



Issue Backgrounder

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Wasted in Denver *Abstract of Study Brief on Denver's Contract for Waste Disposal*

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The City of Denver entered into an ill-advised contract for the management of the Denver Arapahoe Disposal Site (DADS) in 1998, and is now defending the Webb Administration's decision in court, at the detriment of consumers, taxpayers and municipal employees. Across the nation, cities that have moved towards privatizing waste collection and disposal have seen improved service, and saved millions of dollars. No other city in the nation has entered into a 100-year contractual monopoly scheme as Denver has.

Rather than choose to save taxpayer funds by switching to a competitive waste collection and disposal scheme, the City of Denver is defending a lawsuit which—whether the City wins or loses—the taxpayers will end up paying

Executive Summary

Across the nation, cities that have switched from monopolies to open-market systems for solid waste collection and disposal have, almost without exception, enjoyed better service, lower prices and a better-compensated workforce.

On December 22, 1997, the City of Denver voted without the scrutiny of a public hearing to enter into a contract for the management of the Denver Arapahoe Disposal Site (DADS), which houses 100 percent of the city's waste. The contract forbids competition for the city's lucrative waste hauling business for possibly the next century.

This Issue Brief reviews the effects of competition on solid waste collection and disposal systems in six cities and concludes that Denver taxpayers are the real victims of the city's monopolistic practices to the tune of at least \$300 million dollars over the life of the contract.

The Hickenlooper Administration should correct the poor policy choices of the Webb Administration, and should start from scratch with a lively and public competitive bid process for a new contract. The city should insist on imposing stringent financial controls on any company or companies that win all or part of the new contract award, including regular financial and performance audits. The contract should be for a reasonable period of time—not a century. It should include evaluation and renewal clauses at standard intervals to ensure that taxpayer dollars are preserved for this and future generations.

Denver's Current Contract and the Resulting Lawsuit

The City of Denver picks up trash and recyclables for Denver residents in homes and small apartments that have less than 8 units. City employees collect the trash in trucks owned by Denver and then haul it to the Denver-Arapahoe Disposal Site (DADS).

Denver owns DADS but it is operated by Waste Management of Colorado, Inc. The original Denver contract with Waste Management was signed in 1980. This relationship was extended and expanded to include DADS as the sole destination for Denver's waste, by virtue of a new, no-bid, sole-source contract in 1998. This new contract will be in place for as long as the DADS landfill operates, a period that could last sixty to one hundred years.

The requirement that all waste is directed to DADS is also known as a "flow control scheme" and is the basis for a lawsuit by BFI Waste Systems of North America (Browning Ferris Industries or BFI). This scheme is anti-competitive and locks the City of Denver into higher prices for waste disposal, to the detriment of its taxpayers. BFI is suing the city in federal court claiming that the flow control scheme violates the Commerce Clause (Article 1, Section 8, of the United States Constitution).

BFI also claims that the Denver contract violates the Denver's procurement laws. According to BFI's claim, the City of Denver failed to abide by C.R.S. § 30-20-107 "Designation of exclusive sites and facilities" when it failed to hold a public hearing "to review the disposal method to be used and the fees to be charged, if any."

In addition, BFI claims that Denver violated C.R.S. § 18-8-307, "Designation of supplier prohibited", which states: "No public servant shall require or

direct a bidder or contractor to deal with a particular person in procuring any goods or service in submitting a bid to or fulfilling a contract with any government."

Finally, the Denver government violated the Denver Charter, which clearly requires that contracts on construction of public improvements must be awarded to the "lowest, responsive, qualified bidder or through an alternative competitive selection process."¹

This Issue Brief first examines Supreme Court precedent for BFI's lawsuit. Then the Brief highlights how some cities have successfully introduced competitive contracting processes into their solid waste management services.

Case Studies: Practical Experience in Competitive Contracting Solid Waste Management Services

Cities across the U.S. are turning to competitive bidding in order to cut spending. Many of these cities allow state or local government organizations to participate in the bidding process; these groups of government employees can win the contract, if they bid at a competitive level in terms of cost, efficiency and improved services. Consumers, taxpayers and municipal employees all stand to benefit from a competitive marketplace for waste hauling and disposal.

Babylon, New York

In a 1995 case that involved Babylon, N.Y., the Second Circuit Court of Appeals ruled that "flow control ordinances" – ordinances in which a local government mandates that all solid waste within a particular community must be sent to a particular landfill – violated the Commerce Clause of the U.S. Constitution.²

After the decision, Babylon submitted a "Request for Proposals" which went out to over 69 possible bidders in the US. The town eventually contracted with Babylon Source Separation Commercial, Inc., for 5 years. The town saves approximately \$7-8

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million per year as a result of this competitive contracting.

