**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Red River Service Corporation

File: B-279250

Date: May 26, 1998

Theodore M. Bailey, Esq., and Jonathan M. Bailey, Esq., for the protester.
Lis B. Young, Esq., George N. Brezna, Esq., and Charles E. Chambers, Esq., Department of the Navy, for the agency.
Lisa K. Friedman, Esq., and John Michaud, Esq., for the Environmental Protection Agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation for solid waste collection and disposal services for Camp Pendleton, San Diego County, California, properly included a provision requiring that the successful contractor comply with a San Diego County ordinance; prior General Accounting Office decisions stating that major federal facilities are exempt from such ordinances will not be followed.

DECISION

Red River Service Corporation protests the terms of invitation for bids (IFB) No. N68711-97-B-6401, issued by the Department of the Navy, for solid waste collection and disposal services for Camp Pendleton, San Diego County, California.

We deny the protest.

The IFB provides for the award of a fixed-price, indefinite-quantity contract for a base period of 1 year with four 1-year options. The successful contractor will be required to provide solid waste collection and disposal services for Camp Pendleton. Camp Pendleton is located in an unincorporated area of San Diego County, and includes approximately 5,784 residential housing units and numerous commercial buildings. The IFB, as amended, states:

> As required by the County of San Diego's Ordinance Number 8790, award of this solicitation is limited only to those contractors who are

> eligible to, or currently, have a non-exclusive solid waste management agreement with the County of San Diego.[1]

Red River argues that the requirement that the successful contractor have a solid waste management agreement with San Diego County unduly restricts competition and is unnecessary because, consistent with certain decisions of our Office, Camp Pendleton is a "major federal facility" and as such is not required to comply with local requirements respecting the collection and disposal of solid waste.

In preparing for the procurement of supplies or services, the procuring agency must specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition. 10 U.S.C. § 2305(a)(1)(A)(i) (1994). A solicitation may include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as otherwise authorized by law. 10 U.S.C. § 2305(a)(1)(B)(ii) (1994).

The agency explains that it interprets section 6001 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6961 (1994), as requiring that it comply with San Diego County's local ordinances in obtaining solid waste collection and disposal services. Section 6001 of RCRA, 42 U.S.C. § 6961(a) (1994), provides in pertinent part as follows:

> Each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

---

[1]Ordinance 8790 provides in part that:

> it is unlawful for any person to engage in the business of collection of solid waste kept, accumulated or produced in the unincorporated County unless a Solid Waste Management Agreement has been entered into and is in full force and effect.

San Diego County, Cal., Ordinance 8790, § 68.530 (Apr. 29, 1997)

According to the record, 25 firms currently have solid waste management agreements with San Diego County. County of San Diego, Solid Waste Management Agreements (Feb. 20, 1998).

Our Office first considered the effect of 42 U.S.C. § 6961 on procurements by federal agencies for waste disposal services in Monterey City Disposal Serv., Inc., B-218624, B-218880, Sept. 3, 1985, 85-2 CPD ¶ 261, at the request of the United States District Court for the Northern District of California. In Monterey, we concluded that the Navy Postgraduate School and the Army Presidio of Monterey, federal facilities located within the city limits of Monterey, California, were required by 42 U.S.C. § 6961 to comply with a city requirement that all inhabitants of the city have their solid waste collected by the city's exclusive franchisee.[2] In reaching this conclusion, we noted that it was clear from the legislative history of 42 U.S.C. § 6961 that its purpose was to require federal agencies to provide leadership in dealing with solid and hazardous waste disposal problems by having them comply not only with federal controls on the disposal of waste, but also with state and local controls as if they were private citizens.[3] Monterey City Disposal Serv., Inc., supra, at 4.

Our Office next substantively considered the effect of 42 U.S.C. § 6961 on procurements by federal agencies for waste disposal services in Solano Garbage Co., B-225397, B-225398, Feb. 5, 1987, 87-1 CPD ¶ 125, recon. denied, B-225397.2, B-225398.2, June 5, 1987, 87-1 CPD ¶ 571, which presented the issue of whether the protester's possession of an exclusive franchise to provide waste disposal services within the city limits of Fairfield, California, precluded Travis Air Force Base (which is located within Fairfield) from issuing a competitive solicitation for such services. Although we recognized that 42 U.S.C. § 6961 requires that federal agencies obtain waste disposal services in accordance with local government requirements, we agreed with the procuring agency that Travis Air Force Base "should be treated as though it is a separate municipality that cannot be required by Fairfield to use that city's exclusive franchisee for refuse collection." Solano Garbage Co., supra, at 6.

