Attachment 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

WASTE CONTROL SPECIALISTS, LLC Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, ALVIN L. ALM, Assistant Secretary for Environmental Management, and MARY ANNE SULLIVAN, Deputy General Counsel for Environment and Civilian Nuclear Defense Programs, Defendants.	)	Civil Action No. 7-97CV-202-X

PRELIMINARY INJUNCTION

This cause came before the Court on Plaintiff's application for a preliminary injunction in its First Amended Complaint, filed pursuant to Rule 65 of the Federal Rules of Civil Procedure on August 29, 1997. The Court has considered such Amended Complaint, the Affidavit of Kenneth N. Bigham and Verification of First Amended Complaint, the Affidavit of Elayne Coppage, the Brief in Support of Plaintiff's First Amended Complaint, Defendants' Response in Opposition to Plaintiff's Application for Preliminary Injunction and Brief in Support thereof, Plaintiff's Opposition to Defendants' Motion to Dismiss and Response in Opposition to Plaintiff's Application for Preliminary Injunction, and the evidence, testimony and arguments of counsel offered at the hearing on September 30, 1997. Having done so, the Court enters the findings and order set forth

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below Although the Court's findings are characterized for convenience as findings of fact and conclusions of law, the essential requisites for the issuance of a preliminary injunction are mixed questions of law and fact *Blue Bell Bio-Medical v Cin Bad, Inc*, 864 F 2d 1253, 1256 (5th Cir. 1989) Accordingly, many of the findings and conclusions might be categorized under either heading.

Additional reasons for the Court's findings and conclusions were stated on the record at the evidentiary hearing. The plaintiffs presented two expert witnesses whom the Court found to be highly credible. Together they have seventy plus years of experience in this field The majority of this experience is nuclear agency regulatory experience They were subjected to cross examination. In contrast, the defendant produced no witnesses and introduced only one exhibit on a tangential point. In short, the Plaintiff's evidence was uncontroverted.

I

Findings Of Fact

1. Plaintiff Waste Control Specialists, LLC ("WCS") is seeking to compete for contracts with Defendant Department of Energy ("DOE") for disposal of DOE radioactive wastes and/or mixed low-level radioactive wastes generated as a result of DOE's efforts to clean up sites used for national defense programs. To this end, WCS has spent millions of dollars to develop a disposal site in Andrews County, Texas

2. DOE has issued a Request for Proposals ("RFP") covering certain radioactive waste disposal services in association with its cleanup of DOE's Fernald nuclear site in Ohio (the "Fernald RFP"), and WCS submitted a bid in response to this

RFP. The RFP required that a successful bidder shall have "all necessary licenses or permits" within twenty-seven (27) months of the date of contract award, and that the successful bidder shall take title to DOE wastes received for disposal.

3 WCS has submitted a proposal dated December 20, 1996, to DOE whereby DOE itself, or some qualified entity acting on DOE's behalf, would at no cost to DOE review the suitability of WCS' Andrews County site If the site is found safe and environmentally sound, WCS would then be able to compete effectively for DOE radioactive and mixed radioactive waste disposal contracts. DOE rejected WCS' proposal, and subsequent variations on it, by letters dated May 5, 1997, and September 17, 1997. The rejection was premised on the DOE contention that WCS must, but has not and cannot, obtain a state or Nuclear Regulatory Commission ("NRC") license for low-level radioactive waste disposal

4. The Court finds, and Defendants do not dispute, that WCS' December 20, 1996, proposal can be lawfully implemented. However, the Defendants counsel argued, without any evidence, in vague, abstract and evasive language, that the adoption of such proposal presented "complex" policy issues that have not yet been resolved by the DOE even though the proposal was made in December, 1996. The Defendants contend, apparently, that until such "policy issues" are resolved, WCS is not a qualified bidder for DOE low level and mixed radioactive wastes. No assurance is made as to how or when such issues will be resolved The Court was unable, in questioning counsel, to determine even the nature of the issues presented. The Defendants did not appear at the hearing personally and no evidence was offered bearing upon such issues.

5. 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 defendants' 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 RFPs 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.

II.

Conclusions of Law

6 The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. § 1331

7 The State of Texas, where the disposal facility of WCS is located, will not issue a license to a private company for the disposal of low level or mixed radioactive wastes, Texas Health and Safety Code, § 401.203, but recognizes that no license is required to dispose of DOE low level and/or mixed radioactive waste. Plaintiff's Exhibit 34 (a letter dated December 13, 1996, from the Texas Natural Resource Conservation Commission to WCS).

