

Ayer
32138

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-218624; B-218880 **DATE:** *September 3, 1985*

MATTER OF: Monterey City Disposal Service, Inc.

DIGEST:

Since Solid Waste Disposal Act requires federal agencies to comply with local requirements respecting the control and abatement of solid waste generated by federal facilities in the same manner and extent as any person subject to such requirements, those federal facilities located within the city of Monterey must comply with a city requirement that all inhabitants of the city have their solid waste collected by the city's franchisee. Therefore, federal solicitations seeking bids for these services should be canceled and the services of the city or its franchisee should be used instead.

Monterey City Disposal Service, Inc. (MCDS), protests the issuance by the Departments of the Navy and the Army of invitations for bids (IFB) No. N62474-84-C-5427 (Navy) and DAKF03-85-B-0022 (Army) for the collection and disposal of solid waste at the Naval Postgraduate School, the Presidio of Monterey and Fort Ord.

MCDS has an exclusive franchise from the city of Monterey for the collection and disposal of solid waste. The city of Monterey code requires that inhabitants of the city utilize the solid waste disposal service provided by the city or its franchisee. The Solid Waste Disposal Act, 42 U.S.C. § 6961 (1982) (SWDA), provides:

"Each department . . . of the executive branch . . . of the Federal Government . . . engaged in any activity resulting, or which may result, in the disposal or management of solid waste . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits . . .), respecting control and abatement of solid

033038|127814

waste . . . in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges."

MCDS contends that section 6961 requires the Navy and the Army, to the extent that their respective IFB's concern services to be performed within the city limits, to utilize its services because of its exclusive franchise with the city.

After protesting to our Office, MCDS filed suit in the United States District Court, Northern District of California, San Jose (District Court) (Gary Parola and Monterey City Disposal Service, Inc. v. Casper Weinberger, et al., No. C-85-20303WAI). The city of Monterey, a party to the suit, supports the plaintiff's action. The District Court issued an interim order on June 24, 1985, granting a preliminary injunction pending our decision on whether the Navy and the Army are required to utilize MCDS's services.

We find that the Navy and Army are required to use the services of the city or its franchisee and the protests are sustained.

The legislative history of section 6961 reveals that its purpose is to require federal agencies to provide leadership in dealing with solid waste 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. S. Rep. No. 94-985, 94th Cong., 2d Sess. 23-24.

Both the Army and the Navy point to two recent court cases, California v. Walters, 751 F.2d 977 (9th Cir. 1984), and Florida v. Silvex Corp., No. 83-926-CIV-J-14, slip. op. (M. D. Fla. Jan. 28, 1985), as indicating that the type of requirement they must comply with does not include local provisions such as the solid waste collection provision of the Monterey code.

In California v. Walters, the city of Los Angeles initiated a criminal prosecution against the Veterans Administration because of its alleged disposal of hazardous medical waste, citing section 6961 as a waiver of sovereign immunity by the United States. The court disagreed, holding that while state waste disposal standards, permits and reporting duties were "requirements" applicable to federal agencies under section 6961, state criminal

sanctions were not. The court stated that sanctions are rather the means by which standards and reporting duties are enforced and, as such, are not clearly within the scope of the waiver of sovereign immunity under section 6961.

Florida v. Silvex Corp. involved a state statute that holds a party strictly liable for removal costs and damages for releasing a hazardous waste. A Navy contractor responsible for removing hazardous waste spilled the waste, and the state sought to hold the Navy liable for damages, citing section 6961. As in the California case, the court reasoned that liability requirements under state statutes were not within the coverage of section 6961.

Sanctions are not being sought in this case. Rather the protester is seeking to require the Army and the Navy to use its solid waste collection services just as any other person in the city of Monterey would be required to do. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905). The city code provision in question clearly is designed to permit the city to control the disposal of solid waste within city limits in a safe and efficient manner.^{1/} The protester and the city point out

^{1/} The California Plan (Oct. 1981) as approved by the Environmental Protection Agency (EPA), 47 Fed. Reg. 6834 (1982), delegated to local government the responsibility for establishing collection standards of local concern. Consistent with the Plan the California Code provides that local government shall determine:

"Whether such services are to be provided by means of nonexclusive franchise, contract license, permit, or otherwise, either with or without competitive bidding, or if in the opinion of its governing body, the public health, safety and well-being so require, by partially exclusive or wholly exclusive franchise, contract license, permit, or otherwise, either with or without competitive bidding. Such authority to provide solid waste handling services may be granted under such terms and conditions as are prescribed by the governing body of the local governmental agency by resolution or ordinance."

