

McAuliffe 147118



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Concord Disposal, Inc.

File: B-246441.2

Date: July 15, 1992

Michael P. McCabe, Esq., and Dean A. Christopherson, Esq., McCabe, Schwartz, Evans, Levy & Dawe, for the protester. Robert G. Hamlin, Esq., Hamlin & Sasser, P.A., for U.S. Eagle, Inc., an interested party. Gilbert H. Chong, Esq., Ray Goldstein, Esq., David W. La Croix, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency. Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Based upon prior General Accounting Office and court decisions, agency reasonably viewed the Naval Weapons Station at Concord, California as a major federal facility entitled to contract for its own refuse collection services.

DECISION

Concord Disposal, Inc. protests invitation for bids (IFB) No. N62474-91-B-2579, issued by the Department of the Navy for refuse collection and removal services for the Naval Weapons Station, Concord, California. Concord Disposal contends that a competitive procurement is improper because it is the exclusive franchisee for refuse disposal in Concord, California, and therefore the Naval Weapons Station is required to use the protester's services.

We deny the protest.

Under the Resource Conservation and Recovery Act (RCRA), the Environmental Protection Agency (EPA) provides guidelines for the submission of state solid waste management plans that provide in part for local regulation of solid waste. 42 U.S.C. §§ 6907, 6912, and 6942 (1988). Federal agencies in turn generally are required to comply with such local

regulation,¹ unless a "[m]ajor federal facility" is involved, in which case, according to EPA regulations, the facility should be treated as an incorporated municipality.²

Under the California plan, local governments (city and county) are responsible for aspects of solid waste handling that are of 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 nonexclusive franchise. See California Plan (Oct. 1981), 47 Fed. Reg. 6834 (1982); Cal. Gov't Code § 6657 (Deering Supp. 1985).

The Contra Costa County solid waste management plan, which encompasses the City of Concord, allows for solid waste collection franchises. (The county plan defines "franchise" as a contract by which exclusive rights to collect municipal refuse are granted to a successful bidder by the local government franchisor.) Concord Disposal's exclusive franchise, awarded to it by the City of Concord in 1967, and extended in 1980, states that the protester has been granted the "exclusive contract right, franchise and privilege to collect and dispose of all garbage, swill, rubbish and

¹42 U.S.C. § 6961 in part provides:

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

²40 C.F.R. § 255.33 (1991) provides that:

"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."

garden waste within the corporate limits of the City of Concord." Neither the county plan nor the protester's franchise agreement specifically references the Naval Weapons Station.

To the extent the IFB concerns services to be performed within city limits, Concord Disposal first contends that 42 U.S.C. § 6961 requires the Navy to use its services because of Concord Disposal's exclusive franchise with the city. (In support, the protester cites Parola v. Weinberger, 848 F.2d 956 (9th Cir. 1988), in which the court held that local requirements respecting control and abatement of solid waste generally include the use of local franchisees.) The protester asserts that the Naval Weapons Station is not a major federal facility and therefore is not exempt from the RCRA requirement for federal facilities to comply with local requirements for waste collection. In this regard, the protester asserts that the Naval Weapons Station has not actively participated in regional solid waste management planning and thus has not exercised any alleged municipality status under the EPA regulation. Alternatively, Concord Disposal argues that the EPA regulation establishing the major federal facility exemption exceeds EPA's statutory authority, as was recently held in Solano Garbage Co. v. Cheney, 779 F. Supp. 477 (E.D. Cal. 1991).

The agency asserts that the Naval Weapons Station is a major federal facility and thus is not subject to the terms of the protester's franchise agreement with the City of Concord. The agency further argues that the EPA regulation which sets forth the major federal facility exemption is authorized by RCRA. In conducting this procurement, the Navy has relied on prior decisions of our Office and federal court decisions recognizing the exemption, including one from the judicial district in which the Station is located. See Carmel Marina Corp. v. Carlucci, No. C-87-20789-WAI (N.D. Cal. Apr. 20, 1988).

We have considered in several cases the issue of whether a protester's possession of an exclusive franchise to provide waste disposal services in various jurisdictions within the State of California precludes federal agencies with facilities located in those jurisdictions from issuing competitive solicitations. E.g., Oakland Scavenger Co., B-241557; B-241584, Feb. 13, 1991, 91-1 CPD ¶ 166; Waste Mgmt. of North Am., B-241067, Jan. 18, 1991, 91-1 CPD ¶ 59; Oakland Scavenger Co., B-236685, Dec. 19, 1989, 89-2 CPD ¶ 565; Monterey City Disposal Serv., Inc., 64 Comp. Gen. 813 (1985), 85-2 CPD ¶ 261. In these cases, we held that 42 U.S.C. § 6961 does require federal agencies to contract with the local franchisees for waste removal and disposal. We also recognized the major federal facility exemption in 40 C.F.R. § 255.33, stating that when by virtue of its size

and function a facility is actually a separate community, it should be regarded as a separate municipality entitled to contract for its own refuse collection services. Solano Garbage Co., 66 Comp. Gen. 237 (1987), 87-1 CPD ¶ 125.

