



September 15, 2006

Fran P. Mainella, Director
National Park Service
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Ms. Mainella:

This is in response to your letter of April 7, 2006, setting forth the National Park Service's (NPS's) reasons for not incorporating the provisions of the McNamara-O'Hara Service Contract Act (SCA) (41 U.S.C. §§ 351-358) into the incumbent concession contract, No. CC-8073-3-0019, and the Solicitation for the new concession contract, No. CC-GOGA001-05. These contracts provide ferry transportation services to the Golden Gate National Recreation Area, including food and beverage services on the vessels, and shuttle access service for persons with disabilities on Alcatraz Island, California. It is NPS's position that SCA does not apply to the referenced contracts because NPS concession contracts are governed exclusively by the NPS Concessions Management Improvement Act of 1998 (1998 NPS Concessions Act), 16 U.S.C. §§ 5951-5966, and its implementing regulations, 36 C.F.R. Part 51. Further, if these concession contracts are determined to be subject to SCA, it is NPS's position that an exemption from SCA for these contracts would be in the public interest, in accord with the remedial purpose of the SCA, and necessary to avoid serious impairment of Government business.

Based on the language of the SCA, if a contract is "entered into" by or with the Government, and if its principal purpose is "to furnish services in the United States through the use of service employees," it is subject to the Act. 41 U.S.C. § 351(a). The SCA is intended to be applied to a wide variety of service contracts; the nomenclature, type, or particular form of contract used is not determinative of coverage. 29 C.F.R. § 4.111(a). To illustrate this point, the SCA regulations provide a listing of contracts that have been found to come within the coverage of the Act. 29 C.F.R. § 4.130(a). Among the types of service contracts included on this list are contracts for concession services. 29 C.F.R. § 4.130(a)(11). The SCA authorizes the Secretary of Labor under "special circumstances" to allow reasonable exemptions from the Act that are consistent with its purpose, 41 U.S.C. § 353(b), and the Secretary has issued an exemption for certain kinds of

concession contracts as provided in 29 C.F.R. § 4.133(b). Exempt concession contracts are those “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 and its personnel.” However, 29 C.F.R. § 4.133(b) also provides that “[w]here concession contracts . . . include substantial requirements for services other than those stated, those services are not exempt” and, accordingly, if a contract exceeds \$2,500, it would be required by the Act to include the stipulations and wage determination that sets forth the minimum wages and fringe benefits to be paid to service employees performing on the contract. 41 U.S.C. § 351(a). *See also* 29 C.F.R. § 4.141(a) (“concession contracts are considered to be contracts in excess of \$2,500 if the contractor’s gross receipts under the contract may exceed \$2,500”). Thus, if the principal purpose of the concession contracts in question is to provide services through the use of service employees, then the contract is covered by SCA, unless the services performed under these concession contracts are among those identified as exempt in 29 C.F.R. § 4.133(b).

It is NPS’s position that “all” NPS concession contracts are generally not subject to coverage under SCA as they are exclusively governed by the 1998 NPS Concessions Act and its implementing regulations. Further, NPS maintains that “[t]he operations provided by NPS concessioners are not for the benefit of the government, but are a benefit for the visiting public.” In support of this position, NPS cites the legislative history of the 1998 NPS Concessions Act and a brief filed by the Solicitor General in *National Park Hospitality Ass’n v. Department of Interior*, 538 U.S. 803 (2003). We do not find these materials to be persuasive.

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

[T]here is no limitation in the Act regarding to 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.

Id. (emphasis added). In promulgating this final rule, DOL specifically rejected the contention that the Act should not be applied to “contracts which primarily benefit the public,” by 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.” See Preamble to the SCA Final Rule, 48 Fed. Reg. 49,753 (Oct. 27, 1983). The preamble referenced the district court decision in *District Lodge No. 166, IAMAW v. TWA Services, Inc.*, 25 Wage & Hour Cas. (BNA) 208 (M.D. Fla. 1981), in which the court stated that “the SCA does not explicitly, or implicitly, exclude concession contracts from its coverage.” *Id.* at 210. Thus, even though NPS claims the concession contracts may not be generally viewed as “contracts for the procurement of goods and services for the benefit of the government,” this position does not serve to defeat SCA coverage.

