

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

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|--|---|-----------------------------|
| <b>McKAY CONSTRUCTION CO., INC.,</b>   | ) |                             |
|  | ) | <b>CASE NO. UWI-W-08-01</b> |
| <b>COMPLAINANT,</b>                    | ) |                             |
|  | ) |                             |
| <b>and</b>                             | ) |                             |
|  | ) |                             |
| <b>SCHMIDT CONSTRUCTION CO., INC.,</b> | ) |                             |
|  | ) |                             |
| <b>COMPLAINANT,</b>                    | ) |                             |
|  | ) |                             |
| <b>vs.</b>                             | ) | <b>ORDER NO. 30624</b>      |
|  | ) |                             |
| <b>UNITED WATER IDAHO INC.,</b>        | ) |                             |
|  | ) |                             |
| <b>RESPONDENT.</b>                     | ) |                             |

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On February 19 (20), 2008, complaints against United Water Idaho Inc. (United Water; Company) were filed by the McKay and Schmidt Construction Companies (collectively Complainants or Contractors). Both Complainants requested and were denied listing on the Company's "approved contractor list" for 2008. Listing is required of contractors to qualify for installation of domestic water facilities within residential subdivisions in United Water's certificated area of service. United Water maintains that because of the costs associated with administering contractors, the recent decrease in construction, and the lack of projected projects in 2008, it is not going to add contractors to the approved contractor list in 2008. McKay requests reinstatement, having previously been on the list from 1997 to October 2005. Schmidt requests listing for the first time. The Contractors contend that they are disadvantaged when bidding on projects when a developer wants the same contractor to install both the sewer and water systems.

On July 21, 2008, the Contractors filed a Petition for Clarification of the Commission's Order No. 26898 in Case No. UWI-W-96-4 wherein the Commission approved a Stipulation and Settlement Agreement (Agreement) that established a "labor in lieu of cash" program for installation of facilities within residential subdivisions. Agreement ¶ 6; RP 325. The Contractors contend that the Company's administrative decision to place a limit on the number of contractors included on the "approved contractor list" in its *labor in lieu of cash*

program is a decision contrary to the best interests of the Company's customers and subject to Commission oversight and reversal. The Commission in this Order finds the Company's decision to cap the list of approved contractors at 10 for 2008 to be a business decision that does not adversely affect customers and one to which we should defer. We find our prior Order needs no clarification and dismiss the complaints filed by the McKay and Schmidt Construction Companies.

### **Background**

In Order No. 26898, Case No. UWI-W-96-4, the Commission approved a Stipulation and Settlement Agreement (Agreement) between United Water and the Building Contractors Association of Southwestern Idaho, et al. that put into place a process allowing developers to choose from a list of approved contractors to install facilities within residential subdivisions. Agreement ¶ 6. Prior to the Commission's Order, United Water facilities were exclusively installed by one contractor; the Company did not allow other contractors to participate. See Order No. 23522, Case No. BOI-W-89-3 (sole contractor or guaranteed revenue and escrow method). Pursuant to terms of the Agreement, United Water was directed to monitor the *labor in lieu of cash* program and to implement a system of procedures to ensure that the program did not result in an increase in costs (administrative and inspection costs) to the Company and its customers. Agreement ¶ 6(b).

During any given year United Water will receive requests throughout the year from contractors wishing to become approved UWI contractors. In order to efficiently implement the *labor in lieu* program, the Company will give the pre-qualification package to any contractor requesting the information and at the same time, tell the contractor that United Water does not review completed packages until January of the next year and may or may not add contractors. In November and December 2007, Schmidt and McKay submitted applications to be included on the preapproved contractors list. All contractors submitting completed pre-qualification packages in 2007 were notified in writing that United Water was not adding new contractors to the approved list in 2008. (February 1, 2008 Letter to Schmidt and McKay.)

