

# Federal Concessions Contractor

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SALTMAN & STEVENS, P.C. • 1801 K Street, N.W., Suite M-110 • Washington, DC 20006 • 202.452.2140 •  
concessions@saltmanandstevens.com

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## GAO REAFFIRMS ITS JURISDICTION TO CONSIDER PROTESTS AGAINST THE AWARD OF CONCESSION CONTRACTS

The Government Accountability Office (GAO) recently reaffirmed its jurisdiction to consider a protest challenging the decision to award a concession contract. If the contract includes the delivery of goods or services of more than *de minimis* value or benefit to the government, in addition to the business opportunity to provide goods or services to the public, it is, at least in part, a procurement over which GAO has bid protest jurisdiction. GAO has consistently taken jurisdiction over such “mixed transaction” contracts. In determining whether the government will receive more than *de minimis* value from the goods or services provided in connection with a concession contract, GAO examines whether the contract reduces the agency’s workload or either directly or indirectly supports the agency’s mission requirements.

## CBCA REJECTS REQUESTS TO WITHDRAW DECISIONS ADVERSE TO GOVERNMENT

As reported in a previous *Federal Concessions Contractor* (vol. 9, no. 2), despite a National Park Service (NPS) regulation which states that concession contracts are not subject to the Contract Disputes Act (CDA), the Civilian Board of Contract Appeals (CBCA) has ruled that it had jurisdiction to consider a concession leasehold surrender interest (LSI) valuation dispute. In an effort to avoid having this jurisdictional ruling stand as precedent in future cases, NPS agreed to pay the concessioner to settle the LSI valuation claim, but expressly conditioned the settlement on the agreement of the CBCA to vacate its ruling. The CBCA refused, concluding that because judicial precedents are valuable to the public as a whole and “not merely the property of private litigants,” decisions can be vacated only in exceptional circumstances, which the parties had failed to demonstrate. Even though the CBCA refused to vacate the decision, NPS agreed to go ahead with the negotiated settlement.

In 2008, the Forest Service unsuccessfully attempted a similar maneuver to avoid another ruling adverse to the government. In the Forest Service case, the government offered to forego an appeal and to pay a timber sale contractor more than the amount awarded by the CBCA if the contractor would join in asking the CBCA to withdraw its decision. The contractor agreed and the parties submitted a joint request asking the CBCA to vacate the decision, but the CBCA denied the request. The parties each had their own reasons for submitting the request – the

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contractor wanted to end the case without appeal and get paid as soon as possible, and the Forest Service wanted to avoid what it viewed as a bad precedent. However, the CBCA ruled that these reasons did not rise to the level of the “exceptional circumstances” needed to support vacating the decision. Like NPS, the Forest Service went ahead and settled with the contractor, despite the refusal of the CBCA to vacate the decision.

### **FOREST SERVICE PROPOSES CHANGES TO ITS CAMPING FEE DISCOUNT PROGRAMS**

The Forest Service has made available for public comment proposed changes to its directives governing permits for the operation of campground concessions and day use recreation sites. Most notable is the proposal to reduce from 50% to 10% the camping fee discount that campground concessioners are required to offer to seniors and disabled persons who hold America the Beautiful Senior and Access Passes and Golden Age and Golden Access Passports. According to the Forest Service, it is the only federal agency that requires its concessioners to provide a 50% discount on camping fees to holders of these passes. The proposed directives would allow concessioners to request amendment of existing permits to incorporate these changes but in exchange would require the concessioners to remit increased land use fees if their gross revenues increase by more than \$10,000 from the reduction in the camping fee discount. In addition, the proposal would require concessioners to offer a 10% discount for standard amenity day use site fees to holders of these passes and to permit free use of these sites by holders of America the Beautiful Annual and Volunteer Passes. The proposal would also allow applicants for future campground concession permits to propose a higher discount than the required 10% minimum. Comments are currently due to be filed by February 1, 2010. The Federal Register notice which describes the proposed changes is available at <http://edocket.access.gpo.gov/2009/pdf/E9-28744.pdf>.

### **NPS PROPOSES NEW POLICIES TO RECOVER COSTS FOR PROVIDING UTILITIES**

NPS has made available for public comment a proposed Director’s Order to update policies and procedures for recovering costs associated with the provision of utility services in the national parks to “concessioners, contractors, permittees” and other park users. Comments are currently due to be filed by January 4, 2010, but we understand that the comment deadline is being extended for an additional 60-day period. The Federal Register notice is available at <http://edocket.access.gpo.gov/2009/pdf/E9-27520.pdf>. The draft proposal is available at <http://www.nps.gov/policy/DO-35Bdraft.htm>.

SALTMAN & STEVENS, P.C.  
1801 K Street, N.W., Suite M-110  
Washington, DC 20006  
(202) 452-2140 FAX (202) 775-8217  
[concessions@saltmanandstevens.com](mailto:concessions@saltmanandstevens.com)