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# Local Finance Notice

Chris Christie  
Governor

Kim Guadagno  
Lt. Governor

Charles A. Richman  
Commissioner

Timothy J. Cunningham  
Director

## Contact Information

### Director's Office

V. 609.292.6613  
F. 609.633.6243

### Legislative and Regulatory Affairs

V. 609.292.6110  
F. 609.633.6243

### Financial Regulation and Assistance

V. 609.292.4806  
F. 609.984.7388

### Local Finance Board

V. 609.292.0479  
F. 609.633.6243

### Mail and Delivery

101 South Broad St.  
PO Box 803  
Trenton, New Jersey  
08625-0803

### Web:

[www.nj.gov/dca/divisions/dlgs](http://www.nj.gov/dca/divisions/dlgs)

E-mail: [dlgs@dca.nj.gov](mailto:dlgs@dca.nj.gov)

## WATER INFRASTRUCTURE PROTECTION ACT (WIPA) & WATER/WASTEWATER PUBLIC-PRIVATE CONTRACTING ACTS

This Local Finance Notice reviews statutory options available for municipalities and other local units to privatize in full or in part their water and/or wastewater treatment systems, primarily focusing on the Water Infrastructure Protection Act (P.L. 2015, c. 18) and the Water Supply and Wastewater Public-Private Contracting Acts (P.L. 1995, c. 101; P.L. 1995, c. 216).

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## I. Introduction

Many local government-operated water supply and wastewater treatment systems throughout New Jersey are of significant age, requiring substantial levels of capital investment in order to rehabilitate and modernize system infrastructure. Local governments may not have sufficient financial and operational resources to ensure the continued long-term viability of their systems. Bringing in an investor-owned utility or outside public entity may be a viable option for preserving the integrity of a local government's water and wastewater infrastructure; thereby protecting the health, safety and welfare of the residents they serve.

Municipalities owning water supply or wastewater treatment systems may solicit bids for the sale or long-term lease of their systems, but the bid of the highest responsible bidder cannot be accepted unless the sale is approved at a referendum held at the next succeeding general election. N.J.S.A. 40:62-4 through 40:62-6 sets forth provisions governing notice publication, bidding, the referendum process, and the use of sale or lease proceeds. N.J.S.A. 40:62-3 permits a sale or long-term lease to another municipality, authority, commission or other public body by ordinance without soliciting bids or conducting a referendum.

In circumstances where a municipal water utility serves less than 5% of a municipality's population, N.J.S.A. 40:62-3.1 permits the governing body to pass an ordinance transferring the system to "any person or another municipality or any authority, commission or other public body," with said transfer not being subject to referendum unless, in a Faulkner Act municipality, a referendum petition is filed pursuant to N.J.S.A. 40:69A-185. In re Petition for Referendum on Trenton City Ordinance 09-02, 201 N.J. 349 (2010)<sup>1</sup>. The terms of the sale and the authorizing ordinance are subject to review by the Board of Public Utilities. N.J.S.A. 40:62-3.1.

The recently enacted Water Infrastructure Protection Act, or "WIPA" (N.J.S.A. 58:30-1 et seq.), established an alternate process by which municipalities (except Newark) can sell or lease on a long-term basis their water and/or wastewater treatment systems if emergent conditions exist. Authorities and joint meetings that own water supply and/or wastewater treatment systems (including the municipalities constituting the joint meeting) cannot avail themselves of the Act.

The New Jersey Water Supply Privatization Act and New Jersey Wastewater Treatment Privatization Act, N.J.S.A. 58:26-1 et seq. and 58:27-1 et seq. respectively, were enacted in 1985 as the original framework for joint public-private operation of water supply and wastewater treatment systems. However, the cumbersome framework for executing a public-private partnership under these Acts resulted in the 1995 passage of the New Jersey Water Supply Public-Private Contracting Act and Wastewater Treatment Public-Private Contracting Act (N.J.S.A. 58:26-19 et seq. and 58:27-19 et seq. respectively, hereinafter collectively referenced as the Water/Wastewater Public-Private Contracting Acts" or the "Acts"). The Acts offer a more streamlined framework through which a local unit may partner with an outside entity to operate, manage and improve its water supply and/or wastewater treatment system.

A more comprehensive discussion of the Water Infrastructure Protection Act and the Water/Wastewater Public-Private Contracting Acts follows.

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<sup>1</sup> Please note that the reasoning behind the Appellate Division's decision could potentially be applied to sales of systems by a Faulkner Act municipality to another municipality, authority, commission or other public body pursuant to N.J.S.A. 40:62-3. Municipalities are encouraged to consult their legal counsel for further guidance.

## II. Water Infrastructure Protection Act

The Water Infrastructure Protection Act (“WIPA”), N.J.S.A. 58:30-1 et seq., permits municipalities (except Newark) to sell their water supply and/or wastewater treatment systems to a private or public entity without a public referendum; unless a sufficient number of voter signatures are gathered following the provisions of N.J.S.A. 58:30-5(g). Under WIPA, a municipality can sell its water supply and/or wastewater treatment system to a “capable private or public entity”, or engage in a long-term lease with said entity where 1) the lease is longer than 30 years, and 2) the municipality seeks to transfer ownership of the system at the end of the lease term. N.J.S.A. 58:30-3.

