

CECIL COUNTY GOVERNMENT

TO: The Board of County Commissioners of Cecil County

FROM: Alfred C. Wein, Jr., County Administrator

RE: Final Report and Recommendation of the Elkton West Water & Wastewater Services Evaluation Committee

DATE: August 19, 2008

Introduction

In July, 2007, Cecil County Government issued Request for Proposal No. 08-02 (the “RFP”), inviting appropriate and qualified entities to submit proposals to develop water and wastewater service within the area known and designated as the Elkton West Service Area.

The County Commissioners appointed an Evaluation Committee to consider and evaluate potential RFP responses. The Evaluation Committee consisted of the County Administrator, the Directors of the Departments of Public Works, Economic Development and Planning & Zoning, the Budget Manager, the Purchasing Agent and Commissioner Brian Lockhart.

The County received proposals from Artesian Water Maryland, Inc. (“Artesian”), and Tidewater Utilities, Inc. (“Tidewater”) in answer to the RFP. The respondents were interviewed and their proposals were evaluated by the Evaluation Committee.

In late 2007 the Evaluation Committee made a preliminary report of its findings and recommendations to the County Commissioners.

The Evaluation Committee reported that it had received timely responses from Tidewater and Artesian, each dated September 7, 2007. The Evaluation Committee reviewed each of the written responses and found them to be compliant with the requirements of the RFP. The Evaluation Committee met with each of the respondents on October 19, 2007, to receive formal presentations from each of them. As contemplated in the RFP, each respondent provided an Executive Summary/Overview with respect to its presentation. The Executive Summaries were dated and received October 23, 2007, and

were found to be compliant with the terms of the RFP.

The Evaluation Committee and counsel met in extended sessions with each of the respondents in November 2007. At the conclusion of these meetings the Evaluation Committee deliberated, and evaluated the respondents and their responses. As set forth in the RFP, the Evaluation Committee's criteria included an evaluation of (i) each respondent's understanding of the project; (ii) the qualifications of each proposed development team; (iii) proposed project design and specifications, and (iv) the benefits, scope and structure of the financial aspects of the proposed transaction.

At the conclusion of this process the Evaluation Committee made a preliminary report to the Board of County Commissions, together with a preliminary recommendation that the Commissioners select Artesian as the respondent with whom the County should engage in detailed negotiations for the award of a franchise agreement for water and wastewater systems for the Elkton West Service Area, as contemplated in the RFP. In making this preliminary report and recommendation the Evaluation Committee emphasized the following:

1. The Evaluation Committee found that the responses of both Artesian and Tidewater were compliant with the requirements of the RFP.
2. The Evaluation Committee found that, based on the responses and the Evaluation Committee's inquiries, either respondent was capable of satisfying the requirements for the installation of water and wastewater systems as contemplated by the RFP, and that the probability was high that the County would be able to negotiate a satisfactory agreement with either one of the respondents.
3. The Evaluation Committee made a preliminary determination that the proposal and qualifications of Artesian were comparatively more advantageous to Cecil County Government, based on the technical and financial factors set forth in the respondent's RFPs. In particular, the Evaluation Committee noted the following factors:
 - a. Artesian has access to significant water resources for immediate delivery to the proposed service area, through multiple and redundant sources, including sources of other water authorities, through over twenty interconnection agreements.
 - b. Artesian appears to have access to significant capital resources to enable it to fund the proposed systems.

- c. Artesian appears to have significant depth and breadth of experience in designing, building and operating water and wastewater systems of the types contemplated in the RFP; and this experience appears to be available within Artesian itself, as distinct from being provided by joint venture or by subcontract, with other specialists or service providers.

- d. Artesian is a publicly regulated public service company, subject to the jurisdiction of the Maryland Public Service Commission.

The Evaluation Committee recommended that Cecil County Government make a preliminary determination with respect to the franchise award, subject to successful conclusion of negotiations.

In December 2007, following a public hearing on the matter, the Cecil County Commissioners voted to accept the recommendation of the Evaluation Committee and to authorize it to commence to engage in negotiations with Artesian exclusively, subject to the reservation of the right to Cecil County Government to suspend or abandon such negotiations whenever, in the judgment of the Evaluation Committee, such negotiations were not likely to lead to the conclusion of an agreement upon terms which were deemed advantageous to Cecil County Government.