8 The existence of a state or NRC license is neither a necessary prerequisite nor a sufficient basis for the receipt by a DOE contractor of DOE low-level or mixed radioactive wastes for disposal at a private site. Atomic Energy Act of 1954, as amended ("AEA"), §§ 11s, 110a(2) and 161b, 42 U.S.C. §§ 2014s, 2140a, and 2201b. Federal law has pre-empted this subject matter of radiological health and safety, Pacific Gas & Electric Co. v. State Energy Resources Conserv. and Develop. Comm'n, 461 U.S 190, 103 S.Ct 1713 (1983), Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615 (1983). Section 274 of the AEA, (42 U.S.C. § 2021), does not relinquish to a state any federal AEA power to license DOE low-level radioactive waste disposal contractors. Thus, neither the grant nor the refusal of a state low-level radioactive waste disposal license can constitute the basis for the qualification or the disqualification of a DOE contractor to dispose of DOE low-level or mixed radioactive wastes at a private site. Although the AEA requires "persons" to obtain a license from NRC (or from a state if such authority has been formally delegated by the NRC to the state) as a precondition to the disposal of low-level radioactive wastes, Sections 110a(2) and 11s of the AEA (42 U.S.C. §§ 2140a(2) and 2014s) exempt, so as not to impede the government's own actions, the activities of DOE and its contractors from this requirement. The contractor exemption in Section 110a(2) is statutorily granted to contractors operating "under contract with and for the account of the Commission." The exemption in Section 11s is statutorily granted to the "Commission" itself. A private contractor of the Commission performing DOE low-level or mixed radioactive waste disposal functions at a private site on DOE's behalf would be acting "with and for the account of the Commission." The term "Commission" as used in these

provisions is defined in the AEA to be the "Atomic Energy Commission." 42 U.S.C § 2014(f). The Atomic Energy Commission was abolished in 1974 and its functions were transferred to the NRC and the Energy Research and Development Administration. See Pub. L. No 93-438, Secs 104 and 201, 88 Stat. 1233. In 1977, Congress terminated the Energy Research and Development Administration and transferred its functions to the newly-created DOE. See Pub. L. No. 95-91, Secs. 301(a) and 703, 91 Stat. 565 As a result, the reference to "Commission" in Section 110a(2) of the AEA must be read to refer to the DOE Accordingly, 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. The Court is compelled to agree with Plaintiff's experts that DOE's stated reasons for disqualification are indeed "bogus."

9. The court further finds 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 Fernald RFP, and WCS' Fernald bid did not seek or purport to alter or vary the terms relative to title of the RFP Accordingly, 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.

10. To obtain a preliminary injunction, a party must show: (A) a substantial likelihood of success on the merits; (B) a substantial threat of irreparable injury if the injunction is not granted; (C) that the threatened injury to the movant out-weighs the threatened injury to the nonmovant; and (D) that the granting of a preliminary injunction

will not disserve the public interest. *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F 3d 246 249 (5th Cir. 1994); *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)

11. The first factor, a showing of a substantial likelihood of success on the merits, does not require that the movant prove his case. *Lakedreams v. Taylor*, 932 F.2d 1103, 1009 n. 11 (5th Cir. 1991). It is enough that the movant has raised questions going to the merits so substantial as to make them fair ground for litigation and thus for more deliberate investigation. *Cho v. Ilco, Inc.*, 782 F.Supp. 1183, 1185 (E.D. Tex 1991). The Court concludes that Plaintiff has satisfied the requisite showing of substantial likelihood of success on the merits

12. The second factor is a substantial threat of irreparable injury if the injunction is not granted An injury is irreparable if it cannot be undone through monetary remedies *Spiegel v. City of Houston*, 636 F.2d 997, 1001 (5th Cir. 1981). To show irreparable injury if the threatened action is not enjoined, a party must show a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm. *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir 1986) The Court concludes that Plaintiffs have demonstrated a substantial threat of irreparable injury if a preliminary injunction is not granted. Again, once these and future contracts are gone, they are gone.

13. The third factor requires a balancing of interests. The Defendants have not shown by any convincing evidence that any significant harm or injury will be borne by the United States or by the Defendants as a result of the issuance of the preliminary injunction

herein granted. The Court finds that the Defendants will suffer no harm from the issuance of the preliminary injunction herein ordered or, alternatively, only minimal harm. The effect of the injunction will allow lawful competition where a monopoly or virtual monopoly now exists. The Court finds that injury to the Plaintiff, described above, in the event injunctive relief is not granted clearly outweighs any damage to Defendants from the injunctive relief herein granted.

14. The fourth factor requires that the public interest be considered. The Court finds that the public interest supports the issuance of the preliminary injunction herein ordered. DOE has not demonstrated that any procurements will be stopped, disrupted, or otherwise hindered, that any pending RFPs will have to be altered or reissued, or that any site cleanups will be harmed or delayed. Indeed, DOE presented no evidence whatsoever on these issues, and the Court concludes this is because they cannot. The "all necessary permits or licenses" and "title" provisions of the Fernald RFP do not require or justify the disqualification of WCS as a bidder, and do not need to be changed by DOE to proceed with the procurement. The public interest in avoiding excessive costs usually associated with a monopoly and in insuring that its public officials act in accordance with law will be advanced by the issuance of such preliminary injunction. See *Nobby Lobby, Inc. v. City of Dallas*, 767 F.Supp. 801 (N.D. Tex. 1991, aff'd 970 F.2d (5th Cir 1992).