---

[2]We noted in Monterey that, while the Competition in Contracting Act of 1984 (CICA) generally requires competition in government contracting, CICA recognizes an exception where a statute expressly authorizes or requires that a procurement be made from a specified source. 10 U.S.C.A. § 2304(c)(5) (West Supp. 1998). As indicated above, we found the exception applicable, and concluded that the protested federal solicitations should be canceled and the services of the city's franchisee used instead. Monterey City Disposal Serv., Inc., supra, at 4.

[3]Shortly after Monterey was issued, the court, consistent with our opinion, entered judgment for the plaintiffs. Parola v. Weinberger, No. C-85-20303-WAI (N.D. Cal. Sept. 12, 1986). This decision was appealed to the United States Court of Appeals for the Ninth Circuit which reviewed de novo the district court's interpretation of the applicable statutes and affirmed the lower court decision holding that federal installations were required to comply with local arrangements for solid waste collection and disposal, including garbage collection franchises. Parola v. Weinberger, 848 F.2d 956 (9th Cir. 1988).

We relied primarily on 40 C.F.R. § 255.33 (1986) in reaching this conclusion.[4] That regulation, issued by the Environmental Protection Agency (EPA) and implementing certain aspects of RCRA, provides as follows:

> Major Federal facilities and Native American Reservations should be treated for the purposes of these guidelines as though they are incorporated municipalities, and the facility director or administrator should be considered the same as a locally elected official.

We determined that 40 C.F.R. § 255.33 created an exception to the RCRA requirement set forth at 42 U.S.C. § 6961, finding that the regulation

> evidences an intent that "major federal facilities" be considered "as though they are incorporated municipalities" for planning purposes under RCRA, which includes planning for the disposal of municipal solid waste.

Solano Garbage Co., supra, at 6. That is, we agreed with the procuring agency that Travis Air Force Base, as a major federal facility by virtue of its size and function (10,000 military inhabitants located on 5,200 acres owned by the United States, and occupying hundreds of buildings, workshops and storage facilities, all surrounded by a chain-link fence), was to be afforded the same status as a municipality under the California Solid Waste Management Plan, and could provide for its own refuse collection services.[5] Id.

Our Office subsequently considered the "major federal facilities" exception in four more protests. We found in one of the protests that the installation at issue was not, by virtue of its size and function, a major federal facility, and thus was required to use the city's exclusive franchise for refuse collection and transportation. Oakland Scavenger Co., B-236685, Dec. 19, 1989, 89-2 CPD ¶ 565 (Coast Guard Island, Alameda, California). In each of the remaining three protests, we determined that the installation at issue was a major federal facility and entitled to contract for its own refuse collection services, and thus was not subject to the

---

[4]This regulation has remained unchanged from the date of our prior decision.

[5]Under the California Solid Waste Management Plan, local governments (city and county) are responsible for aspects of solid waste handling that are of a local concern. This includes such aspects as frequency and means of collection, level of services, charges and fees, and whether collection services are provided by means of an exclusive or non-exclusive franchise. Cal. Public Resources Code § 40059 (West 1996).

waste disposal arrangement requirements of the local municipality or county. Waste Management of N. Am., Inc., B-241067, Jan. 18, 1991, 91-1 CPD ¶ 59 (El Toro Marine Corps Air Station, Orange County, California); Oakland Scavenger Co., B-241577, B-241584, Feb. 13, 1991, 91-1 CPD ¶166 (Alameda Naval Air Station, Alameda, California); Concord Disposal, Inc., B-246441.2, July 15, 1992, 92-2 CPD ¶ 24 (Naval Weapons Station, Concord, California).

The protester in Concord Disposal, the most recent decision of our Office in this area, challenged, among other things, the validity of the major federal facilities exception first set forth in Solano Garbage Co., supra. In support of this challenge, the protester argued that EPA was without statutory authority to issue a regulation exempting major federal facilities from the requirements 42 U.S.C. § 6961, and pointed out that its view was consistent with that of the United States District Court of the Eastern District of California, as set forth in Solano Garbage Co. v. Cheney, 779 F. Supp. 477 (E.D.Cal 1991).

