



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

IN THE MATTER OF THE PETITION OF THE)	ORDER APPROVING A PUBLIC-
TOWNSHIP OF MAHWAH WATER UTILITY)	PRIVATE CONTRACT WITH THE
REQUIRING APPROVAL OF A CONTRACT FOR)	TOWNSHIP OF MAHWAH AND
WATER WELL MAINTENANCE WITH UTILITY)	UTILITY SERVICE CO., INC.
SERVICE CO., INC., PURSUANT TO THE)	
PROVISIONS OF THE NEW JERSEY WATER)	
SUPPLY PUBLIC PRIVATE CONTRACTING)	
ACT, N.J.S.A. 58:26-19 <u>ET SEQ.</u>)	DOCKET NO. WO19080958

Parties of Record:

Brian T. Champion, Esq., Kelly, Kelly, Marotta, & Tuchman, LLC, on behalf of the Petitioner
J. Shane Albritton, Esq., for Utility Service Company, Inc.
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

BACKGROUND/PROCEDURAL HISTORY

On August 6, 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 Mahwah ("Petitioner," "Mahwah," or "Owner"), submitted a verified petition ("Petition") for the approval of a contract with Utility Service Co., Inc. ("Utility Service," or "Company") for water well maintenance.

Mahwah filed the Petition pursuant to N.J.S.A. 58:26-24(f) and N.J.S.A. 58:26-25 with 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").

The Petitioner is a municipal corporation located in Bergen County. 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., Mahwah provides services to its citizens.

Mahwah 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 and negotiated a contract with Utility Service on March 6, 2019, which included the required

provisions pursuant to N.J.S.A. 58:26-23(e). Mahwah chose Utility Service for the following reasons:

1. Utility Service has a track record of successful performance not only in New Jersey, but in numerous states;
2. Utility Service'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; and
3. Mahwah entered into a similar contract with Utility Service in 2015 for water storage tanks and their performance under the contract has been excellent.

Provided with the above information, Mahwah entered into a 20-year contract with Utility Service to provide long-term maintenance services needed to service its water wells and their accompanying pumps pursuant to the Water Act with respect to the following seven wells:

- Ford West Well # 1;
- Ford West Well # 2;
- Ford West Well # 3;
- Ford West Well # 4;
- Well # 16;
- Well # 17; and
- Well # 19.

On March 26, 2019, Mahwah notified DCA, DEP and the Board of its intent to enter into a contract with a private firm for the provision of water supply services pursuant to N.J.S.A. 58:26-23a.

On March 25, 2019, Mahwah published its Notice of Intention in the Bergen Record and Star Ledger, newspapers of general circulation, and posted it on its website.¹ Mahwah also issued a notice of its request for proposals ("RFP") of vendors interested in providing well maintenance services, which was published in the Bergen Record and Star Ledger and posted on its website on March 25, 2019.

Per the RFP, submissions were received and reviewed on April 26, 2019. One proposal was received from Utility Service. The proposal was reviewed by Mahwah's contract review committee on May 7, 2019. A summary evaluation was performed and a written recommendation was made to award the contract to Utility Service.

A public hearing on the proposed contract with Utility Service was scheduled for June 27, 2019. Notice of the public hearing was published in the Bergen Record on June 10, 2019. This notice was published pursuant to N.J.S.A. 58:26-24(b). No members of the public spoke at the public hearing.

A resolution (Resolution No. 243-19) was adopted on July 11, 2019 by the Mahwah Township Council, which approved the contract with Utility Service.

Mahwah obtained a written opinion from its bond counsel McManimon, Scotland & Bauman, LLC, on August 5, 2019 in accordance with N.J.S.A. 58:26-23(g).

¹ Mahwah's website is located at www.mahwahtwp.org.

TERMS OF THE PUBLIC-PRIVATE CONTRACT²

The terms of the contract are as follows:

Mahwah agrees to engage the Company to provide the professional services needed to service its seven water wells with their accompanying pumps. The Company shall perform any necessary rehabilitation of the Well to return the Well to as prime a condition as possible. Utility Service may rehabilitate the Well using appropriate technology, which includes but is not limited to: (1) Aqua Freed® - injecting carbon dioxide or other approved gases into the Well; (2) treatment of the Well with approved chemicals; (3) the mechanical cleaning of the Well; or (4) or any combination thereof.

Utility Service shall make repairs to the pump or replace the pumping unit during the aforementioned rehabilitation as well as provide emergency services, when needed, during the term of the contract to perform all repairs to the pumps covered under this contract.

Reasonable travel time must be allowed for the repair unit to reach the Well site. The Company will install the necessary well maintenance equipment following the acceptance of the contract.

Utility Service will service the well using the well maintenance equipment installed in the well. A minimum of one well maintenance service for each well shall be performed each contract year. Also, Utility Service will conduct a performance test annually and provide a written report of the findings of each well and pump performance to the Owner following each well's annual test. Utility Service will provide future rehabilitation of the well as necessary. The need for any future well rehabilitation will be determined by the specific capacity of the well. It is understood that only the Company's employees or personnel authorized by the Company shall install, operate, and/or maintain the well maintenance equipment installed by the Company, and Mahwah shall not permit any of its employees, agents, or independent contractors, except as authorized by the Company, to operate the well maintenance equipment.

Mahwah agrees that it will make no alterations in or to the equipment without obtaining prior written permission from the Company. The well maintenance equipment shall have a label attached to it, which the Owner shall not remove, describing the equipment and directing system operators to contact the Company prior to removing any equipment from the well. The Owner shall notify the Company immediately of any breakdown, malfunction, or other evidence that the Well maintenance equipment may need to be serviced. Mahwah shall notify the Company immediately of any operational changes to the well or pump that could impact the performance of the well, including but not limited to increasing or decreasing the capacity of the pump, modifications to the pump setting, or modifications to size, or performance.

