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

COMPLAINT FOR JUDICIAL REVIEW OF AGENCY ACTION

TO THE HONORABLE JOE KENDALL, UNITED STATES DISTRICT JUDGE:

Nature of the Action

1. Plaintiff Waste Control Specialists, LLC files this action for review of agency action, pursuant to 5 U.S.C. § 701, et seq.; and for declaratory judgment relief, pursuant to 28 U.S.C. § 2201, et seq.

Parties

2. Waste Control Specialists, LLC ("WCS"), is a limited-liability company qualified to do business in the State of Texas. WCS is doing business in Wichita County, Texas, and thus resides in Wichita County, Texas. WCS in an unincorporated association

composed of Andrews County Holdings, Inc. (a corporation with its principal place of business and residence in Dallas County, Texas) and KNB Holdings, Ltd. (a limited partnership with its principal place of business and residence in Harris County, Texas).

3. The United States Department of Energy ("DOE") is an executive department of the United States government under 42 U.S.C. § 7131.

4. Alvin L. Alm, a Defendant herein, is sued only in his official capacity as Assistant Secretary for Environmental Management of DOE. Defendant Alm is the DOE official responsible for arranging, on DOE's behalf, for the disposal of low-level and mixed radioactive waste.

5. Mary Anne Sullivan, a Defendant herein, is sued only in her official capacity as Deputy General Counsel for Environment and Civilian Nuclear Defense Programs of DOE. Defendant Sullivan's nomination for General Counsel of DOE is currently before the United States Senate for confirmation. Defendant Sullivan has heretofore been DOE's senior-most attorney with cognizance over the subject matter of this lawsuit.

Jurisdiction And Venue

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

7. Venue is proper in this court under 28 U.S.C. § 1391(e).

Facts Giving Rise to this Action

DOE's Weapons Facilities Cleanup

8. WCS is ready, willing and capable of receiving, storing, transferring, processing, treating, and disposing of hazardous wastes, toxic wastes, low-level

radioactive wastes, and mixed low-level radioactive wastes. WCS seeks contracts and authorizations with DOE for the receipt, storage, transfer, processing, treatment, and disposal of DOE low-level and mixed radioactive waste (hereinafter collectively referred to as "DOE radioactive waste").

9. With the end of the cold war, DOE embarked on a massive cleanup of radiologically contaminated nuclear weapons production sites and other radiologically contaminated sites throughout the nation. This cleanup effort, which is now DOE's primary mission, is projected to cost taxpayers hundreds of billions of dollars. A major part of this expense is the cost of permanently disposing of low-level and mixed radioactive waste.

10. Notwithstanding the enormity of DOE's cleanup, DOE has to date authorized only one non-government disposal facility in the entire United States to receive any of the immense quantities of DOE's radioactive waste that are earmarked for permanent disposal. That facility, located in Clive, Utah, is owned by Envirocare of Utah, Inc. ("Envirocare"). Envirocare's Utah facility receives the largest share of such waste from DOE with a lesser share being disposed of at various government-owned facilities. Since 1994, Envirocare has received for disposal over 4 million cubic feet of DOE radioactive waste (approximately 97 percent of all DOE radioactive waste shipped off-site for disposal since 1994).

WCS Proposal

11. Plaintiff WCS owns a facility in Andrews County, Texas, which is suitable for the safe and environmentally sound storage, treatment, processing, and disposal of DOE radioactive waste. The WCS site is permitted by the State of Texas for the permanent

disposal of hazardous waste under the Resource Conservation and Recovery Act, 42 U.S.C. 6901, et seq., and by the United States Environmental Protection Agency for the permanent disposal of toxic waste under the Toxic Substances Control Act, 15 U.S.C. 2601, et seq.

12. Plaintiff WCS also leases a facility in Wichita County, Texas, which is suitable for safe and environmentally sound use as a holding, staging, and transfer location for DOE radioactive waste and other wastes awaiting shipment to the WCS disposal facility in Andrews County. A registration has been filed with the State of Texas covering such activities at the Wichita County site.

13. In 1995, with full cognizance of the immense cleanups underway and planned by Defendant DOE and the lack of available private disposal sites other than Envirocare's Clive, Utah site, WCS decided to expand its waste business operations to accommodate the disposal of DOE radioactive waste. To secure the necessary authorization from DOE to be allowed to compete against Envirocare to dispose of DOE's radioactive waste, in the spring of 1996, WCS officials began discussions with senior DOE officials (including Defendant Sullivan) and senior officials with the State of Texas. Since disposal of DOE's radioactive waste is not an activity subject to regulation by the State of Texas, WCS proposed that DOE could self-regulate the disposal of the DOE radioactive waste at the WCS facility or could delegate that function, by contract, to an appropriate oversight body.

