

Federal Concessions Contractor

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PROTEST SUSTAINED BECAUSE AGENCY FAILED TO CONSIDER ALL TECHNICALLY ACCEPTABLE OFFERS IN “BEST VALUE” TRADEOFF ANALYSIS

In a “best value” contract competition, the source selection authority performs a tradeoff between price and non-price factors to determine whether one offer’s technical superiority is worth a less favorable price. Even where price is stated to be of less importance than non-price factors, an agency must meaningfully consider cost to the government and must adequately document any decision to select a technically superior, but less favorably priced, offer. In a concession contract, the price factor favors a higher proposed franchise fee; in a procurement contract, the price factor favors a lower proposed price. However, the principles of “best value” contracting are identical in both types of government contract competitions.

In one recent case, the agency performed a tradeoff between the two offers with the highest technical ratings but did not consider the other technically acceptable offers in its analysis, even though several of those offers contained more favorable pricing than the price offered by the company selected for contract award. Because the price proposed by the protestor was the most favorable to the government, the protestor’s offer might have been viewed as the best value even with a lower technical rating in the non-price factors. The agency was therefore directed to perform a new price/technical tradeoff analysis that included all technically acceptable offers.

INJURED CONCESSIONER EMPLOYEE SUES THE UNITED STATES FOR NEGLIGENCE

A national park concessioner employee who was injured while on the job sued the United States for damages under the Federal Tort Claims Act (FTCA), claiming that a dangerous condition created by the concessioner’s operations caused his injury. The FTCA permits suit against the federal government for the negligent or wrongful conduct of a government employee acting within the scope of his employment. Concessioners are not subject to suit under the FTCA because concessioners are independent contractors. The injured employee therefore could not hold the government liable under the FTCA for any alleged negligence of the concessioner. Because the injured employee also claimed that the United States was negligent by failing to properly exercise its control over the concessioner’s operations, the lawsuit against the government was allowed to proceed and is currently pending in federal court.

Federal Concessions Contractor is published periodically by Saltman & Stevens, P.C. to update developments of interest to federal concessioners. It is not intended to provide legal advice. Legal advice may be given only when related to specific facts. Those desiring further information may contact Alan Saltman or Ruth Tiger (editor) at (202) 452-2140. For general information about the Firm’s attorneys and practice areas, please visit our website at <http://www.saltmanandstevens.com>.

GAO RECOMMENDS A FORMAL, RISK-BASED APPROACH TO BETTER MANAGE AGENCY LAW ENFORCEMENT RESOURCES

The Government Accountability Office (GAO) recently issued a report that addressed the increase in certain “high-profile” illegal activities on federal lands, such as marijuana cultivation and the smuggling of drugs and people into the United States. These illegal activities have raised concerns that the four land management agencies – the Forest Service, the Bureau of Land Management, the Fish and Wildlife Service and the National Park Service – are becoming less able to protect our nation’s natural and cultural resources and ensure public safety. The report examines (1) the types of illegal activities occurring on federal lands and the effects of those activities on natural and cultural resources, the public and agency employees; (2) how the agencies have used their law enforcement resources to respond to these illegal activities; and (3) how the agencies determine their needs and distribute their law enforcement resources. In addition to finding that the available data do not allow the agencies to monitor trends in the occurrence of illegal activities on federal lands, GAO also expressed concern that more than half of the National Park Service’s 393 units were not using standardized incident reporting systems. A new Incident Management Analysis and Reporting System is currently being field tested and is expected to be fully deployed by the end of 2012.

The report is available at <http://www.gao.gov/new.items/d11144.pdf>.

YELLOWSTONE WINTER USE CONTROVERSY CONTINUES

Yellowstone National Park has been operating under interim winter use plans for the past decade due to a variety of legal disputes, court rulings, failed attempts by the National Park Service to complete a legally adequate long-term winter use rule, and actions by Congress that have ensured continued snowmobile access to the Park despite the uncertainty associated with the lack of a long-term rule. The interim rule currently in effect allows a maximum of 318 commercially-guided snowmobiles and 78 commercially-guided snowcoaches per day in the Park. Last summer, Park officials outlined a range of six alternatives to be considered in a draft Environmental Impact Statement (EIS) for a long-term winter use plan. The draft EIS is expected to be published within the next month. The limits contained in the current temporary rule are among the six alternatives under consideration, in addition to alternatives that would allow a maximum of 540 or 720 commercially-guided snowmobiles along with 78 commercially-guided snowcoaches per day.

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