

DEPARTMENT OF THE INTERIOR**National Park Service****36 CFR Part 51**

RIN 1024-AC72

Economic Analysis of Proposed Concession Contracting Regulations

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: With this notice, the National Park Service ("NPS") addresses the economic impacts of its proposed concession contracting regulation, which NPS published pursuant to Title IV of the National Park Omnibus Management Act of 1998.

DATES: NPS will accept written comments, suggestions or objections until December 22, 1999.

FOR FURTHER INFORMATION CONTACT: Wendelin Mann, Concession Program, National Park Service, 1849 "C" Street, NW, Washington, DC 20240 (202/565-1219).

Background

Concession contracts are the form of governmental authorization used to permit private businesses ("concessioners") to provide visitor services in areas of the national park system. Visitor services include lodging, food service, merchandising, transportation, outfitting and guiding and similar activities.

NPS has been awarding and administering concession contracts in various forms since its establishment in 1916. In 1965, Congress formally established by the Concession Policies Act of 1965 (the "1965 Act") a number of policies and procedures regarding concession contracts. 36 CFR part 51 as it presently exists implemented the 1965 law. On November 13, 1998, the Congress substantially reformed these policies and procedures by passage of Title IV of Act of 1998 (the "1998 Act").

The 1998 Act requires NPS to promulgate regulations appropriate for its implementation. On June 30, 1999, NPS published proposed regulations for public comment in the **Federal Register**. The deadline for submission of public comments was October 15, 1999. NPS is currently considering the public comments received.

The June 30, 1999, **Federal Register** proposed regulation stated that NPS would publish in the **Federal Register** a related initial regulatory flexibility analysis and invite public comment on it. Because the proposed concession contracting regulations address contracts and public property (park

areas), they are not subject to the notice and comment provisions of 5 U.S.C. 553. This conclusion is not affected by the fact that section 417 of the 1998 Act requires NPS to promulgate regulations appropriate for its implementation, as the 1998 Act does not require that this be done through a general notice of proposed rulemaking. Accordingly, the proposed regulations were published for public comment as a matter of policy. NPS has preliminarily determined that because the regulations are exempt from the notice and comment provisions of 5 U.S.C. 553, they appear not to be subject to the Regulatory Flexibility Act. The Regulatory Flexibility Act is only applicable to rules and regulations that are required by 5 U.S.C. 553 or other law to be promulgated after publication of a general notice of proposed rulemaking. As indicated above there is no such notice and comment requirement for the concession contracting regulations. Accordingly, the NPS believes there may be no requirement that an initial regulatory analysis is required.

Nevertheless, NPS has chosen as a matter of policy to prepare an analysis that meets the requirements of the Regulatory Flexibility Act. This analysis has concluded at this juncture that these proposed regulations would not have a significant economic impact on a substantial number of small entities. Public comment is invited on the content of this discussion, as well as the question of whether the proposed concession regulations are in fact subject to the Regulatory Flexibility Act. Upon consideration of the public comments received, NPS will take appropriate final action with respect to any applicable requirements of the Regulatory Flexibility Act by the date of publication of the final concession contracting regulations. The publication of the following analysis is not to be construed as indicating that NPS necessarily considers that it is required by the Regulatory Flexibility Act to prepare an initial regulatory flexibility analysis for the proposed concession contracting regulations.

As a final background note, NPS points out that the preamble to the proposed concession regulations included a statement to the effect that it is likely that the number of concession contracts and permits may decrease to as few as 360 because alternative authorities are now available to NPS. This statement was erroneously included in the preamble after it had been determined by NPS to be incorrect. Accordingly, this statement in the preamble to the proposed regulations should be disregarded and the preamble

to the proposed regulations is hereby amended to delete this statement.

General Content of the Proposed Regulations

The proposed concession regulations establish the procedures under which NPS is to administer concession contracts and certain terms and conditions of concession contracts in furtherance of the requirements and policies of the 1998 Act.