14. WCS proposed to DOE that the Texas Natural Resource Conservation Commission ("TNRCC") could act as DOE's agent to oversee the disposal of the DOE

radioactive waste at the WCS facility in Andrews County, Texas. TNRCC is an agency of the State of Texas with expertise in licensing and regulating commercial low-level radioactive waste disposal in Texas.

15. In discussions with WCS in the spring and summer of 1996, Defendant Sullivan and other DOE senior officials stated their strong desire to create competition for Envirocare in the DOE radioactive waste disposal industry and to thereby lower the costs of waste disposal services. They also stated that, although a detailed review would be necessary, they were favorably disposed to the WCS proposal for delegated oversight provided that such a plan: (a) involved competitive procurement; (b) was acceptable to both TNRCC and the federal Nuclear Regulatory Commission ("NRC"); and (c) addressed long-term liability issues.

16. Accordingly, throughout the summer of 1996, Defendant DOE acting through Defendant Sullivan and others, engaged in discussions with representatives of the TNRCC, the NRC, and WCS to develop a suitable arrangement for TNRCC's oversight of the disposal of DOE radioactive waste at the WCS facility in Andrews County, Texas. It was generally agreed by such parties that DOE possessed the legal authority to contract with a third party to perform on DOE's behalf oversight activities of a private waste disposal facility.

17. Because of this understanding, by August 1996, DOE permitted WCS to submit a contingent bid in response to a Request for Proposals issued by DOE's Ohio Field Office to dispose of DOE radioactive waste. This Request for Proposals, valued at approximately $350 million, involved the cleanup of radiologically contaminated soil and

other materials from DOE's Fernald weapons production site in Ohio. On September 20, 1996, WCS submitted its bid which set forth the process that would be used, upon contract award, to obtain the necessary authorization to dispose of DOE radioactive waste at WCS' facility. This bid made specific reference to the TNRCC oversight plan that had been discussed between WCS representatives and DOE representatives. The bid was "contingent" in that WCS would not receive any DOE radioactive waste unless WCS received DOE authorization within 27 months of the date of any contract award. Envirocare was the only other bidder in response to the Request for Proposals.

18. In October 1996, TNRCC decided not to oversee the WCS facility for reasons that are the subject of a current Texas state court lawsuit by WCS against Envirocare[1]. In early November 1996, DOE's Ohio Field Office requested, and WCS provided, additional proposals for obtaining DOE authorization to proceed without TNRCC's involvement. On December 6, 1996, Defendant Sullivan and other DOE officials invited WCS to propose an alternative oversight body and to formally submit a proposal to DOE for authorization to proceed.

19. On December 20, 1996, WCS submitted to DOE the invited proposal, accompanied by a five-thousand-page site analysis and regulatory review that set forth in detail the manner in which the WCS facility could be appropriately regulated and utilized by DOE for the safe and environmentally sound disposal of DOE radioactive waste. This proposal suggested the use of an oversight group consisting of Texas Tech University (a

[1] Waste Control Specialists, LLC v. Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda, Cause No. 14,580, in the 109th Judicial District Court of Andrews County, Texas.

state governmental entity with vast experience in West Texas environmental/geological analysis), Texas A&M University (a state government entity with vast experience in nuclear engineering) and Integrated Resources Group (a private consulting firm and DOE contractor with vast experience in the regulatory aspects of radioactive waste sites).

20. In subsequent conversations and correspondence with Defendant DOE (including Defendants Alm and Sullivan), WCS made it clear that the oversight group suggested in its December 20, 1996, proposal could include or substitute DOE's Sandia National Laboratories in New Mexico (a federal government entity with vast experience in nuclear environmental matters), the U.S. Nuclear Regulatory Commission, or even an arm of DOE itself -- all at DOE's discretion.

21. WCS' proposal received the public endorsement of both Texas senators, eighteen congressmen from Texas, local community groups, and both of DOE's employee unions.

22. WCS' proposal is fully in accord with the Atomic Energy Act and all other applicable federal and state laws. WCS' proposal is also structured in such a manner that other private waste disposal entities could utilize the same general DOE-delegated regulatory mechanism, so that no undue favoritism toward WCS could result from DOE's adoption of the WCS proposal.

23. WCS has expended millions of dollars on this project and has offered to reimburse DOE for all costs associated with DOE's review and oversight with respect to the sites and the proposal.

DOE's Use of the Envirocare Waste Disposal Site

24. Since 1991, DOE radioactive waste has been shipped for disposal to Envirocare's site in Utah. Shipments of DOE radioactive waste to the Envirocare facility have continued since that time and are continuing to occur today, in round-the-clock trainloads.