While United Water is a regulated utility, the Company contends that it is still a private corporation and that substantial deference should be paid by the Commission to the judgment of the Company in the operations of its business. Determining the size of the contractor pool, it states, is the type of decision that the Company should be allowed to make

without Commission interference. The Company's Rules and Regulations are silent as to the size of the approved contractor pool. Rule 67 (Extensions for Individual Residences); Stipulation and Settlement Agreement ¶ 6A. The question before the Commission, United Water contends, is whether the Company's decision to limit the number of eligible *labor in lieu* contractors to 10 for the year 2008 for the purpose of containing costs was within the range of reasonable business judgment. The Company contends a pool of 10 qualified contractors is adequate. It promotes price competition and provides developers with a choice of suppliers. Through experience, the Company has learned that a significant amount of time and effort is required to train each newly-approved contractor in preparing construction estimates, in adhering to Company construction standards, and in learning how to provide as-built information. Each newly-approved contractor will go through a two-year learning curve before the contractor becomes proficient in the Company's processes. Increasing the pool of qualified contractors, United Water contends, would increase costs and administrative burden without a commensurate benefit to the Company or its customers.

#### **Petition for Clarification**

On July 21, 2008, the Contractors filed a Petition for Clarification of Order No. 26898, Case No. UWI-W-96-4. RP 325. The Contractors contend that the Company's administrative decision to place a limit on the number of contractors included on the "approved contractor list" in its *labor in lieu of cash* program is a decision contrary to the best interests of the Company's customers and subject to Commission oversight and reversal.

In its Order No. 26898, the Commission approved a Settlement Agreement allowing United Water to implement a *labor in lieu of cash* program for installation of water facilities within residential subdivisions. Paragraph 6(b) of the Agreement provides that:

United Water shall implement such systems and procedures as are necessary to monitor the implementation of a *labor in lieu of cash* program to ensure that implementation of this program does not result in increased administrative and inspection costs for United Water and its customers generally. . . .

Rule 67 of the Company's Rules and Regulations Governing the Rendering of Water Service and Water Main Extensions (the "Tariff") provides that "applicant contractors shall comply with Section 1 and Section 2 of the Company's requirements for *labor in lieu of cash* contractors (the "Rules"). In general, areas covered are requirements for inspection, monitoring

of construction, acceptance and handling of materials, documentation of costs, correction of faulty installation, insurance, bonding, license requirements, experience, and equipment availability. Nothing in the Company's tariff or rules addresses the question of a capped list of approved contractors. The Commission's Order No. 26898 is silent on the question of whether the Company is authorized to cap the number of approved contractors.

The demand for contractor services performed by McKay is evidenced by letters from the Harris Family Limited Partnership, Park Pointe Development, Inc., G.L. Voigt Development Company. Petition for Clarification, Exhibit B. The demand for contractor services performed by Schmidt is evidenced by letters from Hubble Homes and Tenant Enterprises, Inc. Also provided is a letter of respect from the City of Meridian's Public Works inspector. Petition for Clarification, Exhibit C.

The clarification requested is whether administration of the approved contractor list (developed pursuant to the Commission's approval in Order No. 26898 of a Stipulation and Settlement Agreement of the parties in Case No. UWI-W-96-4) is a matter appropriate for active Commission oversight and control or a matter of business judgment deferred to by the Commission and best left to the Company.

The Contractors contend that the Company's implementation of the contractor list unduly increases costs to all ratepayers, thereby triggering the Commission's regulatory authority. Citing the Company's argument that a cap on the list of approved contractors enables the Company to contain the costs of administering the *labor in lieu* program, the Company, the Contractors contend, offered no explanation or evidence as to why the costs associated with reviewing, approving, and training an applicant contractor cannot be directly assigned and recovered from the applicant through an application fee. Administrative costs of maintaining the approved contractor list, the Contractors contend, should be specifically identified and assessed against the contractor or developer who is responsible for the costs, not paid for by ratepayers. The Commission, the Contractors contend, in its role as the regulator of a monopolistic provider of utility service, ought to take a keen interest in the Company's arbitrary decision to prevent the free market from policing its anti-competitive actions.

*United Water Reply*

United Water does not dispute McKay and Schmidt's individual qualifications. Those qualifications, it states, are not at issue in this case. At issue, it states, is the

reasonableness of a generic policy capping the size of a qualified contractor pool, applied to all contractors in a non-discriminatory way. The policy adopted, it states, is the result of a reasonable exercise of business judgment. To United Water's knowledge, Idaho Power, Intermountain Gas, and Qwest all employ sole service contractors and do not allow competitive bidding on developer projects at all.

Regarding the direct billing proposal of the Contractors, the Company states that it does not currently have a system and method in place to quantify and allocate these costs. A period of time, possibly a full year, would be required to accumulate actual cost data in order to be able to accurately charge for these services.