15. Accordingly, the Court finds that the Plaintiff has clearly carried the burden of persuasion relative to all four of the following factors, to wit: (A) there is a substantial likelihood of success on the merits of its claim, (B) irreparable injury will be suffered by the Plaintiff unless the injunction is issued, (C) the threatened injury to Plaintiff outweighs any

damage which the injunction may cause the Defendants, and (D) the injunction will not be adverse to the public interest. *Allied Mktg. Group. Inc. v. CDL Mktg., Inc.*, 878 F.2d 806. 809 (5th Cir.1989). Considering on balance. each of these factors, they collectivaly favor granting the injunctive relief herein ordered. *Picker International, Inc. v. Blanton*, 756 F.Supp. 971 (N.D. Tex. 1990)

16. The decision to grant or deny a preliminary injunction lies within the sound discretion of the district court. *DSC Communications Corporation v. DGI Technologies, Inc.*, 81 F.3d 597 (5th Cir.1996). Such a grant is the exception rather than the rule *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir.1985).

III.

Injunctive Relief

The Court believes it is the litigants' right to know the Court's reasons for action it takes. Without intending to be harsh or vitriolic, the court infrequently feels compelled to make observations regarding the facts before it. See, e g., *DSC Communications Corp v. DGI Technologies, Inc.* 898 F.Supp. 1183, 1193 (N.D. Tex. 1995). This is such a case because the evidence presented at hearing so clearly shows that something is amiss at the Department of Energy. The DOE's reasons given in argument for its' position frankly do not pass the "straight face" test (can this argument be made with a straight face?) It is no wonder that the term "understatement" was used when Counsel for DOE was asked if they were "under a lot of heat on this." Defense counsel candidly used that term to describe the situation. As of now, there is a virtual monopoly in bidding for the off-site disposal of DOE low level and mixed radioactive waste yet there is at best an apparent

lack of interest at DOE in allowing other interested parties to compete for the award of such contracts. WCS characterizes the contracts issued and to be issued as being "one of the largest non-defense taxpayer expenditures in U.S. history, exceeding, for example, the cost of the federal savings and loan ballout." See Plaintiff's Brief In Support of Plaintiff's Application For Preliminary Injunction, p.2. This evaluation may or may not be accurate. The experts indicated that "we are talking Bill Gates type money."

From the record it is unclear if the Court is dealing with a sin of the head or a sin of the heart. It may be a case of gross incompetence, or it may be something far worse. In any event, it is clear that for some unknown reason the Defendants have little interest in allowing WCS to compete in the current bidding process.

In accordance with the foregoing findings of fact and conclusions of law, the court finds that the Plaintiff is entitled, until further order of the Court and pending further hearing of this cause, to a preliminary injunction against the Defendants as set forth below.

Accordingly, it is ORDERED, ADJUDGED and DECREED that during the pendency of these proceedings, 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 this Order and its contents by personal service or otherwise, be, and they are hereby, ENJOINED from denying any WCS bid or contract for DOE low-level or mixed radioactive waste disposal services on the ground(s) that: (i) WCS is not or cannot be licensed by Texas for the disposal of low-level radioactive or mixed wastes, (ii) WCS is not licensed by the NRC for the disposal of low-level radioactive or mixed wastes; or (iii) WCS

has imposed or sought to alter the provisions of the Fernald RFP relative to title to the wastes subject thereto

It is further ORDERED, ADJUDGED and DECREED that the foregoing provisions of this injunction shall not cause or justify the reissuance of any currently outstanding RFP and 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 this order and its contents by personal service or otherwise be, and they are hereby, ENJOINED from any such reissuance.

It is further ORDERED that Plaintiff shall post an injunction bond in cash or by a corporate surety qualifying under the Local Rules of the court, in the sum of $10,000 00, for payment of such costs and damages as may be incurred by the Defendants in the event that the Defendants have been wrongfully enjoined. Such bond shall be filed with the Clerk of the Court.

It is further ORDERED, ADJUDGED and DECREED that a copy of this Order shall be served upon the Defendants by service upon its attorneys in this proceeding, or any of hem, by any person, over the age of eighteen (18) years and not a party to this action, acting under the supervision of Plaintiff's attorneys Such service is hereby deemed to be good and sufficient service The Defendants and their counsel are ORDERED to make all parties who could be affected by this Order aware of its existence and its contents.

The preliminary injunction herein ordered shall not become effective until the bond herein above required has been filed and approved by the Court. Plaintiff may post a cash deposit in lieu of a bond and later move to replace such cash deposit with a bond.

IT IS SO ORDERED.

Signed this 3rd day of October, 1997.

Joe Kendall

JOE KENDALL
UNITED STATES DISTRICT JUDGE