Collection costs were reduced from more than \$12 per cubic yard to less than \$4 per yard in 2000. Aggregate fees paid decreased by 8.8% and revenues retained by the town increased by more than 110%.³

Seattle, Washington

The city of Seattle accepts bids for residential collection concerning garbage, yard waste, and recyclables. One contract is for residential garbage and another is for yard waste processing. Thus, a firm which does not have access to a disposal site can still bid on the yard waste processing contract, since the yard waste can be recycled.

The last time residential contracts were bid, four companies submitted final proposals. All of the proposals offered innovations, such as satellite tracking systems for the trucks and computerized customer lists that were kept on the trucks for example. While offering improved services, none of the bidders asked for an increase in prices to the consumer.⁴

Phoenix, Arizona

Phoenix, Arizona has been a pioneer in competitive contracting reform. Residential solid waste collection has been put up for bid six times and private firms have won 50% of the time.

Phoenix is divided into three solid waste districts, each consisting of approximately 100,000 households; two of the districts are served by the city and one by a private corporation. Although the cost-per-ton of garbage collected increased slightly after competitive contracting was implemented in 1979, the cost decreased after the second contract was awarded to a private firm in 1983. Overall, Phoenix trash collection is slightly lower than the costs for similar cities.⁵

Phoenix estimates that since competitive contracting was instigated the city has saved approximately \$30

million.⁶

One year, when maintenance costs exceeded projections in the portions of the city that were serviced by the city the Public Works Department, the Department was given six months to reduce costs; if the Department failed, the contract would be put up for rebidding. Drivers and mechanics, who were initially at odds and attempted to blame each other for cost overruns, began to hold regular meetings to work together more efficiently and save money. After eight months, the drivers and mechanics managed to reduce costs by more than a quarter of a million dollars.⁷

Clearwater, Florida

In 1993 City of Clearwater employees were forced to bid against private companies to run the recycling program. Clearwater's recycling program is now so efficient that the city processes recyclable materials from Belleair, Dunedin, Gulfport, Indian Rocks Beach, Largo, Safety Harbor, and unincorporated north Pinellas County. The city makes a profit of \$250,000 to \$750,000 annually.⁸

Faced with competitive bidding, city workers negotiated with the city to reduce total spending by 31%.

Flint, Michigan

After soliciting bids for pick-up of bulk garbage (such as mattresses and refrigerators), Flint realized it could save \$2 million. City employees that had been picking up those items separately and charging the city overtime. Faced with competitive bidding, city workers negotiated with the city to reduce total spending by 31%.⁹

Indianapolis, Indiana

In 1993 the city divided into 11 waste collection districts and contracted with several private firms. The city government, which already had a waste hauling system in place, was allowed to bid as well, and won some of the bids. Taxpayers saved over two million dollars. City waste disposal employees received a bonus of \$1,700 for saving money.¹⁰

Precedent for BFI's lawsuit against Denver

The constitutional basis of BFI's lawsuit is the Commerce Clause of the United States Constitution, which grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." The original intent of the Commerce Clause was to give Congress the power to act against state barriers to interstate commerce; for example, if Virginia imposed a tax on Pennsylvania goods which were sold in Virginia, but imposed no tax on similar Virginia goods, the Virginia tax would be a barrier to interstate commerce, which Congress could outlaw.

Long-established Supreme Court doctrine has interpreted the Commerce Clause to forbid any state laws which discriminate against interstate commerce, unless such laws have been specifically authorized by Congress. Thus, a victim of state discrimination can sue in federal court, without

having to wait for Congress to use its power actively against the state trade barrier. The legal doctrine is known as the "dormant commerce clause."

When states and local governments have enacted discriminatory laws regarding waste disposal, they have often sought to evade the dormant commerce clause by claiming that waste disposal is not commerce.

After all, waste has no commercial value, so how could waste disposal be commerce?

There are two responses: first, potentially recyclable materials do have economic value. Second, although unrecyclable waste is not, in itself, a commercial product, the disposal of waste is a commercial service.¹¹

Current United States Supreme Court precedent suggests that BFI has a strong argument

that Denver's monopoly contract with Waste Management violates the dormant commerce clause.

C&A Carbone, Inc. v. Clarkstown (1994)¹²

Clarkstown allowed a private contractor to build a solid waste transfer station that would separate recyclable from nonrecyclable waste, and would be operated for five years. When the five years were up, the town would buy the station for \$1. The profitability of the station ensured by the town's guarantee of a minimum amount of waste to be delivered to the facility. The private contractor would then charge whoever was dropping off waste a fee which was higher than the going market rate. In order to meet the minimum volume guarantee, Clarkstown required that all nonhazardous solid waste produced within the town had to be dumped at the station.