The Evaluation Committee commenced negotiations with Artesian in January 2008, and completed its assigned task in late July 2008, and now recommends the accompanying agreements, entitled "**FRANCHISE FOR WATER SERVICES AND WATER SERVICE AGREEMENT**" between the County and Artesian Water Maryland, Inc., and "**FRANCHISE FOR WASTEWATER SERVICES AND WASTEWATER SERVICE AGREEMENT**" between the County and Artesian Wastewater Maryland, Inc., for acceptance by the County Commissioners. The basis for the Evaluation Committee's recommendations follows, including highlights of the referenced agreements.

Determination to Award Franchise as Opposed to Operation and Maintenance of County-Owned Systems and County Purchase of Water

The proposed agreements contemplate the issuance of two franchises, one for the installation and operation of a water system, the other for the installation and operation of a wastewater system, initially within the area delineated in the RFP as the "Elkton West Service Area." Provision is also made, in each agreement, for expansion of the water and wastewater service areas, in connection with the conclusion of so-called "Definitive Agreements" with the relevant franchisees, for the sale and transfer of certain county and privately owned water and wastewater facilities, all of which presently lie outside of the

Elkton West Service Area. Some preliminary work is on order about how these agreements came to take the forms in which they are now presented.

The County's initial search for assistance in the development of a water and wastewater system for the Elkton West Service Area was crafted in the form of a request for proposal, governed with reference to the procurement and purchasing provisions of Chapter 183 of the County Code, because the County's request was framed in the alternative, as either (A) a request for contract services to develop and/or operate County-owned water and wastewater systems in the area or (B) a request to apply for and to receive a franchise for the development and operation of private systems. To the extent that the process was governed by Chapter 183 of the County Code – governing County procurements - the RFP specifically provided that the County reserved the right to accept or reject, in whole or in part, any responses, as well as "to negotiate further with one or more of the bidders as to any features of their bids and to accept modifications the work and bid price when such action will be in [the County's] interest and is desirable."

After careful consideration, the Evaluation Committee determined that the ownership and operation of additional County facilities, for water and wastewater service, within the Elkton West Service Area, was not in the public interest. Accordingly, the County did not ultimately determine to accept either proposal (from Artesian and Tidewater, the two RFP respondents) for the provision of goods and services, for the construction and operation of County-owned water and wastewater systems. Instead, the County determined to issue franchises for the development and operation of such systems by Artesian, as a defined "public service company" under the *Public Utility Companies* article of the Annotated Code of Maryland, subject to regulation by the Maryland Public Service Commission. The agreements also contemplate the potential sale of portions of County-owned systems and for their further ownership and operation by these publicly regulated public utility companies, under an expansion of those franchises.

Under applicable provisions of the Maryland Code as applied to Cecil County, neither the award of franchises for the private operation of water and wastewater systems nor the sale of County property are governed by the procurement provisions of Chapter 183 of the County Code. Rather, the Commissioners have extensive power to grant franchises for water and wastewater systems, as well as to enter into options, memoranda of understandings, letters of intent and the like respecting the disposition of County property. These decisions, as to franchise issuance and as to sale of County property, are within the scope of the plenary powers of the County Commissioners, to which the procurement and bid provisions of the County Code do not apply in the first place.¹

Provisions for Potential Sale of County-Owned Systems and for Expansion of

¹ See, generally Md. Ann. Code art. 25, Sections 3D and 8.

Franchise Areas

A word is also in order respecting the provisions of each franchise agreement which calls for the potential sale and transfer of certain County-owned facilities (most notably the Meadowview Wastewater Treatment Plant) as well as the franchisee's acquisition and operation of presently-privately held facilities (the Ceco WWTP), together with the expansion of the franchise areas to accommodate the franchisee's expanded operations.

The RFP specifically provided that "The County also reserves the right to negotiate further with one or more of the bidders as to any features of their bids and to accept modifications of the work and bid price when such action will be in their best interests and is desirable."² The responses of Artesian as well as Tidewater each spoke to the potentiality of expansion of their proposals to accommodate ownership, or at least operation and maintenance, of existing County facilities located outside the existing defined service area. For example, in its response Artesian stated: "Artesian also proposes the option of an expansion to the County's Meadowview wastewater plant for increased treatment and disposal requirements;"³ and "Artesian proposes to purchase the Cherry Hill wastewater treatment facility."⁴ These provisions reflect Artesian's argument, made at the beginning of the RFP process, that the best approach to meeting the County's objective for the provision of wastewater service might be to incorporate existing County facilities.

