



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

Memorandum

February 24, 2000

TO: Karen Hawkins
Department of Finance

CC: Arthur Balmer, Chief
Division of Solid Waste

VIA: Marc Hansen, Chief *MPH*
General Counsel Division

FROM: Jared Littmann *JL*
Assistant County Attorney

RE: Billing for federal customers of the County's solid waste disposal services

QUESTION

You have requested an opinion from this office concerning the billing of federal agencies that use the County's solid waste disposal facilities. Sections 48-35 and 48-36 of the Code requires a person to pay a solid waste charge¹ within 15 days after the County issues an invoice. Section 48-36 requires the Director of Finance ("Director") to charge interest on overdue payments. You ask if federal law prohibits the Director from complying with Section 48-36. If federal law does not affect the payment due date for federal agencies, then you ask if the Director can terminate the dumping privileges of a federal agency for the failure to pay an invoice within 15 days.

SHORT ANSWER

Under federal law, the Director must give a federal agency 30 rather than 15 days to pay a solid waste charge. Moreover, the billing period for a federal agency starts when the agency receives the invoice rather than the date the invoice is sent. Because a federal agency must be given 30 days to pay a solid waste charge, the Director can not terminate the dumping privileges of a federal agency for the failure to pay an invoice within 15 days.

¹ The "solid waste charge" is the "charge established for use of County solid waste acceptance facilities for disposal," MONT. COUNTY CODE, §48-1.

BACKGROUND

Users of the County's solid waste acceptance facilities are billed according to the amount of solid waste they deliver based on a fixed dollar amount per ton of solid waste. Currently, the Director bills federal agencies that dispose of solid waste at the acceptance facilities like other users; that is, the Director generates invoices monthly for the usage during the previous month and mails the invoices during the 3rd - 5th days of the month. The Director states in the invoices that the charges are due within 15 days after the County renders the invoice. Presumably, the date when an invoice is rendered is imprinted on the invoice and the invoices are mailed the same day they are rendered.² The payment due date stated in the invoice is based on Section 48-36, which states in part,

If any person does not pay any solid waste charges within 15 days after the County renders a monthly invoice . . . the Director of Finance must apply any posted collateral against the amount due and must immediately suspend access to county solid waste acceptance facilities . . . until full payment, including interest and penalties, is received

The County must charge interest for late payments on the full amount of the monthly invoice pursuant to Section 48-36. The Department of Finance has applied Sections 48-35 and 48-36 uniformly for all users of the disposal facilities, including federal agencies, by charging interest on payments not received within 15 days after invoices have been rendered.

DISCUSSION

Contractual or statutory authority is required to charge a federal agency interest for failing to timely pay an invoice. The relevant contractual or statutory authority, however, must be considered in light of the no-interest rule. This discussion first addresses the no-interest rule, then the relevant contractual relationships and statutory authority.

The no-interest rule

Under the no-interest rule, a federal agency is only liable for interest on an overdue payment if Congress has expressly waived the United States' sovereign immunity. *Library of Congress v. Shaw*, 478 U.S. 310, 319, 106 S.Ct. 2957, 2963 (1986). In the "absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *Id.* 478 U.S. at 317, 106 S.Ct. at 2963 (quoting *United States v. Louisiana*, 446 U.S. 253, 264-65, 100 S.Ct. 1618, 1626 (1980)). The required "express congressional consent to the award of interest" is "separate from a general waiver of immunity to suit." Under the required strict interpretation of the no-interest rule,

² If either presumption is not accurate, tangential issues may arise.

“there can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.”

Id. at 478 U.S. at 318, 106 S.Ct. at 2963 (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 604 (1947)). Based on the no-interest rule, there must be an express contract or federal statutory provision that permits the County to charge federal agencies interest on late payments of solid waste invoices.

An express contract does not exist between the parties

If a contract exists between the County and the federal agencies that use the County’s disposal facilities, then it is an implied contract. The County and the relevant federal agencies do not have express contracts, let alone an express contractual provision constituting an express waiver of sovereign immunity for the imposition of interest charges on overdue solid waste service charges. Although private entities post collateral or surety bonds for establishing credit which could possibly be interpreted as creating an express contract, federal agencies are waived from the bond requirements. *See* Section 48-34(c). Regardless of whether the duties and obligations between the County and the federal agencies using the disposal services are based on implied contracts, the federal agencies cannot permit itself to be subject to interest based on an implied contract or contractual term.

No express statutory authority in RCRA

The County can charge federal agencies interest for overdue payments on solid waste invoices if there is express statutory authorization. For this determination, there are two relevant statutes, the Resource Conservation and Recovery Act (“RCRA”) and the Prompt Payment Act. RCRA permits the County to charge federal agencies for the use of disposal facilities by subjecting each federal agency “engaged in any activity resulting, . . . , in the disposal or management of solid waste [to local regulations] respecting control and abatement of solid waste . . . including the payment of reasonable service charges.” The reasonable service charges “that are assessed in connection with a . . . local solid waste . . . regulatory program” must be “nondiscriminatory charges.”³ RCRA § 6001, codified at 42 U.S.C. § 6961(a). The service charges that the County imposes on users of the solid waste disposal facilities are based, *inter alia*, on this authorization.