Any private or public water system owner can qualify as a “capable private or public entity” under WIPA if, when submitting a proposal to purchase or lease on a long-term basis the water and/or wastewater system, they meet the following conditions:

- Owns a system serving no less than the number of residential or commercial accounts as the system which the entity proposes to lease or purchase
- Is not a significant noncomplier as defined under N.J.S.A. 58:10A-3 of the Water Pollution Control Act
- Is not currently the subject of a formal enforcement action initiated by the New Jersey Department of Environmental Protection (DEP) to address a material violation not having been corrected over a reasonable period of time given the specific situation
- Is not substantially out of compliance with an administrative consent order, settlement agreement, stipulation of settlement or judicial consent order entered into with the DEP.

### A. Emergent Conditions Certification

Municipalities may only utilize WIPA upon a determination that “emergent conditions” exist. N.J.S.A. 58:30-4. Emergent conditions exist if one or more of the following conditions are met:

- The system is located in an area designated by the New Jersey Department of Environmental Protection (DEP) as an Area of Critical Water Supply Concern I or II, or any future designation or newly added area of critical water supply concern.
- The municipality that owns the system is a “significant noncomplier” as defined pursuant to N.J.S.A. 58:10A-3 of the Water Pollution Control Act, and has been the subject of a formal enforcement action initiated by the DEP, or is substantially out of compliance with an administrative consent order entered into with the DEP.
- There is a present deficiency of violation of maximum contaminant levels established pursuant to the Safe Water Drinking Act (N.J.S.A. 58:12A-1 et seq.) concerning the availability or potability of water, or concerning the provision of water at adequate volume or pressure, or distribution or treatment of wastewater.
- There is a demonstrated lack of historical investment, repair or sustainable maintenance as determined by the DEP, or material damage to system infrastructure.

- The system owner lacks the financial, technical or managerial capacity to adequately address any of the above-referenced conditions on a sustainable basis or own and operate the system in a way that supports economic activity in the municipality on a sustainable basis.

N.J.S.A. 58:30-5(b). The initial determination that emergent conditions exist shall be made by certification of the mayor, a municipal officer designated by the mayor, and a licensed engineer. N.J.S.A. 58:30-5(a). For further information on emergent conditions, DEP has a dedicated [“WIPA” page](#) containing a [guidance document](#) on the topic (including an application submission checklist) along with FAQ pages geared toward the [general public](#) as well as questions of a [technical nature](#). Submission of emergent condition documentation to DEP requires utilization of an [online document portal](#).

### Independent Financial Advisor Report

Once the emergent conditions determination is made and the municipality decides to move forward under WIPA, an independent financial advisor must review, analyze and report on 1) the value of the system and 2) the short and long term impacts to ratepayers of the proposed transaction’s cash flow structure, as well as provide an estimate as the financial requirements necessary to address the emergent conditions, operate and maintain the system. N.J.S.A. 58:30-5(c). Procurement of the financial advisor would be subject to the Local Public Contracts Law and “Pay-to-Play” legislation.

Within 10 days of approving the financial advisor’s report, the municipality shall make the report available for public review and transmit copies to the Board of Public Utilities, Department of Environmental Protection, and the Director of the Division of Local Government Services.

### Public Hearing on Emergent Condition Certification; DEP Approval of Certification

After the financial advisor submits their completed report to the municipality, the governing body must hold a public hearing on the proposed emergent condition certification. N.J.S.A. 58:30-5(d). Notice of the hearing shall be provided no less than 30 days prior to the hearing date, published at least once in a newspaper circulating in the municipality and a newspaper circulating in the county in which the municipality is situated. The notice must also appear on both the municipal website and on the website of the county in which the municipality is situated. If the municipality does not have a website, notice of public hearing must be published on the Department of Community Affairs website. The notice must prominently state the following:

- The findings upon which the emergent conditions certification is based
- Summary of the independent financial advisor’s findings; and
- A statement that the certification is in anticipation of a proposed long-term lease or sale of water or wastewater assets to a capable private or public entity.

After the public hearing and considering the findings of the independent financial advisor, two-thirds of the governing body's authorized membership must adopt a resolution certifying that 1) one or more emergent conditions exist and 2) that the municipality intends to sell or long-term lease its water or wastewater assets to a capable private or public entity to address the emergent conditions and to operate and maintain the system. N.J.S.A. 58:30-5(e). Within five (5) days of adopting the resolution, a true copy of the resolution shall be transmitted to DEP, BPU and the Director of DLGS.

The DEP must approve or reject the municipality's emergent conditions certification within 30 days of receiving the governing body's resolution. Please consult the [DEP's WIPA page](#) for further details on what is needed for DEP approval of an emergent conditions certification. If the municipality chooses to proceed with the sale or long-term lease process under WIPA, the municipality must publish notice of the DEP's approval of the emergent conditions certification. N.J.S.A. 58:30-5(f). The notice must prominently state that:

- the emergent conditions certification is in anticipation of a long-term lease or sale of water or wastewater assets to a capable private or public entity, and
- A petition may be filed within 45 days after publication of the notice of DEP approval to require a referendum before a resolution authorizing the long-term lease or sale of water or wastewater assets may take effect.

