located within North Brunswick'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

The Board acknowledges Rate Counsel's lack of service of the Petition by the Township. While there is no statutory requirement that the Township 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 Township inadvertently, rather than intentionally, failed to provide Rate Counsel with a copy of its filing.

Therefore, based upon the above, the Board **HEREBY APPROVES** the Public-Private Contract between the Township of North Brunswick and Veolia subject to the following provision:


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 Township to serve future petitions upon the Director, Division of Rate Counsel.

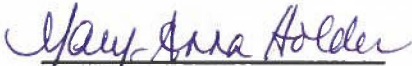
This Order shall be effective on September 30, 2022.

DATED: September 28, 2022


BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



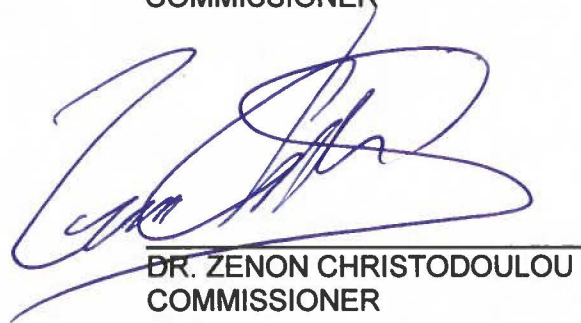
MARY-ANNA HOLDEN
COMMISSIONER



DIANNE SOLOMON
COMMISSIONER




ROBERT M. GORDON
COMMISSIONER



DR. ZENON CHRISTODOULOU
COMMISSIONER

ATTEST: 

ROBERT M. GORDON
COMMISSIONER



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

In the Matter of the Township of North Brunswick (Middlesex County) Application to the Board of Public Utilities Intent to Enter Contract for Water Supply Services Via Public-Private Partnership Agreement

BPU DOCKET NO. WO22080477

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