



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

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|--|---|---------------------------|
| PETITION FOR CONTRACT APPROVAL BY |) | ORDER APPROVING A PUBLIC- |
| TOWNSHIP OF LONG BEACH UNDER NEW |) | PRIVATE CONTRACT WITH THE |
| JERSEY WATER SUPPLY PUBLIC PRIVATE |) | TOWNSHIP OF LONG BEACH |
| CONTRACTING ACT, N.J.S.A. 58:26-19 ET SEQ. |) | AND SUEZ ADVANCED |
| |) | SOLUTIONS |
| |) | |
| |) | DOCKET NO. WO19070783 |

Parties of Record:

Tennant D. Magee, Sr., Esq., Tennant Magee Law, on behalf of the Petitioner
J. Shane Albritton, Esq., on behalf of SUEZ Advanced Solutions
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On July 1, 2019, 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 Long Beach ("Petitioner," "Long Beach," or "Township"), submitted an application ("Petition") for approval of a contract with Suez Advanced Solutions ("SUEZ," or "Company") for water tank maintenance.

Petitioner agrees to engage SUEZ to provide the professional service needed to maintain and sustain its five (5) water storage tanks as identified below:

- Beach Haven Terrace water plant elevated storage tank
- Peahala elevated storage tank
- Beach Haven Terrace water plant ground storage tank
- Holgate elevated storage tank
- Brant Beach elevated storage 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). 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 (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.

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. 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 Petitioner is located in Ocean County. The Township of Long Beach is a municipal corporation within the County of Ocean. 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., Long Beach provides services to its citizens.

Long Beach 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. Long Beach determined to enter into a contract for water tank maintenance pursuant to the Water Act.

On February 14, 2019, Long Beach issued a notice of its request for proposals ("RFP") of vendors interested in providing water tank maintenance services and published same in the Beach Haven Times as well as The Asbury Park Press, newspapers of general circulation, and also on the Township's website.

All proposals were received by the March 15, 2019 deadline. Two proposals (SUEZ and Alpine Painting & Sandblasting Contractors) were received and reviewed shortly thereafter.

On April 23, 2019 Long Beach 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.

Long Beach negotiated a contract with SUEZ on June 3, 2019, which included the required provisions pursuant to N.J.S.A. 58:26-23(e). Long Beach chose SUEZ for the following reasons:

1. SUEZ has a track record of successful performance not only in New Jersey, but in numerous states.
2. SUEZ provided detailed and thorough inspection reports and recommendations for each tank.

3. 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, Long Beach agreed to enter into a 20-year contract with SUEZ to provide it with a long-term tank maintenance plan on the five storage tanks.

Notice of the public hearing was published in the Beach Haven Times, a newspaper of general circulation, on April 18, 2019. 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 May 6, 2019 in the Township Municipal Court Room. Mayor Mancini and Commissioner Bayard spoke at the public hearing and their main comments dealt with the cost savings which will help maintain their facilities over the next 20 years. No members of the public spoke.

A resolution was adopted on June 3, 2019 (Resolution No. 19-0603.17(a) by the Long Beach Council authorizing the process for a public private contract with SUEZ for tank maintenance in accordance with N.J.S.A. 58:26-23 et seq.

Long Beach obtained a written opinion from its bond counsel Parker McCay P.A., on June 25, 2019 in accordance with N.J.S.A. 58:26-23(g).

TERMS OF THE PUBLIC-PRIVATE CONTRACT¹

Long Beach agrees to engage the Company to provide the services set forth herein to maintain and perform the specific maintenance work on five (5) separate water storage tanks located in the Township, specifically, a 300,000 gallon Beach Haven Terrace water plant elevated storage tank, a 300,000 gallon Peahala elevated storage tank, a 330,000 gallon Beach Haven Terrace water plant ground storage tank, a 150,000 gallon Holgate elevated storage tank, and a 150,000 gallon Brant Beach elevated storage tank (collectively "Water Tanks"), each of which is also set forth and referenced in the Township's Request for Proposals for Management and Full-Service Maintenance Program for Water Storage Vessels ("RFP Specifications"). Except as set forth herein, the Company shall provide the goods and services set forth in the RFP Specifications. The Company shall also inspect all water tanks annually and provide a complete, written annual report provided to the Township on or before November 30th of each calendar year and a minimum of two (2) washout inspections with detailed engineering report shall be conducted in any ten (10) year period. The Company shall also be responsible for all corrections and repairs to the water tanks necessitated by acts of vandalism or through normal deterioration. The Company shall also be responsible to repaint all lettering on the Water Tanks in same size, color, and location that existed prior to the Company's repainting of the Water Tanks.