Notice shall be published on the municipality's website and at least once in one or more newspapers circulating in the municipality. If the municipality does not have its own website, notice of DEP approval shall be published on the Department of Community Affairs website.

### **B. Process for Forcing a Referendum on the Transaction**

No later than 45 days after the notice of DEP approval is published by the municipality, a petition may be filed protesting the lease or sale of water or wastewater assets without a public referendum. N.J.S.A. 58:30-5(g). The petition must be signed by a number of legal voters in the municipality equal to at least 15% of the total votes cast in the municipality at the last election where members of the General Assembly were elected. If the municipal clerk certifies the petition as having the sufficient number of signatures, a resolution to lease or sell water or wastewater assets pursuant to WIPA cannot take effect unless approved by public referendum pursuant to N.J.S.A. 40:62-4 and 40:62-5. If a petition is either not filed, or filed but found to be invalid, the transaction can move forward without a public referendum.

### **C. Process for Soliciting and Selecting Qualified Entities**

A Request for Qualifications from a capable private or public entity wishing to be considered for the long-term lease or sale of the water or wastewater system shall be advertised after the emergent conditions certification, allowing at least 30 days for prospective entities to respond. N.J.S.A. 58:30-6(a). Advertisement of the request for qualifications shall be published on the municipality's website and at least once in 1) one or more newspapers with municipal

circulation, and 2) one or more newspapers with Statewide circulation. Id. If the municipality does not have its own website, advertisement of the request for qualifications shall be published on the Department of Community Affairs website.

After the deadline passes for responding to the request for qualifications, the municipality shall determine which respondents are “capable private and public entities” and as such are qualified respondents. The municipality must then issue a request for proposals to each qualified respondent no less than 14 days prior to the date established for submission of the proposals. N.J.S.A. 58:30-6(b). Request for proposals shall include relevant technical submissions, documents and criteria including but not limited to a description of the facilities, the debt related thereto, and the evaluation criteria to be used by the municipality.

Proposals by qualified respondents shall include the following; based upon which, at a minimum, the proposals will be evaluated by the municipality:

- The documented deficiencies of the municipality’s system upon which the emergent conditions certification are based, and a description of the corrective measures to be undertaken by the respondent to address and correct the identified emergent conditions
- A description of the financial, managerial, and technical capabilities of the respondent to operate and maintain the system in compliance with all applicable State and federal laws and regulations, as well as a description of respondent’s outstanding and pending violations of the following State laws: Pollution Prevention Act, Realty Improvement Sewerage and Facilities Act and the Safe Water Drinking Act
- An analysis of the relevant expenditures associated with such activities and the projected impact on customer rates
- An analysis of any Internal Revenue Code or other tax code issues that may arise from the long-term lease or sale of a publicly funded water or wastewater asset, as well as any potential short-term or long-term costs arising therefrom
- A long-term capital improvement or asset management plan
- Any other pertinent information required of or deemed appropriate by the municipality

Upon reviewing the proposals the governing body must designate, by resolution adopted by at least two-thirds of its authorized membership, one qualified respondent whose proposal the governing body found most advantageous to the public pursuant to the evaluation criteria. N.J.S.A. 58:30-6(c). The resolution must include a detailed summary of the governing body’s findings that the proposal of the designated respondent is most advantageous to the public. This summary must be published at least once in a newspaper circulating in the municipality and a newspaper circulating in the county in which the municipality is situated. The summary must also appear on both the municipal website and on the website of the county in which the municipality is situated. If the municipality does not have a website, the summary must be published on the Department of Community Affairs website.

### D. Contract Provisions and Regulatory Agency Approval

Contract negotiations may commence once a designated respondent is selected. N.J.S.A. 58:30-7(a). The proposed contract must contain the following provisions:

- The rent or sale price, and any appraisals supporting same
- Documentation regarding the defeasance of debt
- A clause stating that, to the extent that doing so does not violate any existing collective bargaining agreements between the capable private or public entity and its employees, the entity shall give first consideration in hiring to any public employees displaced by the transaction
- Any other information required by the Board of Public Utilities

N.J.S.A. 58:30-7(b)(1); 58:30-7(c)(1). After an agreement is reached the governing body shall, by a resolution adopted by no less than two-thirds of its authorized membership, concurrently submit the proposed contract to the Board of Public Utilities and the proposed use of the municipality's proceeds from the transaction to the Director of the Division of Local Government Services for approval. N.J.S.A. 58:30-7(b)(2).

#### Board of Public Utilities Approval

The BPU shall approve or reject the proposed contract within 90 days of receipt thereof. N.J.S.A. 58:30-7(c)(1). If no disposition is made within 90 days, the proposed contract is deemed approved.