25. In order to effectuate shipments to Envirocare, DOE relies on three principal legal instruments. The first such legal instrument DOE relies on is a license issued to Envirocare by the Bureau of Radiation Control, which authorizes the disposal of certain types of commercial radioactive waste at the Envirocare facility. The second legal instrument DOE relies on is an exemption granted to Envirocare by the Bureau of Radiation Control from the legal requirement that such disposal can occur only on land owned by the state or federal government. The third legal instrument DOE relies on is a letter Envirocare received from the Bureau of Radiation Control purportedly authorizing Envirocare to dispose of DOE radioactive waste at the Clive, Utah site. However, there is no contract or other agreement between DOE and the State of Utah (or its agencies including the Bureau of Radiation Control) whereby DOE could or did properly delegate to the state the authority to regulate the Envirocare facility on DOE's behalf, as required by the Atomic Energy Act.

26. Each of the documents on which DOE relies -- the disposal license, the exemption, and the letter to Envirocare allegedly authorizing receipt of DOE radioactive waste -- were issued by a man named Larry F. Anderson, formerly Utah's chief nuclear

regulatory official at the Bureau of Radiation Control. Mr. Anderson personally signed each document in that official capacity.

27. Mr. Khosrow B. Semnani is the sole shareholder and owner of Envirocare of Utah, Inc., and until recently (as further discussed below) was its chief executive officer, president and chairman of its board of directors.

28. In late 1996, Mr. Semnani publicly admitted, in court filings, that he had secretly paid Mr. Anderson hundreds of thousands of dollars in cash, gold coins, and a ski resort condominium. These payments were made by Mr. Semnani to Mr. Anderson during the period in which Mr. Anderson was the chief official responsible for issuing the Envirocare license, granting the Envirocare exemption, and allegedly authorizing disposal of DOE waste at the Clive, Utah site. Indeed, Mr. Anderson has sued Mr. Semnani [2], claiming that, when he retired from the Bureau of Radiation Control, Mr. Semnani was somehow contractually obligated to pay Mr. Anderson another $5 million. Far from denying the payments, Mr. Semnani has since countersued Mr. Anderson for extortion.

29. As a result of these developments, on February 18, 1997, Defendant DOE issued Envirocare a "show cause" letter requesting information bearing on why Envirocare should continue to perform as a government contractor in light of the debarment and suspension provisions of Federal Acquisition Regulation, 48 C.F.R., Subpart 9.4. DOE's letter of February 18, 1997, generally recounted Mr. Semnani's admissions in his lawsuit

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[2] Larry F. Anderson, an individual, and Lavicka, Inc., a Utah corporation v. Khosrow B. Semnani, an individual, and Envirocare of Utah, Inc., a Utah corporation, Civil No. 960907271, in The Third Judicial District Court of Salt Lake County, Utah.

with Mr. Anderson, and recognized Mr. Semnani's role as sole owner and president of Envirocare of Utah, Inc. Specifically, DOE asked "why a company wholly owned by you [i.e., Mr. Semnani] and, therefore, under your control is presently responsible to perform government contracts." (Emphasis added)

30. The revelations in the lawsuit between Mr. Anderson and Mr. Semnani have also precipitated an FBI investigation of Envirocare and, on information and belief, the convening of a federal grand jury. In addition, the U.S. Environmental Protection Agency has been auditing Envirocare and the Envirocare site.

31. On May 27, 1997, the State of Utah propounded a $100,000 civil penalty against Envirocare for possessing unlicensed quantities of Uranium-235, a material used in nuclear weapons. Likewise, the NRC has also commenced a similar enforcement action. Under some circumstances, the possession of unlicensed quantities of Uranium-235 constitutes a felony offense under federal law. Finally, on July 31, 1997, the United States Environmental Protection Agency filed a 31-count administrative complaint against Envirocare for numerous violations, and proposed a $600,000 civil penalty.

32. Envirocare is the only known private sector competitor of WCS for the disposal of DOE radioactive waste.

DOE Actions

33. 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.

34. DOE senior officials have not carefully or reasonably considered WCS' proposal of December 20, 1996, or any subsequently proposed oversight body for the WCS facility despite having invited WCS' submittal. For example, on April 2, 1997, several months after such proposal was submitted, Defendant Sullivan admitted to WCS that she had only skimmed the WCS proposal briefly "over lunch" on that date.

35. By letter to WCS dated May 5, 1997, Defendant Alm rejected the WCS proposal of December 20, 1996. On information and belief, this letter was drafted by Defendant Sullivan. In rejecting the proposal, DOE cited unspecified 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. Thus, DOE has refused to consider the merits of WCS' proposal even through the WCS proposal does not request or require the action DOE claims to raise its concerns.

36. Subsequent discussions with DOE officials and various DOE documents indicate that DOE does not and never did, in fact, have legitimate concerns about implementing the WCS proposal through delegation of its oversight responsibilities to a qualified third party. Instead, on information and belief, political considerations and other

factors drove DOE to reject WCS' December 20, 1996, proposal. The alleged concerns referred to in DOE's rejection letter to WCS are in fact not genuine.