The Carbone company, like others, already had its own solid waste disposal facilities, but Clarkstown law required Carbone to take its non-recyclable waste to the government-favored station. When Clarkstown realized that Carbone had been shipping non-recyclable waste out of state, Clarkstown sued in state court and won a summary judgment; the state trial court held that the flow control ordinance was constitutional, and the state appellate court affirmed the trial court's decision.

The United States Supreme Court reversed the state court, and ruled that the flow control ordinance violated the dormant commerce clause. The Court held that because the ordinance discriminated against interstate commerce it was invalid; not only did the flow control ordinance increase costs for companies that were located out of state, the ordinance blocked access to local markets and crippled competition within the solid waste management industry in the Clarkstown market.

Fort Gratiot Landfill v. Mich. DNR (1992)¹³

Under Michigan's Solid Waste Management Act, a landfill in one county could not accept waste from other states, or even from other counties, unless the county government where the landfill was located

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gave express permission. St. Clair County refused to allow Fort Gratiot Landfill to accept out of state waste. Fort Gratiot sued in federal district court under the dormant commerce clause. The lawsuit was dismissed and the dismissal was affirmed by the federal court of appeals.

The United States Supreme Court reversed the court of appeals on the basis, because the Michigan restrictions discriminated against interstate commerce. The Court pointed out that the restrictions shielded most waste producers from outside competition in obtaining disposal services.

Policy Recommendations

The City of Denver has prevented people and businesses who generate solid waste from obtaining competitive disposal services. Rather than allowing waste generators to contract with companies on the basis of price or quality service, Denver has imposed a monopoly, for the sole benefit of one company, Waste Management, Inc.

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When Denver created the monopoly, it repeatedly broke the law. By failing to hold a public hearing in which disposal methods and fees would be reviewed, the City of Denver appears to have violated state law. By requiring bidders or contractors to deal with

a particular person or company, the City has further violated state law. The City also violated its own Charter requirement for competitive contracting. The Denver flow control ordinance prohibits commerce between Denver customers and waste disposal providers in Denver, Colorado or in other states; accordingly, the Denver-Waste Management monopoly contract is probably a violation of the dormant commerce clause of the United States Constitution.

Denver's government should repudiate the ill-advised decisions of the previous Denver

administration. Denver should ask Waste Management to terminate the contract voluntarily. Although the monopoly does serve Waste Management's short-term economic interests, as the company stands to reap more over \$10 billion over the lifetime of the contract, Waste Management would prove itself to be a good corporate citizen by renouncing the unfair monopoly created by the previous Denver administration.

Second, rather than resisting BFI's lawsuit, Denver should confess error, and take appropriate legal action to void the contract.

If Waste Management is confident about its ability to provide high-quality services as a reasonable price, the company should have nothing to fear from fair and open competitive bidding. All over America, waste disposal providers which once were protected by illegitimate monopolies are now thriving in the competitive marketplace. No matter who ends up winning a competitive bidding process, Denver's taxpayers will be the true winners, once Denver's current government renounces the illegal crony monopoly created by the previous administration.

Endnotes

¹ Denver Charter 2.3.3(A)(i).

² USA Recycling, Inc. et al. v. Town of Babylon, 66 F.3d 1272 (2d Cir., 1994).

³ O'Brien, Jeremy, Barbara J. Stevens. "Examples of Public Sector Action to Promote Competition in the Solid Waste Industry." May 2003. Prepared by HDR Engineering, Inc. and Ecodata, Inc. for King County

⁴ Ibid.

⁵ Franciosi, Robert. "Garbage In, Garbage Out: An Examination of Private/Public Competition By the City of Phoenix." Goldwater Institute. Arizona Issue Analysis 148. January 1998. www.goldwaterinstitute.org/article.php/102.html

⁶ Hayes, Tammy L. "Establishing a Fair Playing Field for Public/Private Competition." MSW Management: The Journal for Municipal Solid Waste Professionals. vol. 12, no. 3, May/June 2002.

⁷ Ibid

⁸ Ibid

⁹ "Detroit Could Collect Savings from Privatized Garbage Pickup." Mackinac Center. December 2000. www.mackinac.org/article.asp?ID=3155

¹⁰ Ibid

¹¹ "Dormant Commerce Clause: Garbage I." Law for Laymen. Rinke-Noonan Law Firm (St. Cloud, Minnesota), <http://www.rnoon.com/lawlaymen/constitulaw/dormcommerce/garbage1.html>.

¹² 511 U.S. 383, 391 (1994).

¹³ 504 U.S. 353 (1992).

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