Cal. Gov't. § 66757(b) (Deering Supp. 1985) (enacted in 1980).

that, by requiring that all solid waste be collected by the city's exclusive franchisee, the city is better able to assure that its rules and regulations regarding solid waste disposal are followed. See also, Strub v. Deerfield, 167 N.E.2d 178, 180 (Ill. 1960), 83 ALR2d 795. The city further points out that until now the Navy has used its services (the Army has always competed for these services) and that if the Navy now withdraws, the city's ability to provide adequate service to the entire community at a reasonable price may be impaired.

The Navy argues, however, that federal procurement statutes require that its services and purchases be obtained on a competitive basis, and that the recently enacted Competition In Contracting Act of 1984, (CICA) 10 U.S.C.A. § 2301 (West Supp. 1985), reinforces the requirement for competition in contracting. The Navy argues that in the absence of an express congressional intent to permit sole source contracting under section 6961, we should not read the section as requiring sole source instead of competitive contracting.

We note that, while CICA requires that federal agencies use competitive procedures, the act recognizes as an exception when:

"A statute expressly authorizes or requires that the procurement be made . . . from a specified source." 10 U.S.C.A. § 2304(c)(5) (West Supp. 1985).

Under section 6961, federal agencies are required to comply with local requirements respecting the control and abatement of solid waste, "in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges." This language expressly requires federal agencies to obtain waste disposal services from local government where the local government requires that its waste disposal services be used. In short, we think the exception provision of CICA is applicable here.

Finally, the Navy expresses concern that it could find itself at the mercy of expensive or unscrupulous contractors if it has to use the local franchises. In this case, for example, Navy notes that it received three bids under its solicitation, a low bid of \$107,400, a second low bid of \$129,000, and a third bid from the protester of

\$250,432. Further, Navy notes that its current contract with the protester provides a price of \$175,000.

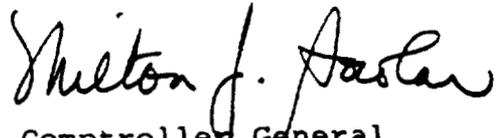
We would share the Navy's concern, but for the fact that the record indicates that the solicitation's statement of work exceeds the statement of work of the current contract. Moreover, MCDS has filed an affidavit showing that it bid using "the standard rates which the Company's franchise agreement with Monterey requires us to charge all customers within the City." Affidavit of Gary Parola, May 14, 1985, p.4. In view of MCDS's status as a public utility under California law, United States v. Scavengers Protective Ass'n., 105 F. Supp. 656 (N.D. Cal. 1952), we find that MCDS's rates are reasonable under the circumstances since they are subject to local government regulation and judicial review. See Ex parte Zhizhuzza, 81 P. 955, 957 (Cal. 1905); see also City of Glendale v. Tronsen, 308 P.2d 1, 6 (Cal. 1957).

Therefore, we find that, in accordance with section 6961, the Navy should use the services of the city's franchisee to collect its solid waste. We recommend that the Navy solicitation be canceled and the Navy's collection requirements be met by using the services of the city or its franchisee.

In the case of the Army, we reach a similar conclusion with regard to Presidio. The Army's solicitation covers both Fort Ord, which is located outside the city, and Presidio, which is located within the city. As indicated by the Army solicitation, most of the solid waste will be generated outside the city (estimated 127.5 tons per week at Fort Ord compared to an estimated 30 tons per week at the Presidio). The Army has not presented any reasons why it can not obtain services for Presidio apart from the solid waste collection services it obtains for Fort Ord. Since the Fort Ord facility is outside the city limits of Monterey, the Army of course need not comply with the city code provision for its Fort Ord collection requirement. We therefore recommend that the Army delete the Presidio requirement from the Fort Ord solicitation. We further recommend that the Presidio requirement be met by using the services of the city or its franchisee.

B-218624
B-218880

The protests are sustained.

A handwritten signature in cursive script that reads "Milton J. Aaster".

Acting Comptroller General
of the United States