The annual fee for the first year of the Agreement shall be due and payable upon the completion of the required goods and services for the Water Tanks set forth in the RFP Specifications. The annual fee for each subsequent year of the Agreement shall be paid on a quarterly schedule set by the Township.

The Company acknowledges and agrees that it has inspected the Water Tanks and that the Company is accepting the requirements of the RFP Specifications on based upon the existing condition of the Water Tanks, as well as the existing equipment located on the Water Tanks. The

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.

consideration shall not be amended on any basis, unless additional services are proposed by the Township and mutually agreed upon by the Parties.

The Company acknowledges and agrees that each of the Water Tanks has wireless telecommunications equipment ("Wireless Equipment") affixed to them by various third-party private companies (collectively "Wireless Companies") and that each such Wireless Company has a separate lease agreement (collectively "Lease Agreements") with the Township which sets forth the terms and conditions of the Wireless Companies' interests in each of the Water Tanks. Accordingly, the Company acknowledges and agrees that the services set forth in the RFP Specifications that it is required to perform are subject to the terms of the Lease Agreements and any scheduling or other issues that may arise therefrom. The scheduling of the services to be performed, therefore, shall be directed by the Township pursuant to and in accordance with the terms of set forth in the Lease Agreements. Based upon the foregoing, the Company shall be required to mobilize to perform the services set forth in the RFP Specifications within thirty (30) days' notice by the Township to the Company and the Company shall not perform any services without such prior notice received from the Township. No action relating to, touching upon, or affecting the Wireless Equipment shall be undertaken by the Company without written notice and approval issued by the Township. In the event that certain services cannot be performed by the Company as a result of a the Lease Agreement and/or a decision by the Wireless Company, those services shall not be performed by the Company and the amount of consideration relating to that/those services shall not be paid by the Township to the Company. The Company understands and agrees that this Agreement shall be subject to the Lease Agreements. The Company releases and waives, to the fullest extent permitted by law, the Township from any and all claims, known or unknown, and seen or unforeseen for consideration and/or damages relating to this Agreement in the event any scope of services are unable to be performed as a result of the Lease Agreements and/or decisions by the Wireless Companies.

The Company shall be responsible for any and all permits and approvals required by the State of New Jersey and/or the County of Ocean to accomplish the scope of services.

The work performed pursuant to this Agreement is subject to prevailing wages, and, therefore, the workers who are performing work pursuant this Agreement shall be paid no less than the prevailing hourly rate of wages as set by the appropriate authority. Any future work performed by workers under this Agreement shall be subject to the wage determination of the appropriate authority that is in effect when the work is performed.

The Company expressly, knowingly, and, to the fullest extent permitted by law, agrees to and shall release, indemnify, defend, and hold harmless the Township, its elected and appointed officials, officers, employees, agents, volunteers, and others working on behalf of the Township from and against any loss, damages, claims, causes of action, liabilities, obligations, penalties, demands, municipal mechanic's liens filed by any subcontractors pursuant to N.J.S.A. 2A:44-125, et seq., and any conduct or action taken by the Township relating to any such lien, and any and all other costs and expenses, including attorneys' fees and costs, threatened against, suffered, and/or incurred by the Township, its elected and appointed officials, officers, employees, agents, volunteers, and others working on behalf of the Township arising out of and/or in any manner relating to the permitted, contracted, and/or licensed activity engaged in by the Company in and/or relating to the Township, and the acts and/or omissions of the Company, its officers, owners, agents, employees, independent contractors, guests, volunteers, others working on behalf of the Company, and/or customers relating thereto. The Company shall be responsible and liable for the payment of any and all of the foregoing attorneys' fees and costs, to attorneys of the Township's

selection, for any investigation and review, pre-litigation, litigation, post-judgment litigation, and any and all appeals arising out of and/or relating to this Agreement.