For purposes of ratemaking and recovery, the BPU shall accept the negotiated sale price between the municipality and the entity as the new base rate effective as of the date of the transaction's approval, so long as the BPU deems the price reasonable. N.J.S.A. 58:30-7(c)(2). The BPU shall deem the rent (i.e. long-term lease) or sale price reasonable if it meets the following conditions:

- The rent or sale price is sufficient to defease system-related debt, and either:
  - The rent or sale price is within the range of any appraisals obtained with respect to the long-term lease or sale of the water or wastewater assets; or
  - If there is little or no established rate base for the water or wastewater assets, the rent or sale price is reasonably comparable to a proxy rate base equivalent to the rate base of the designated respondent.

N.J.S.A. 58:30-7(c)(2)a and b. In valuing the assets, appraisers must comply with the [Uniform Standards of Professional Appraisal Practice \(USPAP\)](#) promulgated by the Appraisal Standards Board of the Appraisal Foundation. N.J.S.A. 58:30-7(c)(3). In valuing the water or wastewater assets for purposes of ratemaking, the original source of funding for any part of the assets shall not be relevant. N.J.S.A. 58:30-7(c)(4). Reasonable and prudent transaction, closing and transition costs incurred by the designated respondent shall be recoverable in rates. N.J.S.A. 58:30-7(c)(5).

### Division of Local Government Services Approval

The proposal for how the municipality proposes to use its proceeds from the transaction must include the rent or sale price, total amount required to defease system debt and any costs associated with compliance with the Internal Revenue Code or other tax code that may arise from the transaction.

The distribution of any remaining proceeds after defeasance of system debt and tax code-related compliance costs shall be dedicated as follows, in order of priority

- compliance with the Pollution Prevention Act, Realty Improvement Sewerage and Facilities Act (1954), and the Safe Water Drinking Act
- any outstanding fees or fines owed by the entity to any federal, State, county or local governmental units
- Capital improvements to the system. The amount dedicated to capital improvements shall both
  - comply with a previously adopted long-term capital improvement or asset management plan, and
  - represent at least 50 percent of the remaining proceeds once the debt is defeased.
- Community improvements
  - The Division will consider debt repayment for non-system related infrastructure as going toward community improvements.
- General purposes of the municipality

N.J.S.A. 58:30-7(c)(6). The municipality shall provide a detailed description of what the proceeds would be used for in each category. In considering proposed use of proceeds for community improvements and general purposes, the Division will only approve uses that are compatible with the municipality's long-term fiscal stability.

The Director of DLGS shall approve or reject the proposed use of proceeds within 30 days of receiving a complete proposal. If no disposition is made within 30 days, the proposed use of the proceeds shall be deemed approved.

#### **E. Procedure to Enter into Contract upon Approvals**

After the BPU approves the contract, and DLGS Director approves the use of the proceeds, the municipality's governing body can enter into a contract for the sale or long-term lease of water or wastewater assets by a resolution adopted with a vote of at least two-thirds of its authorized membership. N.J.S.A. 58:30-8.



### III. Water Supply and Wastewater Treatment Public-Private Contracting Acts

The Water/Wastewater Public-Private Contracting Acts authorize a public entity to enter into a long-term agreement (referenced herein as a “public-private contract” or “public-private partnership”) with an outside firm for the provision of water supply and/or wastewater treatment services. Municipalities and counties, as well as local authorities, joint meetings or commissions charged with providing water supply and/or wastewater treatment, are defined as “public entities” authorized to enter into public-private partnerships pursuant to the Acts. N.J.S.A. 58:26-21; 58:27-21. A public entity can enter into a public-private partnership with a public authority (e.g. utilities authority, sewerage authority, joint meeting) for wastewater treatment services only. N.J.S.A. 58:27-22.

The Acts define “services” as the “construction, improvement, operation, maintenance, administration, or any combination thereof” of the system. N.J.S.A. 58:26-21; 58:27-21. As such, the Acts offer a public entity flexibility in terms of defining the outside firm’s responsibilities under the contract. For example, a contract could be limited to operations or extend to repair/replacement of system infrastructure. The contract can require a firm to make specified capital expenditures on behalf of the system.

Public-private water-supply contracts must be approved by both the Local Finance Board and the Board of Public Utilities, with the Department of Environmental Protection (DEP) having the opportunity to review and comment. N.J.S.A. 58:26-25(a). Those public-private contracts pertaining solely to wastewater treatment require only Local Finance Board approval, with DEP being given the opportunity to review and comment. N.J.S.A. 58:27-25(a).

In a public-private partnership, the public entity may receive a concession fee from the firm that will provide the service. The concession fee is a payment from the contracting firm to the public entity that, regardless of when it is received, is exclusive of or exceeds any contractually specified reimbursement of direct costs incurred by the public entity. See N.J.S.A. 58:27-21.

Any concession fee or monetary benefit paid by a firm to a public entity as part of a water supply public-private contract must be used for the purpose of reducing or offsetting property taxes. N.J.S.A. 58:26-23(h). Where a public-private contract encompasses wastewater treatment services, N.J.S.A. 58:27-23(h) states that the concession fee or monetary benefit must be used to reduce or offset property taxes, and/or for one or more of the following purposes:

- reducing wastewater treatment services rates
- offsetting one-time non-recurring expenses
- offsetting capital asset expenditures
- repayment of federal grant awards associated with the wastewater treatment system as may be required by federal law or regulation

## A. Process for Awarding a Public-Private Contract

The Water/Wastewater Public-Private Contracting Acts set forth notice and public hearing requirements that the public entity must follow, and required state agency approvals, prior to awarding the contract. Differences in requirements pertaining to water supply and wastewater treatment contracts are noted below, but contracts for provision of both water supply and wastewater treatment must follow the statutory requirements of both Public-Private Contracting Acts.