The Evaluation Committee was not initially receptive to these arguments, desiring to confine its actions to the recommendation of an award of franchises within the initially-defined Elkton West Service Area. But during the seven months of negotiations, it became apparent to all parties that the best use of the limited nutrient credits available in Cecil County was becoming a matter of increasing significance, particularly in regard to the County's desire for expansion of its Seneca Point wastewater treatment plant. It also became apparent that the Meadowview wastewater facility might have significantly greater unused discharge capacity than initially believed.

All of these matters were brought to the fore when, in mid-2008, as the final forms of agreement with Artesian were being drafted, Ceco Utilities, Inc., approached the County with an offer to have the County acquire and operate CECO's Manchester Park

² See Cecil County Government Request for Proposal RFP 08-02 Elkton West Water and Wastewater Services – Basis of Award section, at p. 7:

³ Artesian response, Section E, at p. 13.

⁴ Artesian response, Section F, at p.8.

wastewater treatment system, then under citation and mandate from the Maryland Department of the Environment for its non-compliant status and operations. In response to this new development the County, under the initiative of the Director of Public Works and his staff, developed a plan for this acquisition and for the ultimate re-routing of discharges from the Manchester Park system and the Cherry Hill system up to, and through, the County's Meadowview system – and thus completely out of the Chesapeake Bay watershed. Initial discussions between the Director of DPW and State MDE officials suggested that such a plan might be favorably received by state officials. However, when the Evaluation Committee considered the potential costs to the County to implement such plans using County resources it determined that Artesian might be able to accomplish these goals more quickly and more efficiently and more economically than the County. The County determined that Artesian had sufficient financial resources to fund improvements to existing County facilities, while the County faced other substantial financial needs and commitments, and that Artesian could provide economies of scale resulting in the more cost-effective provision of water and wastewater service than if the County acquired or retained ownership of these existing systems. Considering these facts, and as contemplated by the language within the RFP and Artesian's proposal, the final negotiated agreements were amended to include the potentiality of an expansion of the franchise area upon the negotiation of definitive agreements for the transfer of existing county-owned water and wastewater facilities (other than Seneca Point) to Artesian.

The Evaluation Committee is at pains to emphasize that the proposed franchise agreements DO NOT expand the franchise area beyond that contemplated in the RFP; and they DO NOT accomplish the sale or other transfer of ANY existing County or privately-owned water and wastewater systems lying outside of the originally defined Elkton West Service Area. The agreements do recognize the present intent of the County and the proposed franchisee to work toward those goals. But significant issues remain to be discussed and agreed upon: timing, order of exercise, valuation of assets, method of payment or reimbursement to the County, use and disposition of wastewater/nutrient treatment credits – to name but a few. The proposed franchise agreements contemplate that these matters will be the subject of detailed private discussion and public review and comment, at the local, County and State level, over the course of weeks or months following the execution of the proposed franchise agreements.

Elements of Water and Wastewater Franchises and Agreements

Article 25, §3D of the Annotated Code of Maryland provides that the Cecil County Commissioners are authorized to issue franchises for the ownership and operation of water and wastewater systems within the County in order to assure delivery of adequate, economical, and efficient services to its citizens, to avoid duplication of facilities, to provide for the health and safety of its citizens, to control disease, to prevent blight and other environmental degradation, to utilize efficiently the public right-of-way, to protect limited natural resources for the benefit of the citizens of the County, and to promote the general health and welfare by providing for adequate water systems. The

proposed franchise agreements are to be issued by the County in exercise of that authority.

Pursuant to the Cecil County Code no water or wastewater system may be constructed in the County without County approval.⁵ And, pursuant to the *Public Utility Companies* article of the Maryland Annotated Code: (i) a person may not construct a water or wastewater system for public use without the prior authorization of the Maryland Public Service Commission⁶; and (ii) in order to obtain that approval such a person must first hold a franchise from the County, evidencing the County's consent before laying pipes or constructing water works within the proposed service area, and (iv) the Commissioners may adopt reasonable regulations for the laying of pipes, construction of works and operations of a public utility company,⁷ (v) and such a person may not exercise a franchise except upon a demonstration to the Public Service Commission that the County Commissioners have provided the required consent for the exercise of the franchise, and then only to the extent authorized by the Public Service Commission.⁸