The Solicitor General’s brief in *National Park Hospitality Ass’n v. Department of Interior*, 538 U.S. 803 (2003), which you have cited, also does not support NPS’s position. Although it is true that the Solicitor General argued 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 Br. at 40 (concession contracts have the “main purpose of providing *service* to visitors”) (emphasis added); *id.* at 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 1998 NPS Concessions Act does not contain any language exempting NPS concession contracts from coverage under SCA. The Senate and House committee reports on the 1998 NPS Concessions Act provide that concession contracts “do not constitute *contracts for the procurement of goods and services* for the benefit of the government or otherwise.” S. Rep. No. 202, 105th Cong., 2d Sess. 39 (1998); H.R. Rep. No. 767, 105th Cong., 2d Sess. 43 (1998) (emphasis added). This language, however, says nothing about whether NPS concession contracts should be considered “contracts for the furnishing of services” within the meaning of SCA.

Thus, contrary to NPS’s position and its interpretation of 29 C.F.R. § 4.133(b), DOL can find no language that expressly excludes all NPS concession contracts

providing services to the public from SCA coverage. Rather, DOL's express intention in promulgating 29 C.F.R. § 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 49,753. Clearly, 29 C.F.R. § 4.133(b) sets forth the types of concession contracts let by federal agencies that may qualify for the exemption.

Because the concession contracts in question principally provide ferry transportation services to and from Alcatraz Island, they are covered by SCA and are not within any of the categories of concession contracts that are specifically exempted under 29 C.F.R. § 4.133(b). Moreover, 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. Our understanding of the concession contracts in question is that the food and beverage services provided on the vessels are incidental to the transportation services provided visitors and NPS staff that are not exempt under 29 C.F.R. § 4.133(b). Although the food and beverage concession services provided might be exempt pursuant to 29 C.F.R. § 4.133(b) if awarded under a separate contract, they are covered by the SCA in this case because they are incidental to the overall purpose of the contracts in question, which is to furnish transportation services to and from Alcatraz Island, services that are clearly covered by the SCA.

The Secretary of Labor's authority under 41 U.S.C. § 353(b) and 29 C.F.R. § 4.123 to provide variances, tolerances, or exemptions under the SCA is limited to "special circumstances where [she] determines that such . . . exemption is necessary and proper in the public interest or to avoid serious impairment of Government business, and is in accord with the remedial purposes of this Act to protect prevailing labor standards." Thus, to grant a blanket exemption for all NPS concession contracts requires a strong and affirmative showing that such exemption is necessary and proper in the public interest or to avoid serious impairment of Government business, while giving due regard to the remedial purposes of the Act to protect prevailing labor standards. Upon consideration of the information submitted, we decline to grant such an exemption.

Inasmuch as the concession contracts in question are principally for ferry transportation services, these contracts are subject to SCA coverage. Therefore, 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(s) into the current concession contract (CC-8073-3-0019) within thirty (30) days of receipt of this letter and apply these stipulations and applicable wage determination(s) prospectively from such date. In addition, please ensure that the SCA stipulations and applicable wage determination(s) are incorporated in

Solicitation No. CC-GOGA001-05. Please inform us of your actions in this matter as soon as possible.

This letter constitutes a final ruling in this matter. Under 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,

A handwritten signature in cursive script that reads "Paul DeCamp".

Paul DeCamp
Administrator

cc: Mr. James Spinoso
Mr. Robert Remar
Mr. Charles S. Birenbaum
Mr. Robert Spagat
Ms. Eleanor Morton
Mr. Dmitri Iglitzin