During the pendency of the Concord Disposal protest, our Office requested EPA's opinion regarding the protester's challenge to the propriety of the major federal facilities exemption. EPA advised our Office that "it would be inappropriate to provide such an opinion, as this is a matter on which the Federal government is currently involved in litigation." Concord Disposal, Inc., supra, at 5. The litigation referred to was the appeal of Solano Garbage Co. v. Cheney, then pending at the United States Court of Appeals for the Ninth Circuit.[6] In light of EPA's position that it would not comment and because the validity of the exemption was squarely before the Ninth Circuit, we declined to revisit the issue of the propriety of the major federal facilities exception in Concord Disposal.[7]

As detailed below, we now conclude that 40 C.F.R § 255.33 does not exempt major federal facilities from the general requirement that federal installations comply with applicable local requirements and arrangements for solid waste collection and disposal. In reaching this conclusion, we give considerable weight to EPA's views on the matter, which were detailed in a letter filed with our Office and provided to the parties for comment on May 4, 1998. We are required to give deference to

---

[6]The Navy has advised our Office that the appeal of the district court's decision in Solano Garbage Co. v. Cheney, supra, was withdrawn by the government on December 12, 1992, several months after we issued our decision in the Concord Disposal protest.

[7]We also noted that two other federal district courts had previously issued opinions which conflicted with Solano Garbage Co. v. Cheney. See Carmel Marina Corp. v. Carlucci, No. C-87-20789-WAI (N.D. Cal. Apr. 20, 1988); Waste Management of N. Am., Inc. v. Weinberger, No. CV-87-4329-DT (C.D. Cal. Sept. 28, 1987), aff'd on other grounds, 862 F.2d 1393 (9th Cir. 1988).

EPA's reasonable interpretation of its regulations. Israel Aircraft Indus., Ltd.--Recon., B-258229.2, July 26, 1995, 95-2 CPD ¶ 46 at 5; see Udall v. Tallman, 380 U.S. 1, 16-17 (1964).

In accordance with section 4002 of RCRA, 42 U.S.C. § 6942 (1994), EPA was required to "publish [by regulation] guidelines for the identification of those areas which have common solid waste management problems and are appropriate units for planning regional solid waste management services." 42 U.S.C. § 6942(a). EPA explains that 40 C.F.R. Part 255 constitutes the guidelines for identifying appropriate regions for waste management planning purposes required by section 4002(a) of RCRA, 42 U.S.C. § 6942(a). These guidelines provide that the preliminary identification of regional boundaries should be made by the governor of the respective State after consultation with local government officials and/or entities. 40 C.F.R. §§ 255.20 and 255.21. The local government officials and/or entities are to be notified of, and allowed to participate in, the process of identifying the appropriate state agencies to be responsible for the solid waste management plan and its implementation, and invited to a public hearing should one be needed. 40 C.F.R. § 255.23.

EPA explains that 40 C.F.R. § 255.33 equated "'major federal facilities' . . . with 'incorporated municipalities' to ensure that these potentially large areas of a State are included in the identification of solid waste management planning regions." The agency adds that, because the guidelines set forth in Part 255 identify certain roles for locally elected officials, the provision in 40 C.F.R. § 255.33 that "the facility director or administrator should be considered the same as a locally elected official" was "intended to allow the director of a federal facility . . . to fully participate in regional solid waste planning and implementation in the same manner as local elected officials." The agency points out that its intentions are confirmed by the terms of 40 C.F.R. § 255.33, which provide that major federal facilities are to be treated as incorporated municipalities only "for the purposes of these guidelines." EPA concludes that 40 C.F.R. § 255.33 "does not . . . go further to exempt federal facilities from local solid waste requirements."

EPA's view is consistent with that expressed in Solano Garbage Co. v. Cheney, supra. In that decision, the district court took issue with our prior reading of 40 C.F.R. § 255.33, and concluded, based upon its examination of the statutory language and legislative history of 42 U.S.C. § 6961 and RCRA as a whole, as well as 40 C.F.R. § 255.33, that 40 C.F.R. § 255.33 did not provide for a major federal facilities exemption to the requirement that federal installations comply with local requirements and arrangements for solid waste collection and disposal. The court noted that the legislative history of RCRA showed that Congress was aware of a history of controversy over the extent of federal compliance with local requirements mandated by section 118 of the Clean Air Act, 42 U.S.C. § 7418, and section 313 of the Federal Water Pollution Control Act, 33 U.S.C. § 1323, and that "the legislative reaction to this history of controversy 'was to subject federal installations to state

environmental control.'" Solano Garbage Co. v. Cheney, 779 F. Supp. at 487. The court concluded that "[a]gainst this history . . . Congress did not intend any exemption to local requirements beyond those specifically described in the statute," and noted that consistent with this, the statute provides no indication that major federal facilities should be exempted from local requirements. Id.