### Solicitation of Service Providers

First, a public entity must publish a public notice of its intent to enter into a water supply and/or wastewater treatment public-private contract at least 60 days prior to conducting the public hearing required under the Acts. N.J.S.A. 58:26-23(a); 58:27-23(a). The notice, which must be published in both a newspaper of general circulation in the jurisdiction or service area that will receive the service(s) and a newspaper of broad regional circulation, must contain the following:

- Description of the type of services desired
- Name, address and telephone number of the person who can provide additional information and a proposal document to an interested party
- A specified deadline for the submission of proposals, which shall not be less than 30 days from the notice's publication date

N.J.S.A. 58:26-23(a)-(b); 58:27-23(a)-(b). Although not statutorily required, it is recommended that the notice also be posted on the public entity's website. For public entities intending to enter into a water supply public-private contract, the public entity shall provide concurrent written notice to the Board of Public Utilities, Department of Environmental Protection and Local Finance Board. N.J.S.A. 58:26-23(a).

The proposal document must describe the services the public entity is considering having provided, specify minimum qualifications firms must meet, and set forth the criteria to be used in evaluating each proposal. N.J.S.A. 58:26-21; 58:27-21. Firms must be "financially, technically and administratively capable" of providing water supply and/or wastewater treatment services. Proposals may be revised at any time during the submittal process so long as the firms receiving the proposals are provided the revised document. N.J.S.A. 58:26-23(c); 58:27-23(c). Review must be conducted in a manner that avoids disclosing proposals to competing firms, but the public entity may communicate with a firm for purposes of clarifying the information submitted. The public entity may revise the proposal document after reviewing the submitted proposals, so long as each responding firm is provided the revision and given a uniform time to submit a revised proposal.

Only private firms can be awarded a water supply public-private contract. N.J.S.A. 58:26-22. Both private firms and public authorities can be awarded a wastewater treatment public-private contract. N.J.S.A. 58:27-22.

### Selecting a Provider and Negotiating the Contract

The public entity shall select one qualified proposal from amongst those submitted, setting forth the reasons for selection in writing. N.J.S.A. 58:26-23(d); 58:27-23(d). Another proposal may be selected if a contract cannot be successfully negotiated.

Contracts under the Water/Wastewater Public-Private Contracting Acts shall contain, in addition to any other negotiated terms and conditions, the following mandatory provisions:

- The charges, rates, fees or formulas to be used to determine the charges, rates or fees to be charged by the public entity for the services to be provided.
- The allocation of the risks of financing and constructing planned capital additions or upgrades to existing system.
- The allocation of the risks of operating and maintaining the system.
- The allocation of the risks associated with circumstances or occurrences beyond the control of the parties to the contract.
- The defaulting and termination of the contract.
- The employment of current employees of the public entity whose positions or employment will be affected by the terms of the contract.
- The requirements for the provision of a performance bond by the private firm or public authority, if so required by the public entity.
- For water supply public-private contracts, the private firm's authority and the extent, or the procedures for the use, of that authority to initiate, negotiate and finalize the terms for a bulk sale of surplus water. The contract shall either grant the private firm such authority or specifically state that the firm is denied that authority. In cases where water is being provided by the New Jersey Water Supply Authority or the North Jersey District Water Supply Commission, these entities must agree to any bulk sale, lease, or transfer of water.
- For wastewater treatment public-private contracts, allocation of the financial cost of compliance with all relevant permits.

N.J.S.A. 58:26-23(e); 58:27-23(e). The public entity must obtain the written opinion of bond counsel as to the contract's effect on the tax exempt status of existing and future financing instruments executed by the public entity in light of the contractual terms and all applicable federal laws or regulations. N.J.S.A. 58:26-23(g); 58:27-23(g). The Water/Wastewater Public-Private Contracting Acts preempt the public bidding requirements of the Local Public Contracts Law; however, pay-to-play laws would still apply. See N.J.S.A. 40A:11-5(1)(z) and 40A:11-5(1)(bb).

### Public Hearing

Any public entity intending to enter into a public-private partnership contract must conduct a public hearing on the proposed contract. N.J.S.A. 58:26-24(a); 58:27-24(a).