Courts interpret this authorization narrowly because it is a waiver of sovereign immunity.

³ “Nondiscriminatory charges” generally requires that the charge is applied in the same manner to everyone using the service. Whether or not the service charge imposed against a federal agency is reasonable and non-discriminatory is beyond the scope of this opinion.

Maine v. Department of Navy, 973 F.2d 1007, 1011 (1992). Based on the Supreme Court's ruling in *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 112 S.Ct. 1627 (1992), the United States Court of Appeals for the First Circuit has held that RCRA § 6001 is a satisfactory express waiver of a reasonable service charge, "[s]o long as the charges do not discriminate . . ., and are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost . . . of the benefits to be supplied" *Id.* at 1013, quoting *Massachusetts v. United States*, 435 U.S. 444, 466-67, 98 S.Ct. 1153, 1167 (1978).

Although RCRA § 6001 permits a service charge, it does not specifically permit a charge for interest based on an overdue payment of a service charge. The statute permits, "civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature . . .," but courts interpret this provision very narrowly. *Maine v. Department of Navy*, 973 F.2d at 1015. In *Maine*, the Court of Appeals for the First Circuit held that a fine titled "[p]enalty for late payment of fee," was an impermissible "penalty for past conduct," rather than "a coercive effort 'imposed to induce [federal agencies] to comply with injunctions or other judicial orders designed to modify behavior prospectively.'" *Id.* (quoting *Department of Energy*, 503 U.S. 607, 112 S.Ct. at 1632).

Although the fine in *Maine* was triple fees for those fees which were more than six months overdue, the Court struck the fine because it was a monetary fine for past conduct rather than an effort to modify prospective behavior related to court imposed injunctive relief. Arguably, a court may not permit any monetary fine for past conduct, regardless of its reasonableness. Because courts strictly construe waivers of sovereign immunity, a court is not likely to interpret RCRA § 6001 to authorize the imposition of interest charges pursuant to local regulations.

Express statutory authority in Prompt Payment Act

The Prompt Payment Act (the "Act") authorizes interest charges against federal agencies and specifies a billing period. Specifically, the Act expressly requires the head of a federal agency to pay an interest payment for the period beginning on the day after the "required payment date" and ending on the date on which payment is made. 31 U.S.C. § 3902 (a) - (b); 5 U.S.C. § 551. The beginning or "required payment date" is "30 days after a proper invoice for the amount due is received if a specific payment date is not established by contract." 31 U.S.C. § 3903(a)(1)(B). Implementing regulations further specify that, "periods for payment shorter than 30 days shall not be specified in contracts without the prior approval of the cognizant accounting office to ensure that procedures are in place to allow timely payment." See 48 C.F.R. Subpart 2432.9. At this time, the Director does not have approval for a payment period shorter than 30 days from any of the accounting offices of the relevant federal agencies. Without said approval, the Director is not authorized to implement a payment period shorter than 30 days for those federal agencies.

Without said prior approval and/or a written contract, the Act requires that the interest charges commence 30 days after the agency receives an invoice. The head of the agency is deemed to receive an invoice either on the date the agency actually receives a proper invoice or on the date of the invoice, if the agency does not "annotate the invoice with the date of receipt at the time of

actual receipt . . .” 31 U.S.C. § 3901(a)(4). Therefore, unless the agency does not mark the invoice with the date it is received, the agency is not liable for interest on overdue payments until 30 days after it actually receives the corresponding invoice. For computation purposes, the interest must be “computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611), which is in effect at the time the agency accrues the obligation to pay a late payment interest penalty.” 31 U.S.C.A. §3902(a).

CONCLUSION

The Prompt Payment Act is the only express contractual or federal statutory provision permitting the imposition of interest against federal agencies using the County’s disposal facilities. Therefore, under current conditions, the County can only impose interest when a federal agency fails to make a payment within 30 days after the agency receives the corresponding invoice.

Based on the difficulties of justifying the interest provisions of the Montgomery County Code against federal agencies, it is my recommendation that the Department of Finance should not apply those provisions against federal agencies. However, the County can charge federal agencies an interest charge for payments that are not made within 30 days from when the agency receives an invoice, as outlined above. This change should be implemented for interest on service charges to all federal agencies, regardless of whether the agency brings these issues to the attention of the County.

For accuracy and clarity, it is also my recommendation to the Division of Solid Waste that the anticipated re-draft of the County Code provisions relating to interest and penalties (§§ 48-35, 48-36) reflect the recommendations in this opinion. One option is to modify §48-36 to include the following subsection, “If the interest provisions of this Chapter are not applicable against the federal government because sovereign immunity is not expressly waived, then the County will apply applicable federal laws for imposing interest on overdue payments.”