

LLW Forum

News Flash

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Waste Control Specialists, LLC v. U.S. Department of Energy

Federal Court Enjoins DOE from Excluding WCS on New Disposal Contracts

On October 10, in response to a lawsuit filed by Waste Control Specialists (WCS) in the U.S. District Court for the Northern District of Texas, a preliminary injunction was issued against the U.S. Department of Energy concerning the award of new contracts for low-level or mixed radioactive waste disposal services. In a harshly worded order, the court termed as "bogus" DOE's stated reasons for disqualifying a recent bid by WCS to provide waste disposal services for the department's Fernald site in Ohio. The court also found that a "virtual monopoly" exists in the bidding for off-site disposal of DOE low-level and mixed radioactive wastes. The court concluded by rebuking DOE for its "apparent lack of interest ... in allowing other interested parties to compete for the award of such contracts" and questioned whether the department's actions stem from "gross incompetence or ... something far worse."

Background

WCS holds permits from the State of Texas for the disposal of hazardous waste and from the U.S. Environmental Protection Agency for the disposal of toxic waste at its Andrews County facility. WCS is interested, however, in expanding its operations to include the disposal of DOE radioactive waste. Accordingly, in the spring of 1996, WCS officials initiated discussions with officials from DOE and the State of Texas.

Since the disposal of DOE waste is not subject to state regulation, WCS proposed that DOE could either self-regulate the disposal of department waste at the WCS facility or delegate the function by contract to an appropriate oversight body. WCS suggested the Texas Natural Resource Conservation Commission (TNRCC) as an appropriate oversight body.

On September 20, 1996, WCS submitted a contingent bid to dispose of DOE radioactive waste from the department's Fernald site in response to a Request for Proposals (RFP) issued by DOE's Ohio Field Office. The bid set forth the process that would be used, if the contract were awarded to WCS, to obtain the necessary DOE authorization to dispose of the department's waste at the Andrews County facility—including specific reference to the TNRCC oversight proposal.

Subsequently, in October 1996, TNRCC declined to act as an oversight body for the WCS facility. In its lawsuit, WCS contends that TNRCC's decision was a direct result of actions taken by Envirocare, the only non-governmental disposal facility operator in the United States authorized to dispose of DOE low-level radioactive waste. (See *LLW Notes*, July 1997, pp. 20-22.)

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In November 1996, DOE requested additional proposals from WCS for obtaining DOE authorization without TNRC's involvement. On December 20, WCS provided alternative proposals, including the use of an oversight group consisting of Texas Tech University, Texas A&M University, and Integrated Resources Group (a private consulting firm and DOE contractor). WCS acknowledged that the oversight group could include or substitute DOE's Sandia National Laboratories, the U.S. Nuclear Regulatory Commission, or even an arm of DOE itself. WCS offered to reimburse DOE for all costs associated with DOE's review and oversight.

On May 5, 1997, DOE rejected the WCS proposal, citing concerns regarding DOE's use of regulatory authority under the Atomic Energy Act to approve a privately owned facility for DOE waste disposal before the award of a contract. "Such a sequence raises difficult questions about the extent of DOE's authority, and it may also create an appearance of favoritism toward one potential bidder over another."

On August 12, WCS filed suit in the U.S. District Court for the Northern District of Texas against DOE; Alvin Alm, Assistant Secretary for Environmental Management; and Mary Anne Sullivan, Deputy General Counsel for Environment and Civilian Nuclear Defense Programs. The suit seeks judicial review of DOE's actions concerning the WCS proposal.

Issues

WCS contends that DOE senior officials have not carefully or reasonably considered the company's proposal and that DOE's alleged concerns regarding delegation of the department's oversight responsibilities to a third party are not genuine. Instead, WCS alleges that the rejection was the result of political considerations and other factors.

WCS argues that DOE's rejection of the company's proposal causes WCS enormous economic damage, stifles competition, and perpetuates an existing monopoly.

Moreover, WCS alleges as follows:

If DOE accepted the approach outlined in WCS' proposal of December 20, 1996, real competition for the disposal of DOE radioactive waste would, for the first time ever, occur. Simultaneously, the monopoly of Envirocare, built upon questionable authorizations issued by Larry F. Anderson, would collapse. Other waste disposal companies would likely seek similar DOE authorizations and a genuine marketplace for the disposal of DOE radioactive waste would develop. As a result of natural market forces, real competition would inevitably drive down DOE's cost for disposal of radioactive waste thus saving DOE and U.S. taxpayers millions of dollars in the short term, and hundreds of millions dollars, or perhaps billions of dollars, in the long term.

Unlawful Rejection of WCS Proposal WCS argues that DOE's rejection of the company's proposal is unlawful on the grounds that it is arbitrary, capricious, an abuse of discretion, or not in accordance with law.