The existence of any available and/or applicable insurance shall not waive or release the Company from the Company's obligations set forth in this Agreement.

Throughout the duration of this Agreement and for a minimum of two (2) years following the termination of this Agreement and completion of services, whichever is later, the Company shall, at its own expense, maintain and carry in full force and effect, at least the following types and amounts of insurance coverage. Certificates of insurance shall state that thirty (30) days written notice shall be served upon the Township prior the policy being canceled or non-renewed. The Company shall not be allowed to perform any services pursuant to this Agreement, and, as noted below, this Agreement shall be null and void until certificates of all insurance required herein are filed and approved by Township. The certificates shall show the type, amount, class of operations covered, effective dates, and the dates of expiration of policies. In addition, the certificates shall name Township, its elected officials, officers, employees, agents, volunteers, and independent contractors as additional insured.

- A. **Worker's Compensation and Employer's Liability Insurance.** This insurance shall protect the Township against all claims under applicable State Workers' Compensation Laws. The liability limits shall not be less than the required Statutory Limits for Workers' Compensation and Employers' Liability in the amount of \$1,000,000 each Accident, \$1,000,000 Disease-Each Employee, and \$1,000,000 Disease-Policy Limit.
- B. **Comprehensive General Liability Insurance.** This insurance shall cover all operations in connection with the performance of this Contract in amounts not less than the following: Coverage in the amount of \$1,000,000 for each occurrence and \$2,000,000 general aggregate and \$2,000,000 products/completed operations aggregate for claims by third parties for bodily injury, property damage, or personal injury. Coverage shall be provided on an occurrence form, not claims made. No exclusions or limitations related to height of work will be allowed.
- C. **Automotive Liability Insurance.** The Company shall maintain automobile liability insurance in the amount of not less than \$1,000,000 combined single limit for bodily injury or property damage liability to protect him from any and all claims arising from the use of the following: (i) the Company's own automobile and trucks; (ii) hired/leased or rented automobiles and trucks. The aforementioned shall cover use of automobiles and trucks on and off the site of the projects/water tanks.
- D. **Owner's Protective Liability Insurance.** The Company shall maintain Owner's Protective Liability Insurance with the Township, and its elected officials, officers, employees, servants, agents, volunteers, and independent contractors as insured in amounts not less than \$1,000,000 each occurrence and \$2,000,000 general aggregate.
- E. **Builder's Risk Insurance.** Until the project is completed and is accepted by the Township, the Firm is required to maintain Builder's Risk Insurance adequate to fully cover the insurable portion of the project for the benefit of the Township and the Company.
- F. **Pollution Liability Insurance.** This insurance shall cover Pollution Liability in amounts of at least \$10,000,000.

G. Contractor's Professional Liability Insurance. This insurance shall cover Contractors Professional Liability in amounts of at least \$2,000,000.

H. Umbrella Liability Insurance. Umbrella or Excess Liability police in amounts of at least \$10,000,000.

The Company shall deliver prior to the Commencement Date an executed performance bond issued by a surety approved by the State of New Jersey, in a form acceptable to the Township and the Township's attorney, and in the amount of the annual fee for the current one-year term as security for the faithful performance of this Agreement. The performance bond shall be renewed and provided within ten (10) days of each year at the new annual amount of consideration. In the event that the Company fails to provide the performance bond acceptable to the Township and the Township's attorney with the aforesaid time periods, this Agreement may be immediately terminated by the Township.

The Company shall have the responsibility to pay any personal property, real estate taxes, assessments, and charges relating to this Agreement, as required, if any.

In addition to the requirements set forth in Paragraph 6, the Company shall provide the Township with written notice to the Department of Public Works and the Municipal Clerk prior to performing the services required by the RPF Specifications. Such notice shall be provided by the Company after receipt of the notice to proceed set forth in Paragraph 6 and at least ten (10) days prior to arriving on site to initiate the services.