The Company's decision to cap the qualified contractor pool, United Water contends, was not "arbitrary" as characterized by McKay and Schmidt, but was instead, a decision based on a reasoned analysis of market conditions, the current demand for and supply of contractor services. The Company chose a cap rather than a fee because the cap has the advantages of simplicity of administration, even-handed and non-discriminatory application, and avoidance of individual cost allocations and potential disputes. United Water contends that there are a sufficient number of contractors to meet the demands of developers. The Company has not received from any developer a complaint that the number of contractors is inadequate. Also, the residential construction market, the Company notes, is currently experiencing a market downturn.

United Water requests that the complaints of Schmidt and McKay be dismissed.

### ***Commission Findings***

The Commission has reviewed and considered the filings of record in Case No. UWI-W-08-01, including the underlying complaints of Schmidt and McKay and the Petition for Clarification. We have also reviewed our prior Order No. 26898 in Case No. UWI-W-96-4 and the underlying Stipulation and Settlement Agreement filed in that case, including Agreement ¶ 6 (Labor in Lieu of Cash) and the therein referenced Exhibit 6 (Hepler, 2<sup>nd</sup> Supplemental Direct Testimony).

The approved contractor list was one of the systems and procedures set up by the Company in implementing the *labor in lieu of cash* program we approved in Order No. 26898. The Company was directed to establish such systems and procedures as might be necessary to ensure that implementation of the program did not result in an increase of administrative and

inspection costs for the Company and its customers. Accordingly, any program-related operating expenses the Company seeks to pass on to utility ratepayers rather than directly charge to program participants and applicants are expenses that will be audited and reviewed.

United Water is a regulated utility and the prudence and reasonableness of decisions that affect its customers are subject to Commission review. In its administration of a *labor in lieu of cash* method program for extension of domestic water facilities in residential subdivisions, United Water has established a “list of approved contractors.” Neither the Agreement nor Order places a limit on the number of contractors who can participate in the program. Likewise, there are no limits specified in the Company’s tariff. United Water decided for the year 2008 to not add new contractors and to cap the list of approved contractors at 10. McKay and Schmidt desire to be added to the list.

The Commission finds the Company’s decision to cap the list at 10 contractors is a business decision based on supportable justification and rationale, and one to which we should defer. Although we regulate United Water’s rates and charges and monitor its ability to maintain adequate, efficient, just and reasonable service, we do not micro-manage its day-to-day operations or generally second-guess its management decisions. In this instance, the established record supports a finding that customers are not adversely affected by the Company’s decision to cap the “approved contractor list” at 10 for 2008. In its program administration description, the Company states it reviews completed contractor applications on an annual basis. We expect that it will continue to actively review and monitor its “list of approved contractors.” We accordingly find our Order No. 26898 in Case No. UWI-W-96-4 does not require clarification. We find it reasonable to grant United Water’s Motion to Dismiss and dismiss the complaints filed by McKay Construction Co., Inc. and Schmidt Co., Inc.

#### **CONCLUSIONS OF LAW**

The Idaho Public Utilities Commission has jurisdiction over United Water Idaho Inc., a water utility, pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Commission Rules of Procedure, IDAPA 31.01.01.000 *et seq.*

#### **ORDER**

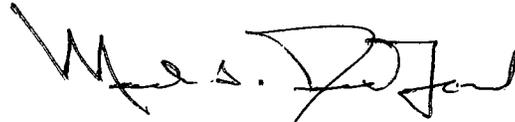
In consideration of the foregoing and as more particularly described above, IT IS HEREBY ORDERED and the Commission does hereby find no reason to clarify its Order No.

26898 in Case No. UWI-W-96-4. We accordingly deny the Petition for Clarification filed by McKay and Schmidt.

IT IS FURTHER ORDERED and the Commission does hereby dismiss the complaints of McKay Construction Co., Inc. and Schmidt Construction Co., Inc. in Case No. UWI-W-08-01.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 21<sup>st</sup> day of August 2008.



MACK A. REDFORD, PRESIDENT



MARSHA H. SMITH, COMMISSIONER



JIM D. KEMPTON, COMMISSIONER

ATTEST:



Jean D. Jewell  
Commission Secretary

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