Violation of Due Process WCS also contends that DOE's rejection evidences "a fundamental, arbitrary and capricious refusal by DOE to do any of its radioactive waste disposal business with WCS, for no lawful reason, while simultaneously demonstrating a fundamental, arbitrary and capricious eagerness to continue to do business with Envirocare in a manner contrary to law." WCS asserts that the rejection effectively prevents the company from prevailing in any bid for DOE radioactive waste disposal services and is, in legal effect, a de facto debarment. According to WCS, "[t]his de facto debarment constitutes a destruction of the constitutionally protected property and liberty interests of WCS without any lawful basis, without notice, and without an opportunity for hearing, and as a result such action violates the right of WCS to due process of law guaranteed by the Fifth Amendment to the United States Constitution."

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Requested Relief

WCS is seeking the following relief from the court:

- a declaratory judgment that DOE's rejection of the WCS proposal is unlawful as arbitrary, capricious, or an abuse of discretion;
- a declaratory judgment that DOE's rejection constitutes a de facto debarment without any lawful basis, without notice, and without an opportunity for hearing in violation of the Fifth Amendment;
- a declaratory judgment that WCS' proposal for oversight of WCS' facilities through contractual delegation of oversight responsibilities to a qualified third party is authorized by applicable law;
- an order remanding the WCS proposal to DOE for reconsideration in accordance with the court's judgments; and
- other relief as the court deems just and proper.

The Preliminary Injunction

Conclusions of Law The court found that although the Atomic Energy Act requires "persons" to obtain a license from NRC (or from a state if such authority has been delegated thereto) as a precondition to the disposal of low-level radioactive waste, the act specifically exempts the activities of DOE and its contractors from this requirement. Accordingly, the court held that "DOE's apparent disqualification of WCS' Fernald bid, and its rejection of the WCS' December 20 proposal on the ground that WCS does not possess (or cannot legally obtain) a Texas or NRC license, is arbitrary, capricious, an abuse of discretion, and unlawful."

In addition, the court determined that WCS is, and at all times has been, willing and able to take title upon receipt of DOE wastes pursuant to the terms of the Request for Proposals issued by DOE's Ohio Field Office, and that the WCS bid made no attempt to alter the RFP's terms relative to title. Accordingly, the court held that "DOE's apparent contemplated denial of Plaintiff's Fernald bid, on the ground that WCS will not take title to the wastes covered by the DOE's RFP, is arbitrary, capricious, an abuse of discretion, and unlawful."

Activities Enjoined In awarding the preliminary injunction, the court wrote as follows:

An award of a DOE contract for disposal of radioactive wastes from the DOE Fernald facility is imminent, and without the injunction herein granted WCS will likely be disqualified from the bidding process on the basis that it lacks a low-level radioactive waste disposal license from the State of Texas, that it lacks an NRC license, or that its bid seeks to alter the provisions of the Fernald RFP relative to title. In fact, a reasonable deduction from the evidence and from the defendant's brief is that the "fix is in" and that the Fernald site is a "done deal" absent this injunction compelling fair consideration and competition. Other DOE radioactive waste disposal contracts may be awarded or RFP's issued during the pendency of this action and, without the preliminary injunction, herein granted, WCS will be unable to compete effectively for them. Once they are gone they are gone. The Court finds that Plaintiff will suffer irreparable injury unless the preliminary injunction herein ordered is issued.

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The preliminary injunction bars the defendants, their respective agents, employees, and attorneys, as well as all persons in active concert or participation with the defendants who receive actual notice of the court's order, from

- denying any WCS bid or contract for DOE low-level or mixed radioactive waste disposal services on the ground(s) that WCS lacks a low-level radioactive waste disposal license from the State of Texas, that it lacks an NRC license, or that its bid seeks to alter the provisions of the Fernald RFP relative to title; and
- using the injunction as a cause or justification for the reissuance of any currently outstanding RFP.

Under the terms of the court's order, the preliminary injunction would not become effective until WCS posts a \$10,000 injunction bond for payment of such costs and damages as may be incurred by the defendants in the event that the defendants have been wrongfully enjoined. WCS posted the bond on October 7.

—Todd Lousnger

The Low-Level Radioactive Waste Forum is an association of state and compact representatives, appointed by governors and compact commissions, established to facilitate state and compact implementation of the Low-Level Radioactive Waste Policy Act of 1980 and the Low-Level Radioactive Waste Policy Amendments Act of 1985 and to promote the objectives of low-level radioactive waste regional compacts. The LLW Forum provides an opportunity for state and compact officials to share information with one another and to exchange views with officials of federal agencies and other interested parties.

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