37. DOE's rejection of WCS' December 20, 1996, proposal and to its subsequent variants precludes WCS from competing against Envirocare for the Ohio Field Office contract referred to above and for most other DOE radioactive waste disposal services. Such rejection causes WCS enormous economic damage.

38. In stark contrast to DOE's treatment of WCS, less than ten (10) days after rejecting WCS as a qualified bidder, DOE entered into a "consent agreement" dated May 14, 1997, with Mr. Semnani and others associated with Envirocare to continue DOE radioactive waste shipments to Envirocare notwithstanding Mr. Semnani's inappropriate relationship with Mr. Anderson and the obvious impropriety of the authorizations issued on behalf of a Utah state agency by an employee who was receiving cash and other valuable properties from the beneficiary of such authorizations. Remarkably, however, and notwithstanding DOE's previous "show cause" letter to Envirocare equating ownership with control, the consent agreement allows Mr. Semnani to maintain his 100-percent controlling ownership interest in Envirocare, allows Mr. Semnani to continue to play a role in managing the company, allows Mr. Semnani to receive all profits from the company's disposal of DOE radioactive waste, and allows Mr. Semnani's wife to remain on the company's board of directors. The consent agreement also appears to forestall DOE from taking any suspension or debarment actions against Envirocare.

39. For reasons it prefers not to articulate, and indeed to deliberately obfuscate, DOE has rejected a WCS proposal that is entirely lawful, promotes the first-ever

competition in DOE radioactive waste disposal, and promises to save DOE and the United States taxpayers many tens or hundreds of millions of dollars, and has instead chosen to continue to pay premium prices to Envirocare for DOE radioactive waste disposal services and to rely, contrary to law, on Envirocare licenses and other authorizations which were beyond the power of the state to grant, and which were corruptly obtained.

Count One:

Unlawful Rejection of the WCS Proposal

40. Plaintiff alleges and incorporates as if fully set forth the allegations of Paragraphs 1 through 39 above.

41. DOE's rejection of the WCS proposal is, in violation of 5 U.S.C. § 706, unlawful in that it is:

(a) arbitrary; or alternatively,

(b) capricious; or alternatively,

(c) an abuse of discretion; or alternatively,

(c) not in accordance with law.

Count Two:

Violation of Due Process

42. Plaintiff alleges and incorporates as if fully set forth the allegations of Paragraphs 1 through 41 above.

43. DOE's rejection of the December 20, 1996, proposal 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. This effectively prevents WCS from being successful in any bid for DOE radioactive waste disposal services, and is, in legal effect, a *de facto* debarment of WCS.

44. This *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.

Prayer for Relief

Wherefore, Plaintiff prays that this Court:

(a) Enter a declaratory judgment that DOE's rejection of the WCS proposal, or its variants as described herein, is unlawful by reason of the same being arbitrary, capricious or an abuse of discretion.

(b) Enter a declaratory judgment that DOE's rejection of the WCS proposal, or its variants as described herein, constitutes a *de facto* debarment without any lawful basis, without notice, and without an opportunity for hearing violates the right of WCS to due process of law under the Fifth Amendment to the United States Constitution.

(c) Enter a declaratory judgment that the WCS proposal, and its variants as described herein, for oversight of WCS' facilities through contractual delegation of oversight responsibilities to a qualified third party, is authorized by applicable law.

(d) Remand the WCS proposal, and its variants, to DOE for reconsideration in accordance with the Court's judgments.

(e) For such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Complaint has been mailed by me in accordance with Rule 4(i) of the Federal Rules of Civil Procedure via certified mail return receipt requested on this 12th day of August, 1997, to the following persons:

Civil Process Clerk
Office of the United States Attorney
Northern District of Texas
Earl Cabell Federal Building
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
(Receipt No. P 288 447 322)

The Honorable Janet Reno
Attorney General of the United States
U.S. Department of Justice, Main Building
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(Receipt No. P 288 447 323)

The Honorable Alvin I. Alm
Assistant Secretary for Environmental Management
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The Honorable Mary Anne Sullivan
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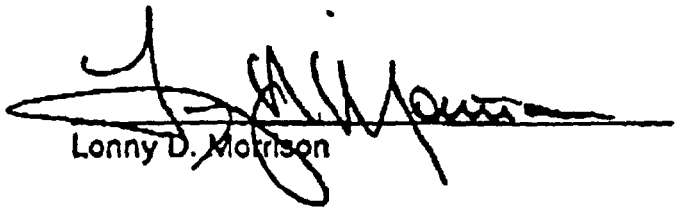

Lonny D. Morrison