Public notice shall be published at least 14 days prior to the public hearing by publication in at least one newspaper of general circulation in the jurisdiction or service area of the public entity. N.J.S.A. 58:26-24(b); 58:27-24(b). The published notice shall set forth the following:

- Date, time, and place of hearing
- The place where, and the times during which, copies of the proposed contract will be available for public inspection
- Whether any concession fee or monetary benefit will be paid to the public entity as a result of the contract
- If the contract contains a concession fee or monetary benefit paid to the public entity, the amount of same and its potential impact on the charges, rates, or fees paid by users

Although not statutorily required, the Division also recommends posting a notice of public hearing on the public entity's website. During the public hearing, the public entity shall:

- Explain the terms and conditions of the proposed contract
- Answer questions raised by prospective consumers and other interested parties
- Explain the charges, rates, or fees that will or may be charged by the public entity for water supply and/or wastewater treatment as a result of the proposed contract
- State whether any concession fee or monetary benefit will be paid to the public entity as a result of the contract
- If the contract contains a concession fee or monetary benefit paid to the public entity, state the amount of same and explain its potential impact on the charges, rates or fees paid by users

The public entity must produce a verbatim record of the public hearing, which must be kept open for a period of seven days following the conclusion of the hearing. During this period interested parties may submit written statements concerning the proposed contract. N.J.S.A. 58:26-24(c)-(d); 58:27-24(c)-(d).

A written hearing report must be prepared by the public entity, and made available upon request to interested parties, that includes:

- A copy of the proposed contract
- A copy of the statement setting forth the public entity's reasons for selecting the proposal of the firm with which the contract was negotiated
- A statement prepared by the public entity summarizing the major issues raised at the public hearing, and the public entity's specific responses to those issues
- The verbatim record of the public hearing
- Any written statements submitted by interested parties
- A copy of the bond counsel's written opinion

## **B. Governing Body Approval of the Proposed Contract**

An ordinance or resolution, as appropriate, approving the proposed contract shall be adopted by the governing body. N.J.S.A. 58:26-24(e); 58:27-24(e). The ordinance or resolution may be introduced by the public entity's governing body at its first meeting held after the public hearing on the proposed contract, and must acknowledge that the contract requires approval pursuant to P.L. 1995, c. 101 (water supply) and/or P.L. 1995 c. 216 (wastewater treatment) (N.J.S.A. 58:26-25 and 58:27-25, respectively).

The Appellate Division has held that, in Faulkner Act municipalities, the Water Supply Public-Private Contracting Act bars residents from seeking a referendum on an ordinance approving a proposed water supply contract. We the People Committee, Inc. v. City of Elizabeth, 325 N.J. Super. 329, 335 (App. Div. 1999). As such, water supply (and by extension wastewater-treatment) public-private contracts cannot be made subject to a binding voter referendum.

## **C. Regulatory Agency Approval of the Proposed Contract**

Within 30 days after the close of the seven-day comment period following the public hearing, the public entity must submit an application to the Local Finance Board and the Board of Public Utilities; unless the contract is solely for wastewater treatment, in which case the application need only be submitted to the Local Finance Board. N.J.S.A. 58:26-24(f); N.J.S.A. 58:27-24(f). If the proposed contract encompasses both water supply and wastewater treatment, BPU only reviews and approves the water-supply aspect of the contract. The application needs to contain the complete written hearing report. For both water supply and wastewater treatment public-private contracts, the public-private entity shall also submit the written hearing report to DEP. N.J.S.A. 58:26-24(f); N.J.S.A. 58:27-24(f).

The public entity must provide written notice to the approving agency or agencies, as well as the DEP, of its intent to submit an application at least 10 days prior to the application's submission. All submissions to DEP shall be made to the Department's Bureau of Safe Drinking Water.

For a water-supply public-private contract, the Board of Public Utilities and the Local Finance Board must, within 60 days of receiving a complete application, approve, conditionally approve or deny the application. Failure of either agency to render a decision on the application within the 60 day timeframe results in automatic approval. N.J.S.A. 58:26-25(a). The DEP must provide its comments on the hearing report to the approving agencies and the public entity within 60 days of receiving the report. For wastewater treatment public-private contracts, the Local Finance Board faces the same 60 day timeframe. N.J.S.A. 58:27-25(a).

Please call 609-292-0479 for the Local Finance Board's application form.

### Criteria for Board of Public Utilities Review (Water Supply Public-Private)

Pursuant to N.J.S.A. 58:26-25(c), the Board of Public Utilities must utilize the following criteria in determining whether to approve a water-supply public-private contract:

- The private firm contracting with the public entity has the financial capacity and technical and administrative expertise to ensure continuity of service over the contract term.
- The standards and requirements contained in the application documents concerning the financial, technical and administrative capacity of the private firm are necessary and sufficient to protect the public interest.
- The terms of the contract are not unreasonable. In making this determination, the BPU shall review the fees and charges under the contract to determine their reasonableness as to the public entity, taking into consideration all of the obligations undertaken by the private firm and all the benefits obtained by the public entity. The traditional rate based rate of return methodology shall not be used in making the determination.
- The franchise customers of a public utility (i.e. investor-owned utility) participating in the proposed contract are protected from the contract's risks and are not subsidizing the contract.
  - If a private firm is not a public utility, the BPU must ensure that under the terms of the proposed contract, the uses of water outside of the jurisdiction or service area that will receive water supply services under the contract are also protected from the contract's risks and that water users outside the jurisdiction or service area are not subsidizing the contract through increased rates, charges or fees for the supply of water.
- The contract addresses the following provisions:
  - The charges, rates, fees or formulas to be 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. 58:26-23(e)(1).
  - The allocation of the risks of financing and constructing planned capital additions or upgrades to existing system. N.J.S.A. 58:26-23(e)(2).
  - The employment of current employees of the public entity whose positions or employment will be affected by the terms of the contract. N.J.S.A. 58:26-23(e)(6).