In the event there is a breach by Company with respect to any of the provisions of this Agreement or its obligations under it, the Township shall provide written notice of such breach. After receipt of such written notice, the Company shall have fifteen (15) days in which to cure any breach, provided the Company shall have such extended period as may be required beyond the fifteen (15) days if the nature of the cure is such that it reasonably requires more than fifteen (15) days and the Company commences the cure within the fifteen (15) day period and thereafter continuously and diligently pursues the cure to completion. The Township may not maintain any action or effect any remedies for default against the Company unless and until the Company has failed to cure the breach within the time periods provided in this Paragraph.

In the event there is a breach by the Township with respect to any of the provisions of this Agreement or its obligations under it, the Company shall give the Township written notice of such breach. After receipt of such written notice, the Township shall have fifteen (15) days in which to cure any such breach, provided the Township shall have such extended period as may be required beyond the fifteen (15) days if the nature of the cure is such that it reasonably requires more than fifteen (15) days and the Township commences the cure within the fifteen (15) day period and thereafter continuously and diligently pursues the cure to completion. The Company may not maintain any action or effect any remedies for default against the Township unless and until the Township has failed to cure the breach within the time periods provided in this Paragraph.

The Company shall conduct its business in compliance with all applicable laws governing the protection of the environment or employee health and safety ("EH&S Laws"). The Company shall indemnify, defend, and hold harmless the Township from claims to the extent resulting from the Company's violation of any applicable EH&S Laws to the extent set forth in Paragraph

On July 1, 2019 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 the Department of Community Affairs is scheduled to consider approval of the contract at its September 11, 2019 agenda meeting.

Due to the timing of the Petition, the 60 day time period set forth in the Water Act for the Board to make a determination in this matter expired prior to the date of the Board's September Agenda meeting. In light of these circumstances, Long Beach filed a letter with the Board on August 14, 2019 agreeing to an extension to act on this matter to September 11, 2019.

By letter dated September 10, 2019, the Division of Rate Counsel advised that it defers to the Board with respect to the approval of the contract.

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:

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 Long Beach. All of Long Beach's customers are located within Long Beach'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 employments of current employees of the public entity whose positions of employment will be affected by the terms of the contract are addressed.

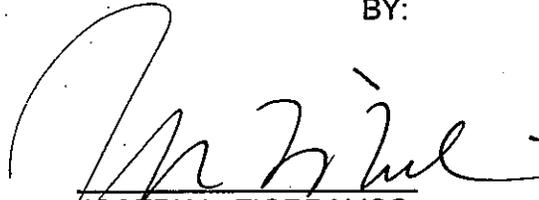
Therefore, based upon the above, the Board **HEREBY APPROVES** the contract between the Township of Long Beach and SUEZ Advanced Solutions., Inc. subject to the following provisions:

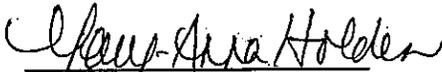
Any extension of the contract beyond the 20-year term or, pursuant to N.J.S.A. 58:26-25(c)(4), any amendment of the contract to change the formula or other basis of determining charges contained therein shall be subject to Board review and approval.

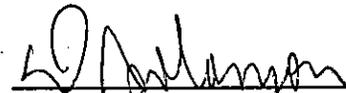
This Order shall be effective on September 21, 2019.

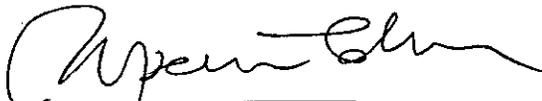
DATED: 9/11/19

BOARD OF PUBLIC UTILITIES
BY:

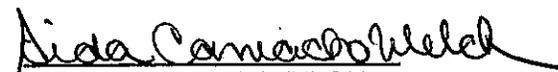

JOSEPH L. FIORDALISO
PRESIDENT


MARY-ANNA HOLDEN
COMMISSIONER


DIANNE SOLOMON
COMMISSIONER


UPENDRA J. CHIVUKULA
COMMISSIONER


ROBERT M. GORDON
COMMISSIONER

ATTEST: 
AIDA CAMACHO-WELCH
SECRETARY

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 PETITION FOR CONTRACT APPROVAL BY THE TOWNSHIP OF
LONG BEACH UNDER NEW JERSEY WATER SUPPLY PUBLIC PRIVATE CONTRACTING
ACT, N.J.S.A. 58:26-19 ET SEQ.**

BPU DOCKET NO. WO19070783

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