Turning to 40 C.F.R. § 255.33, the court noted that the scope and purpose of Part 255 is defined in 40 C.F.R. § 255.1(a) as follows:

> These guidelines are applicable to policies, procedures, and criteria for the identification of those areas which have common solid waste management problems and which are appropriate units for planning regional solid waste management services pursuant to section 4002(a) of the Solid Waste Disposal Act, and amended by [RCRA] (the Act).[8] The guidelines also define and guide the identification of which functions will be carried out by which agencies pursuant to section 4006 of the Act.[9]

---

[8]Section 4002(a) of RCRA, 42 U.S.C. § 6942(a), provides that EPA "shall by regulation publish guidelines for the identification of those areas which have common solid waste management problems and are appropriate units for planning regional solid waste management services."

[9]Section 4006 of RCRA, 42 U.S.C. § 6946(a), provides in part that:

> the Governor of each state, after consultation with local elected officials, shall promulgate regulations based on [EPA's] guidelines identifying the boundaries of each area within the State which . . . is appropriate for carrying out regional solid waste management.

Section 4006(b) of RCRA, 42 U.S.C. § 6946(b), adds in relevant part that:

> the State, together with appropriate elected officials of general purpose units of local government, shall jointly (A) identify an agency to develop the State plan and identify one or more agencies to implement such plan, and (B) identify which solid waste management activities will, under such State plan, be planned for and carried out by the State and which such management activities will, under such State plan, be planned for and carried out by a regional or local authority or a combination of regional or local and State authorities.

The court held:

> By its plain language, 40 C.F.R. § 255.33 requires "major federal facilities" to be treated as local municipalities for purposes of the guidelines, i.e., for purposes of the regulations in Part 255, which were intended to guide the states in developing state plans pursuant to § 4006. The regulation does not require the states to treat major federal facilities as separate municipalities for all purposes.

Solano Garbage Co. v. Cheney, 779 F. Supp. at 488. The court added that reading the regulation in the manner suggested by our Office would conflict with the congressional concern for unification of waste disposal systems by effectively multiplying rather than unifying the number of jurisdictions with such systems. 779 F. Supp. at 488-89. The court also noted that, because 42 U.S.C. § 6961 did not provide for a "major federal facilities" exemption, reading 42 C.F.R. § 255.33 as creating one would place the EPA in the position of having issued a regulation which exceeded its statutory authority. 779 F. Supp. at 489.

We are persuaded by EPA's position and that expressed in Solano Garbage Co. v. Cheney, and now agree that 40 C.F.R. § 255.33 does not exempt major federal facilities from the general requirement that federal installations are required to comply with local arrangements for solid waste collection and disposal. As noted by the district court in Solano Garbage Co. v. Cheney, there is no language in 42 U.S.C. § 6961 or anywhere else in RCRA, or in RCRA's legislative history, indicating that Congress intended that major federal facilities be exempt from the general requirement that federal installations are required to comply with local arrangements for solid waste collection and disposal. With regard to 40 C.F.R. § 255.33, we agree with EPA that the context of the regulation makes it clear that the regulation is only meant to ensure that major federal facilities are considered in the identification of solid waste management regions and that the facilities' administrators are included in the decision-making process, and was not intended to exempt federal facilities from local requirements regarding solid waste collection and disposal. In this regard, we note that there is no indication in the explanatory comments in the Federal Register notice setting forth the Part 255 regulations that 40 C.F.R. § 255.33 was intended to exempt major federal facilities from the general requirements of section 6001 of RCRA. See Part 255--Identification of Regions and Agencies for Solid Waste Management, 42 Fed. Reg. 24,925-927 (1977).[10]

---

[10]The protester similarly argues that 40 C.F.R. § 255.33 requires that Camp Pendleton be construed as an incorporated municipality because it is a major federal facility, such that the San Diego County ordinance is applicable, inasmuch as it only applies to unincorporated areas of the county. This argument also fails because the EPA regulation requires treatment of major federal facilities as incorporated municipalities solely for the limited purposes discussed above.

Accordingly, we will no longer follow our prior decisions stating that major federal facilities are exempt from the general RCRA requirement that federal agencies comply with local solid waste management regulations. The agency here acted properly in including in the solicitation the clause providing that the successful contractor comply with the San Diego County ordinance, by requiring that the contractor have or be able to obtain a solid waste management agreement with the County of San Diego.

The protest is denied.

Comptroller General
of the United States