#### Criteria for Local Finance Board Review

The Local Finance Board must utilize the following criteria in determining whether to approve a public-private contract:

- The terms of the proposed contract do not materially impair the ability of the public entity to punctually pay principal and interest due on its outstanding indebtedness and to supply other essential public improvements and services.
- A concession fee or other monetary benefit paid by the firm contracting with the public entity is paid directly to the municipality or municipalities constituting the public entity.
  - For water-supply contracts, any concession fee or monetary benefit must be used to reduce or offset property taxes.
  - For wastewater treatment contracts, any concession fee or monetary benefit must be used to reduce or offset property taxes, reduce wastewater treatment services rates, one-time non-recurring expenses or capital asset expenditures.

- Although the Local Finance Board will consider any proposed concession fee or monetary benefit on its merits, public entities are strongly advised to consider how said concession fee/monetary benefit fixes promotes underlying fiscal integrity (e.g. debt repayment versus funding unsustainable staffing levels and employee compensation).
- For water-supply public private contracts, that the contract addresses the following provisions:
  - The allocation of the risks of operating and maintaining the water supply facility. N.J.S.A. 58:26-23(e)(3).
  - The allocation of risks associated with circumstances or occurrences beyond the control of the parties to the contract. N.J.S.A. 58:26-23(e)(4).
  - The defaulting and termination of the contract. N.J.S.A. 58:26-23(e)(5).
  - The private firm's authority and the extent, or the procedures for the use, of that authority to initiate, negotiate and finalize the terms for a bulk sale of surplus water. The contract shall either grant the private firm such authority or specifically state that the firm is denied that authority. In cases where water is being provided by the New Jersey Water Supply Authority or the North Jersey District Water Supply Commission, said entities must agree to any bulk sale, lease or transfer of water. N.J.S.A. 58:26-23(e)(7).
  - Requirements for the provision of a performance bond by the private firm, if one is required. N.J.S.A. 58:26-23(e)(8).
- For wastewater treatment public-private contracts, that the contract addresses the following provisions:
  - The charges, rates, fees or formulas to be used to determine the charges, rates or fees to be charged by the public entity for the wastewater treatment services to be provided. N.J.S.A. 58:27-23(e)(1).
  - The allocation of the risks of financing and constructing planned capital additions or upgrades to existing system. N.J.S.A. 58:27-23(e)(2).
  - The allocation of the risks of operating and maintaining the wastewater treatment system. N.J.S.A. 58:27-23(e)(3).
  - The allocation of risks associated with circumstances or occurrences beyond the control of the parties to the contract. N.J.S.A. 58:27-23(e)(4).
  - The defaulting and termination of the contract. N.J.S.A. 58:27-23(e)(5).
  - The employment of current employees of the public entity whose positions or employment will be affected by the terms of the contract. N.J.S.A. 58:27-23(e)(6).
  - Requirements for the provision of a performance bond by the private firm or public authority, if one is required. N.J.S.A. 58:27-23(e)(7).
  - The financial cost of compliance with all relevant permits N.J.S.A. 58:27-23(e)(8).

N.J.S.A. 58:26-25(c); 58:27-25(c). In addition, the Local Finance Board must review and specifically approve any provision pursuant to which a public entity will or may execute a financing provision for purposes set forth in the contract.

For wastewater public private contracts where a public authority is paying a concession fee, the Local Finance Board must determine if the concession fee is in the best interest of the contracting parties. N.J.S.A. 58:27-25(c).

The importance of diligent contract monitoring cannot be overemphasized. The public entity should assign monitoring responsibility to at least one appropriate individual, ensuring both parties carry out their respective duties and obligations under the contract. **An applicant should set forth to the Local Finance Board all provisions being made for monitoring the public-private partnership agreement.** In 2009, the State Comptroller audited the City of Camden's water supply public-private partnership agreement and found several problem areas; the Comptroller's March 31, 2016 follow-up [report](#) found that many issues had been addressed or were moving toward resolution, leading to significant operational and maintenance improvements.

#### Conditional Approval of Application

If either Local Finance Board or the Board of Public Utilities conditionally approves an application, the agency or agencies must set forth in writing the revision(s) required for approval, as well as determine whether said revision(s) are substantial. N.J.S.A. 58:26-25(b); 58:27-25(b).

Substantial revisions are changes that result in an increase in the charges, rates or fees of the firm contracting with the public entity, or that materially change other terms and conditions of the contract. N.J.S.A. 58:26-25(b); 58:27-25(b). In order to incorporate a substantial revision or revisions into the contract, the public entity shall hold a public hearing conducted in the same manner as the initial public hearing on the contract. The proposed revision or revisions shall be submitted to the Local Finance Board, BPU and DEP no later than 15 days prior to the date of the public hearing.

If the Local Finance Board and/or the Board of Public Utilities determine that the required revision(s) to the contract is not substantial, a new public hearing is not needed before submitting the proposed revision(s) to the Local Finance Board and BPU for approval, and to DEP for review.