The purposes of the proposed agreements are to: (i) confirm the grant of the water and wastewater franchises to the identified Artesian entities, as the defined "Franchisee" in each instance, as a franchise created in exercise of the authority vested in the Commissioners pursuant to Article 25, §3D of the Annotated Code of Maryland; (ii) establish the Franchise Area, and the Franchise Term, including provision for expansion of the Franchise Area in connection with the potential sale and disposition of certain County-owned facilities to the franchisees; (iii) define the terms, covenants, conditions and restrictions upon which each franchise is granted by the Commissioners and upon which it is to be accepted and held by the relevant franchisee, and exercised by the franchisee subject to the regulatory control of the Maryland Public Service Commission under Maryland law; and (iv) define the terms, covenants, conditions and restrictions upon which each franchisee contractually agrees with the County to provide water or wastewater services within the franchise area.

Here are some of the highlights or essential terms from the agreements:

- the County grants Franchisee the right and franchise to design, build, own, operate, maintain, repair and replace the water and wastewater systems solely

⁵ Cecil County Code §67-16.

⁶ Md. Public Utility Companies art., §5-204

⁷ Md. Public Utility Companies art., §7-105(b)

⁸ Md. Public Utility Companies art., §5-201.

with respect to the defined Franchise Area, for the Franchise Term (20 years, subject to renewals for three successive periods, each of 20 years).

- The franchise agreement contemplates the negotiation and completion of definitive agreements for the transfer of defined water and wastewater systems, and for the incorporation of these into an expanded service area, assuming that the County and the relevant franchisee can come to terms for the same.
- The franchisee may operate in the franchise area solely for the purpose of providing the contemplated services.
- The franchisee acknowledges the County's right to regulate the placement, construction, repair and maintenance of physical facilities within the franchise area in accordance with applicable laws.
- The franchise rights are exclusive to the named franchisee within its franchise area, subject to the County's reserved rights, and subject to the County's reserved rights to condemn and acquire the systems.
- The franchises themselves convey no compensable property right to the respective franchisees.
- The franchises are subject to the applicable police powers of the County, including the County's power to tax.
- The agreements contemplate the expansion of the franchise area, either at the request of the County or upon request of the franchisee.
- The franchises contemplate specific requirements imposed on the franchisee for development and operation of the relevant systems. The following provision, taken from the Water Service Franchise, states the County's goals and expectations in issuing the franchise and the same applies to the issuance of the wastewater franchise:

"As set forth in the RFP, the Cecil County Master Plan contemplates that future growth and development within the County shall be directed to designated growth areas, and away from rural conservation and resource protection districts, but the County understands that its success in so directing such growth and development will be dependent upon its ability to cause sufficient public utilities infrastructure to be created within the designated growth areas – sooner rather than later - so that such future growth can be accommodated there. The parties acknowledge that the County issued the RFP in order to accelerate the development of the Water System within the Service Area (which forms part of such designated growth areas under the County Master Plan) beyond what the County deemed itself able to do in this regard, in the near term. And Franchisee expressly understands and acknowledges that the County has awarded the

Franchise to Franchisee, and has entered into this Agreement with Franchisee, on the expectation that Franchisee will proceed with all dispatch, and employ all commercially reasonable efforts, to design, develop and install the Water System within the Franchise Area so as to provide Water Service to the maximum number of Customers in the Franchise Area by the earliest practicable date. Accordingly, Franchisee acknowledges that in accepting the Franchise and in executing this Agreement with the County, Franchisee does so agree to proceed with all dispatch, and employ all commercially reasonable efforts, to design, develop and install the Water System within the Franchise Area so as to provide Water Service to the maximum number of Customers in the Franchise Area by the earliest practicable date.

- The franchise agreements contemplate the regular reporting to the County with respect to franchise operations.
- No transfer of control of the franchise or of the franchisee may occur without the prior written consent of the County.
- Franchisee shall not enter into any agreement or contract with any Person which materially affects Franchisee's performance of its obligations under the Franchise and this Agreement, or abandon or discontinue the exercise of the Franchise, and the operation of the Water System within the Franchise Area, as a whole or in part, without the prior written consent of the County. Provision is made for County approvals, after notice and a public hearing.
- Each franchise agreement contains detailed provisions respecting breach and termination of the agreement.