² 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 contract does not include the cost for and/or liability on the part of the Company for: (1) site maintenance of the well site during the term of the contract; (2) disposal of any hazardous waste or hazardous materials; (3) resolution of operational breakdowns and/or malfunctions or structural damage of the well of any type caused by the Owner's failure to operate the pump and/or well in accordance with the manufacturer's recommendations and/or guidelines; (4) repair of structural damage due to any other work performed by others at the site, on the well, or on associated equipment attached to the well or located nearby; (5) resolution of operational problems or repair of structural damage or site damage caused by physical conditions below the surface of the ground; (6) negligent acts of the Owner's employees, agents or contractors; (7) damages, whether foreseen or unforeseen, caused by the Owner resulting in the increase of starts and stops of the well pump including that the Owner must operate the equipment within any and all manufacturer's recommendations and/or guidelines when the Owner is using a variable frequency device or other electrical controls; (8) damage to electrical components caused by nonexistent or inadequate electrical protection; (9) repairs or modifications to the foundation or pedestal of the well; (10) repairs necessary due to the unwarranted delay by the Owner in notifying the Company of the malfunction or breakdown of equipment; (11) repair or replacement of electrical controls, casings, screens, seals, or other components of the well; (12) any cost associated with the containment or management of the development water that will be produced during the redevelopment of the well; (13) other conditions which are beyond the Company's control, including, but not limited to: acts of God and acts of terrorism; and (14) integrity of the well or well site, including but not limited to formation shifts, subsidence, water supply, and earthquakes.

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

On August 7, 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 DCA is scheduled to consider approval of the contract at its October 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 27, 2019 agenda meeting. In light of these circumstances, Mahwah filed a letter with the Board on September 24, 2019 agreeing to an extension to act on this matter to October 17, 2019.

NEW JERSEY DIVISION OF RATE COUNSEL ("RATE COUNSEL") COMMENTS

By letter dated October 4, 2019, the Division of Rate Counsel advised that it defers to the Board with respect to the approval of the contract.

DISCUSSIONS 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). 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.

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. Utility Service has the financial capacity, 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). Utility Service 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 not unreasonable given the services that are to be performed by Utility Service pursuant to 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 Mahwah. In this instance, all of Mahwah's customers are located within Mahwah's boundaries and, therefore, the statute is not applicable.
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.

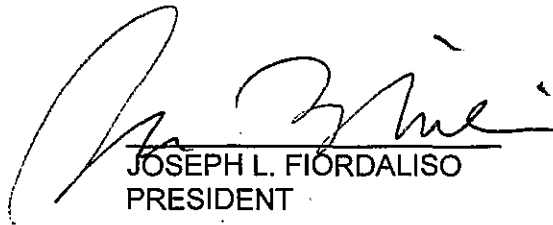
Therefore, based upon the above, the Board **HEREBY APPROVES** the contract between the Township of Mahwah and Utility Service Co., Inc. subject to the following provisions:

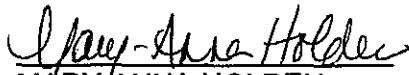
Any extension of the contract beyond the 20-year term or, pursuant to N.J.S.A. 58:26-25(c)(4), any amendment of the contract to change the formula or other basis of determining charges contained therein shall be subject to Board review and approval.

This Order shall be effective on October 17, 2019.

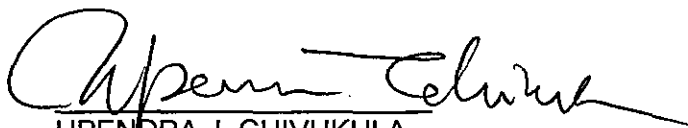
DATED: 10/7/19

BOARD OF PUBLIC UTILITIES
BY:

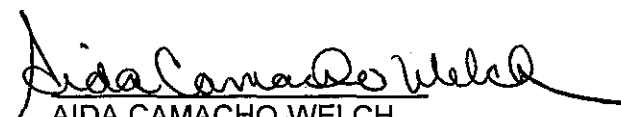

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MARY ANNA HOLDEN
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DIANNE SOLOMON
COMMISSIONER


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 OF THE TOWNSHIP OF MAHWAH WATER UTILITY
REQUIRING APPROVAL OF A CONTRACT FOR WATER WELL MAINTENANCE WITH
UTILITY SERVICE CO., INC., PURSUANT TO THE PROVISIONS OF THE NEW JERSEY
WATER SUPPLY PUBLIC PRIVATE CONTRACTING ACT, N.J.S.A. 58:26-19 ET SEQ.**

BPU DOCKET NO. WO19080958

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September 24, 2019

Aida Camacho-Welch
Secretary of the Board
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue
P.O. Box 350
Trenton, New Jersey 08625-0350

Re: In the Matter of the Petition of the Township of Mahwah Water Utility
Requiring Approval of a Contract for Water Well Maintenance with Utility
Service Co., Inc., Pursuant to Provisions of the New Jersey Water Supply
Public Private Contracting Act, N.J.S.A. 58:26-19, et seq.
BPU Docket No. WO19080958

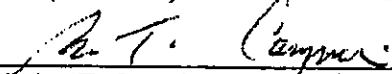
Dear Board Secretary,

Please be advised that I represent the Township of Mahwah, New Jersey.

The Mayor and Township Council of the Township of Mahwah consent to an extension for the Board of Public Utilities to act on the above-referenced matter through October 17, 2019.

Very truly yours,

KELLY, KELLY, MAROTTA & TUCHMAN, LLC

By: 
Brian T. Campion, Esq.

cc: Renee Greenberg, DAG
Mayor and Township Council