In Solano Garbage Co., we considered Travis Air Force Base to be a major federal facility because of its size and function--Travis consists of more than 5,200 acres, has a population of more than 10,000 military residents, and exists as a self-contained military community separate and distinct from the adjoining civilian community of Fairfield, California. Similarly, in Waste Mgmt. of North Am., supra, we found El Toro Marine Corps Air Station with 4,800 acres and more than 10,000 military residents to be a major federal facility, not subject to Orange County's waste abatement authority. In Oakland Scavenger Co., B-241577; B-241584, supra, we found Alameda Naval Air Station and Annex with 1,500 acres and a population of 10,000 (mostly day-time residents) to be a self-contained military installation entitled to regulate its own refuse collection as a major federal facility. On the other hand, we rejected the argument that a 65-acre federal facility inhabited by 2,000 residents was a "major federal facility" based upon the facility's size and the fact that the facility did not operate independently from the local government since, for example, the facility obtains its electrical services, emergency services and police protection from the neighboring community. Oakland Scavenger Co., B-236685, supra.

Here, the record shows that the Naval Weapons Station encompasses 12,989 acres, of which 7,269 acres (constituting the Inland area or Naval Magazine Concord) fall within the corporate boundaries of the City of Concord, and has a population of approximately 3,000 (1,800 military personnel and dependents and 1,200 civilian employees).³ All but a small portion (approximately 150 people) of the population are stationed in the Inland area (the portion of the facility within city limits), which contains administrative buildings, residential areas, barracks, community facilities, and magazines for munitions storage. The facility also offers food services, a medical clinic, a Naval Exchange and an Officer's Club. In support of its contention that the Naval Weapons Station is a self-contained military community separate from the adjoining

³The protester has provided newspaper articles which suggest that the station's population may decrease slightly due to a proposed cut in Navy operations at the station. However, the agency anticipates other additional operations and positions to become available in the near future, so that its population will remain relatively constant.

community of Concord, the Navy explains that the facility has historically regulated its own refuse collection and that "[a]ll of [the facility's roads and streetlights are maintained by the station [which] . . . receives no utilities from the City of Concord." The agency also states that:

"[e]xcept for the residential area [of the Inland area, the Naval Weapons Station] is surrounded by a high security fence and access is strictly controlled. Except for the residential area, all police and fire protection is provided by station forces."

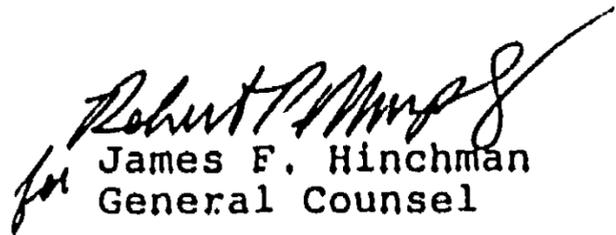
Although the Naval Weapons Station has a smaller population than some of the other facilities we have found to be "major federal facilities" for refuse collection purposes, we think the station reasonably can be considered a major federal facility. The Naval Weapons Station does not use Concord's utilities or road services; it provides the majority of its emergency service needs; a high security fence has been erected around the installation to separate the non-residential areas of the station from the neighboring community, and it provides food, housing and medical services to its population. In sum, the Naval Weapons Station operates essentially as a separate self-contained military installation. The fact that the facility has not participated in Contra Costa County regional solid waste management planning does not change the fact that the station functionally is a separate community. Accordingly, consistent with our prior cases, the Station reasonably may be viewed as a major federal facility.

With respect to Concord Disposal's challenge to the major federal facility exemption, we requested EPA's opinion on the matter. EPA has advised our Office that ". . . it would be inappropriate to provide such an opinion, as this is a matter on which the [f]ederal government is currently involved in litigation." The litigation to which EPA refers is an appeal of the Solano Garbage Co. v. Cheney decision; the appeal was filed on January 3, 1992 and is pending at the United States Court of Appeals for the Ninth Circuit.

The district court in Solano Garbage Co. v. Cheney takes issue with our reading of the EPA regulations and EPA's authority under RCRA to provide for a major federal facility exemption. We believe that RCRA can be read to provide EPA authority to promulgate the exemption, and our prior decisions recognizing the exemption reflect this view. Two federal district courts in California have issued opinions

which conflict with the recent district court holding, Compare Solano Garbage Co. v. Cheney with Carmel Marina Corp. v. Carlucci, supra; Waste Mgmt. of North Am., Inc. v. Weinberger, No. CV-87-4329-DT (C.D. Cal, Sept, 28, 1987), affirmed on other grounds, 862 F. 2d 1393, 1396 (9th Cir. 1988)). Here, the matter raised by Concord Disposal, the validity of the major federal facility exemption, is squarely before the Ninth Circuit. Under these circumstances, we see no useful purpose in revisiting the issue.

The protest is denied.


for James F. Hinchman
General Counsel