Interplay between Franchises and the County's Land Use, Preservation and Development Goals

The Evaluation Committee believes that the award of franchises for water and wastewater systems to Artesian, initially confined to the Elkton West Service Area, together with the potentiality of expansion of those services in connection with the County's sale transfer of defined water and sewer systems to Artesian, is consistent with and supportive of the County's stated goals and intentions for rational, controlled growth and development in the County, as set forth in the County Comprehensive Plan. As stated in the County Comprehensive Plan, "The distribution of new development will depend to a large extent on the County's ability to provide a public water supply and a sewer system to the Development, Town and Suburban Districts recommended by this Plan. Development in these districts is currently limited by insufficient water supply and sewerage infrastructure. ... When the districts recommended for more intense development have the necessary infrastructure have the necessary infrastructure, the County should implement measures to attract development to these districts and

discourage development in the Rural Conservation and Resource Protection Districts."⁹

The Evaluation Committee believes that the proposed franchises further the goals expressly stated in the Comprehensive Plan, to "Adopt a regional concept for sewage and wastewater treatment to eliminate proliferation of wastewater treatment plant point discharges," and "to encourage a water supply under the control of the County government for the needs of development within the County."¹⁰ Specifically, as stated in the Comprehensive Plan, with regard to sewer and water systems, at the time of its adoption approximately 75% of County residents received their water from private wells, nearly 60% received water from individual on-site wells, and only about 15% the County residents used water from a private or public supply system.¹¹ Only 40% of the County population was served by municipal or private sewage treatment plants, with such service being provided by about 30 separate systems.¹² These percentages have not changed markedly since the adoption of the Comprehensive Plan. The proposed franchises further the stated goals and objectives to "Provide a system of community facilities, public services and utilities which is responsive to residents' needs, and encourages the form of development consistent with the Land Use Plan,"¹³ and to "Plan and encourage a water supply under the control of the County government for the needs of development within the County."¹⁴ Under the proposed agreements, each of the named franchisees will be required to qualify as a defined "public utility company", subject to the control, disclosure, reporting and regulatory requirements imposed on such companies by the Maryland Public Service Commission and under Maryland law. Additionally, each of such franchisee's services and operations will be subject to County oversight and control by the County's Director of Public Works, acting as the Director of Sanitary Facilities, and otherwise pursuant to Chapter 67 of the Cecil County Code. As such, the franchises represent an improvement over the present state of affairs, in which, with respect to the Franchise Area, publicly-managed or supervised systems are non-existent, and services there are provided solely through private well and septic systems.

Finally, concern has been raised in some quarters that the proposed franchises will foment growth and development in a manner which is inconsistent with that contemplated in the Comprehensive Plan, or in areas which are not presently marked for

⁹ Cecil County Comprehensive Plan, "Major Plan Features," at p. 2.

¹⁰ *Id.*, at p. 3.

¹¹ *Id.*, "Community Facilities and Public Services," at p.54.

¹² *Id.*, at p. 55.

¹³ *Id.*

¹⁴ *Id.*

more intensive development. These concerns are misplaced. As required by Maryland law, the County has a Comprehensive Plan as well as a Master Water and Sewer Plan. As indicated above, the proposed franchises apply solely to the defined Development District and Suburban District as delineated in the Comprehensive Plan and its accompanying Land Use Maps. Development, as and when it occurs within the franchise area, will be governed by the terms of the County's Comprehensive Plan, and will be required to conform to applicable zoning and development regulations. The proposed franchises do nothing to change or to circumvent these controls, but rather serve to make them more relevant and effective.

Conclusion and Recommendation

In conclusion, it is the consensus of the Evaluation Committee, and its recommendation, that the Commissioners approve the award of franchises, for the provision of water and wastewater services within the Elkton West Service Area, in accordance with the terms of those agreements, entitled "**FRANCHISE FOR WATER SERVICES AND WATER SERVICE AGREEMENT**" between the County and Artesian Water Maryland, Inc., and "**FRANCHISE FOR WASTEWATER SERVICES AND WASTEWATER SERVICE AGREEMENT**" between the County and Artesian Wastewater Maryland, Inc., which are presented along with this report. The Evaluation Committee further recommends that work commence to negotiate and to conclude the so-called Definitive Agreements as referenced in each of these Agreements and in their respective accompanying letters of intent.