For both substantial and non-substantial contractual revisions, the Local Finance Board and the Board of Public Utilities must review the revisions proposed by the public entity to determine their consistency with the conditions set forth in the conditional approval. Final approval, or disapproval with a written explanation as to why the revision is not consistent with the relevant conditions, must be issued by the Local Finance Board and BPU within 15 days after the next public meeting of each agency.

#### Process for Review and Approval of Amendments to Public-Private Contracts

Amending a public-private partnership contract after approval is granted requires the subsequent approval of the Local Finance Board (and also BPU if a water-supply contract).



Proposed amendments must be submitted to the Local Finance Board, and BPU if applicable, as well as to the DEP for review. At the next public meeting after receipt of the proposed amendment(s), the Local Finance Board (and BPU if applicable) shall determine whether the proposed amendment(s) is substantial. If the proposed amendment(s) is substantial, the public entity shall conduct a public hearing in the same manner as for the original contract. If an amendment is determined to be non-substantial, no public hearing is required. The amendment or amendments shall be approved by the Local Finance Board, and BPU if applicable, within 60 days of receipt in accordance with the procedures for an original contract. N.J.S.A. 58:26-25(g); 58:27-25(g).

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Approved: Timothy J. Cunningham, Director, Division of Local Government Services

<b>Document</b>	<b>Internet Address</b>
DEP WIPA webpage	<a href="http://www.nj.gov/dep/wipa">http://www.nj.gov/dep/wipa</a>
DEP Emergent Condition Guidance & Checklist – WIPA	<a href="http://www.nj.gov/dep/wipa/docs/wipa-emergent-conditions-guidance-dep.pdf">http://www.nj.gov/dep/wipa/docs/wipa-emergent-conditions-guidance-dep.pdf</a>
DEP Document Submission Procedure – WIPA	<a href="http://www.nj.gov/dep/wipa/docs/wipa-document-submission-procedure.pdf">http://www.nj.gov/dep/wipa/docs/wipa-document-submission-procedure.pdf</a>
DEP Technical WIPA FAQ	<a href="http://www.nj.gov/dep/wipa/tech-faq.html">http://www.nj.gov/dep/wipa/tech-faq.html</a>
DEP Public WIPA FAQ	<a href="http://www.nj.gov/dep/wipa/public.html">http://www.nj.gov/dep/wipa/public.html</a>
Uniform Standards of Professional Appraisal Practice (USPAP)	<a href="http://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/TAF/USPAP.aspx?hkey=5a640dda-464d-4683-b4e1-190201e0eda7">http://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/TAF/USPAP.aspx?hkey=5a640dda-464d-4683-b4e1-190201e0eda7</a>
March 31, 2016 Comptroller’s Report on Camden City Public-Private Contract	<a href="http://www.nj.gov/comptroller/news/docs/camden_united_water_pressrelease.pdf">http://www.nj.gov/comptroller/news/docs/camden_united_water_pressrelease.pdf</a>

## Appendix "A"

Timeframes for Notice, Public Hearing and Regulatory Approvals for  
Water Infrastructure Protection Act Transactions

Key Events	Timeframe
Independent financial advisor report: make publically available and transmit to DEP, BPU, and Director of DLGS	Within 10 days of the municipality approving report
Provide notice of public hearing on the proposed emergent condition certification	No less than 30 days prior to the hearing date
Transmit true copy of adopted resolution certifying emergent conditions to DEP, BPU, and DLGS	Within five days of the resolution being adopted
DEP approval of emergent conditions certification	Decision within 30 days of receipt of resolution, otherwise deemed approved
Submission of voter petition seeking a referendum on the transaction (to municipal clerk)	No later than 45 days after municipality publishes notice of DEP approving emergent conditions certification
Advertise request for qualifications (RFQs)	No less than 30 days prior to the date on which responses are due
Issue request for proposals (RFPs) to qualified respondents	No less than 14 days prior to the date established for submission of proposals
BPU approval of proposed contract	Decision within 90 days after receipt thereof, or deemed approved
DLGS Director approval of use of transaction proceeds	Decision within 30 days after receipt thereof, or deemed approved

## Appendix "B"

Timeframes for Notice, Public Hearing and Regulatory Approvals under  
Water & Wastewater Public-Private Contracting Acts

Key Events	Timeframe
Publish notice of intent to enter into contract	At least 60 days prior to public hearing
Deadline for RFP Responses	Not less than 30 days from the notice of intent publication date.
Publish notice of public hearing	At least 14 days prior to public hearing
Keep record of public hearing open to permit written statements	Period of 7 days after conclusion of public hearing
Submit notice of intent to apply to LFB, BPU (if water supply), and DEP	At least 10 days prior to submission of application
Submit complete application w/ hearing report to LFB, BPU (if water-supply); hearing report to DEP	No later than 30 days after record of public hearing closed
BPU and LFB decision on complete application	No later than 60 days after receipt of application, otherwise deemed approved, unless extension mutually agreed to

**Note:** *The Water Supply and Wastewater Treatment Public Private Contracting Acts bar voter referendums on whether an ordinance awarding such contracts should take effect. We the People Committee, Inc. v. City of Elizabeth, 325 N.J. Super. 329 (App. Div. 1999).*

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