U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

JUN 23 2006

Ms. Fran Mainella
Director, National Park Service
1849 C Street, N.W.
MS 3100
Washington, D.C. 20240

Dear Ms. Mainella:

This is in reply to the August 3, 2005, letter from Paul D. Hoffman, former Deputy Assistant Secretary for Fish and Wildlife and Parks, that seeks review and reconsideration of the July 13, 2004, ruling, which determined that the concession contract, No. CC-9100-1-002, and currently No. CC-DENA001-03, at the Denali National Park and Preserve (Denali) is subject to coverage under the McNamara-O'Hara Service Contract Act (SCA) (41 U.S.C. 351-358). A variety of services are provided under this concession contract for both the general public visiting Denali as tourists and employees employed by the contractor, Doyon Limited and ARAMARK Sports and Entertainment, Inc. (Doyon/ ARAMARK), a joint venture partnership. In your letter, you argue that all of the concession contracts entered into by the National Park Service (NPS) should be exempt from the SCA because these contracts provide services to the public, rather than the Government. You also assert that the July 2004 ruling "inappropriately narrowed" the scope of the regulatory exemption provided for concession contracts in 29 C.F.R. 4.133(b).

The SCA applies, in pertinent part, to "[e]very contract . . . entered into by the United States or District of Columbia in excess of $2,500 . . . the principal purpose of which is to furnish services in the United States through the use of service employees[.]" 41 U.S.C. 351(a). The legislative history indicates that the purpose of the Act was to fill a gap in the coverage of existing labor standards legislation and to include generally as contracts for "services" those contracts which have as their principal purpose the procurement of something other than construction activity subject to the Davis-Bacon Act or the furnishing of materials and supplies subject to the Walsh-Healey Act. S. Rep. No. 798, 89th Cong., 2d Sess. 1 (1965); 29 C.F.R. 4.111(b). The types of service contracts covered by the SCA are numerous and varied, and the Department's regulations include concessionaire services as an example of services covered by the law. 29 C.F.R. 4.130(a)(11). The SCA authorizes the Secretary of Labor under "special circumstances" to issue

regulations allowing reasonable exemptions from the Act that are consistent with its purpose, 41 U.S.C. 353(b), and the Secretary has issued exemptions for certain kinds of concession contracts as provided in 29 C.F.R. 4.133(b). Accordingly, if the principal purpose of the concession contract in question is to provide services through the use of service employees, the contract is covered by the SCA, unless services performed under this concession contract are among those identified as exempt in 29 C.F.R. 4.133(b).

It appears to be NPS's position that the SCA does not apply to its concession contracts because they "do not provide services to or for the benefit of the government." In support, your letter cites to the legislative history of the NPS Concessions Management Improvement Act of 1998, 16 U.S.C. 5951 et seq., and a brief filed by the Solicitor General in the case of National Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803 (2003). We do not find these materials to be dispositive.

The plain language of the SCA dictates that it applies to "every contract" the principal purpose of which is to furnish services; the Act does not contain any provision that limits coverage to those contracts in which the Government procures the service for itself or is the beneficiary of such services. 41 U.S.C. 351(a). Department of Labor ("DOL") regulations are also clear that SCA coverage of service contracts does not depend on the Government receiving a direct benefit from the services provided. At 29 C.F.R. 4.133(a), our regulations provide as follows:

> [T]here is no limitation in the Act regarding the beneficiary of the services, nor is there any indication that only contracts for services of direct benefit to the Government, as distinguished from the general public, are subject to the Act. Therefore, where the principal purpose of the Government contract is to provide services through the use of service employees, the contract is covered by the Act, regardless of the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service, and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere.

In promulgating this final rule, DOL specifically rejected the contention that the SCA should not be applied to "contracts which primarily benefit the public," stating that "[t]he language of the Act makes no distinction based on the beneficiary of the contract services, and further, the Act's legislative history provides no evidence of a Congressional intent to so limit coverage." The preamble referenced district court decision District Lodge No. 166, IAMAW v. TWA Services, Inc., et al., 25 WH Cases 208 (M.D. Fla. 1981), in which the court

stated that "the SCA does not explicitly, or implicitly, exclude concession contracts from its coverage." 25 WH Cases at 210. Thus, even though NPS concession contracts may not be generally viewed as "contracts for the procurement of goods and services for the benefit of the government," this does not serve to defeat SCA coverage.

The Solicitor General's brief in National Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803 (2003), which you have cited, does not support NPS's position. Although it is true that the Solicitor General argues in that brief that most NPS concession contracts are not "procurement" contracts, that distinction is not relevant to the question whether a contract falls within the scope of the SCA. On the other hand, the Solicitor General repeatedly characterized NPS concession contracts throughout the brief as contracts for the provision of services to the general public. See pg. 40 (concession contracts have the "main purpose of providing service to visitors") and pg. 54 (citing legislative history stating that "contracts made with these operators in the national parks are made ... for service to be furnished to the public who go to the parks") (emphasis added). As we have explained, contracts for the provision of services to the general public fall within the scope of the SCA.

Similarly, the NPS Concessions Management Improvement Act of 1998 does not contain any language exempting NPS concession contracts from the reach of the SCA. The Senate Report on the 1998 Act that is cited by NPS also does not support its position. The Senate Report provides that NPS concession contracts "do not constitute contracts for the procurement of goods and services for benefit of the government or otherwise." S.Rep. No. 202, 105th Cong., 2d Sess. 39 (1998). This language indicates that the Senate did not consider NPS concession contracts to be procurement contracts. It says nothing, however, about whether concession contracts should be considered "contracts for the furnishing of services" within the meaning of the SCA.

You further claim that DOL has "inappropriately narrowed the exemption" provided for certain concession contracts at 29 C.F.R. 4.133(b) by failing to recognize a blanket exemption for all NPS concession contracts. This contention misreads the regulation and the preamble to the final rule. In promulgating the final rule, DOL stated that it "continues to be of the view that an exemption from the Act is necessary for National Park and similar concession contracts providing food, lodging, souvenir, and similar services to the general public." 48 Fed. Reg. 49736, 49753 (Oct. 27, 1983). This language does not indicate an intention to exempt all NPS concession contracts from coverage under the SCA, regardless of the nature of the services provided. Rather, it conveys that the exemption established by 29 C.F.R. 4.133(b) for the listed kinds of concession contracts is not limited to those entered into by NPS, but rather also applies to other "similar"

concession contracts entered into by other federal agencies that meet the requirements of the exemption.

With respect to the description of the types of concession contracts that fall within the exemption, DOL's use of the term "similar services" in the preamble language cannot be read as open-endedly including every type of service for which the NPS enters concession contracts. As DOL stated in the preamble, the final rule was "recast . . . making it clear that the provision was an exemption and carefully delimiting its scope to the listed concession contract services." 48 Fed. Reg. at 49753 (emphasis added). The regulation specifies that "concession contracts (such as those entered into by the National Park Service) principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public, as distinguished from the United States Government or its personnel, are exempt." 29 C.F.R. 4.133(b). This regulation further clarifies that "[w]here concession contracts, however, include substantial requirements for services other than those stated, those services are not exempt." Id. (emphasis added). Thus, the "similar services" referred to by DOL in the preamble are those specifically listed in the final regulation, in addition to the "food, lodging, [and] souvenir" services that were expressly mentioned in the preamble.

We can find no language in section 4.133(b) or its preamble which expressly excludes from SCA coverage all NPS concession contracts providing services to the public. Rather, the Department's express intention in promulgating section 4.133(b) was "to exempt certain types of concession contracts pursuant to the Secretary's authority under section 4(b) of the Act." 48 Fed. Reg. at 49753. Section 4.133(b) sets forth the types of concession contracts let by Federal agencies that may qualify for the exemption, which were reiterated in the July 2004 ruling. Because the contract for transportation services at Denali does not fall within any of the categories of concession contracts that are specifically exempted under 29 C.F.R. 4.133(b), it is covered by the SCA.

Consistent with the position set forth in our July 2004 ruling, when a concession contract is principally for services covered by the SCA, the remaining services are deemed incidental to the overall purpose of the contract and thus are also subject to the requirements of the SCA. In this case, the information that you provided in your September 25, 2005 letter demonstrates that the concession contract in question is principally for visitor transportation services that are not exempt under 29 C.F.R. 4.133(b). This information also demonstrates that other items

provided under the contract, which might be exempt "if awarded under a separate contract 'principally for' exempt service" (July 2004 ruling, p. 3), constitute a relatively small portion of the overall contract and therefore are deemed covered as incidental to the overall purpose of the concession contract, i.e., the provision of visitor transportation services.

We therefore affirm our determination set forth in the July 13, 2004 ruling that SCA covers the concession contract in question. We have also decided that this is not an appropriate case in which to require application of the SCA retroactively to the beginning of the contract. See generally Raytheon Aerospace, ARB Case Nos. 03-017, 03-019, 2004 WL 1166284 (May 21, 2004). Pursuant to 29 C.F.R. 4.5(c)(2), please take all necessary steps to incorporate the SCA stipulations and the applicable wage determination into the current concession contract in question within thirty (30) days of receipt of this letter and apply these stipulations prospectively from such date. Please inform us of your actions in this matter as soon as possible.

This letter constitutes a final ruling in this matter. Under the regulations at 29 C.F.R. 8.7, any aggrieved party may file a petition for review of this final determination with the Department of Labor's Administrative Review Board within sixty (60) days. Any appeal should be addressed to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C. 20210.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

cc: Barbara L. Camens, Esq.