The proposed regulations have two major purposes. The first is to set forth procedures as to how concession contracts are to be solicited and awarded by the National Park Service under the 1998 Act. With certain exceptions, the 1998 Act requires competitive awards of concession contracts. In some circumstances, an existing satisfactory concessioner may have a right to match the terms of a competing proposal for a new concession contract.

Second, unlike the existing 36 CFR part 51, the proposed regulation sets forth in detail the nature of the compensatory interest in capital improvements a concessioner may construct on park lands under the terms of a concession contract. This interest, called a "leasehold surrender interest," is described at length in the 1998 Act. It is the intention of NPS to establish appropriate contract terms and conditions for leasehold surrender interests by the proposed regulations so as to assure that the requirements of the 1998 Act are strictly followed.

Content of Subparts of the Proposed Regulations*Subpart A. Authority and Purpose*

Subpart A of the regulation describes the authority for the proposed regulations, their scope, and the scope of concession contracts in general. It also describes the statutory policies that underlie concession contracts.

Subpart B. General Definitions

Subpart B provides a number of definitions of terms that are used throughout the proposed regulations.

Subpart C. Solicitation, Selection and Award Procedures

Subpart C describes general procedures for competitive solicitation, selection and award of concession contracts in compliance with the 1998 Act. Except as described in subpart D, NPS must award all concession contracts on a competitive basis.

Subpart D. Non-Competitive Award of Concession Contracts

Subpart D describes the three limited situations in which NPS may make non-competitive awards of concession contracts as expressly authorized by the 1998 Act. NPS may extend a concession contract for up to three years on a non-competitive basis, may award a temporary contract for a term of no more than three years on a non-competitive basis, and, may award a concession contract on a non-competitive basis in extraordinary circumstances if certain findings are made and special procedures followed.

Subpart E. Right of Preference

Subpart E describes the right of preference to a new concession contract that may be obtained by certain existing satisfactory concessioners. Only satisfactory outfitter and guide concessioners or satisfactory concessioners annually grossing under \$500,000 are eligible for the preference. If a concessioner is eligible for the preference, it must submit a responsive offer pursuant to the prospectus issued for the new contract. If the concessioner does so, it is entitled under specified conditions to match the terms of a better proposal for the concession contract.

Subpart F. Leasehold Surrender Interest

Subpart F first defines a number of terms necessary to understand the leasehold surrender provisions of the regulation. Subpart F then sets forth the terms and conditions of leasehold surrender interests which may be obtained under a concession contract. Generally, a leasehold surrender interest constitutes a right of a concessioner to receive payment for capital improvements a concessioner makes on park area lands.

Subpart G. Possessory Interest

Subpart G sets forth transition procedures with respect to the form of compensatory interest ("possessory interest") obtained by concessioners under certain concession contracts entered into under the 1965 Act and concession contracts to be entered into under the 1998 Act. In general terms, a 1965 Act concessioner may either receive full compensation for existing possessory interest as described in the applicable contract or convert the possessory interest to a leasehold surrender interest if it seeks and is awarded a new concession contract.

Subpart H. Concession Contract Provisions

Subpart H describes in general the terms of certain concession contract

provisions that reflect the policies and procedures of the 1998 Act.

Subpart I. Assignment or Encumbrance of Concession Contracts

Subpart I sets forth the standards and procedures applicable to NPS approval of assignments of concession contracts and encumbrance of concessioner assets.

Subpart J. Information and Access to Information

Subpart J describes the types of records a concessioner must retain for the purposes of NPS concession contract administration, the access rights of the government to the records, and the types of concessioner information that are made available to the public.

Subpart K

Subpart K describes the effect of the 1998 Act's repeal of the 1965 Act by the 1998 Act.

Subpart L

Subpart L sets forth information collection requirements of the proposed regulations.

Impacts of the Proposed Regulations on Small Businesses

NPS considers that the fundamental policy objective of the 1998 Act was to make the award of larger NPS concession contracts more competitive by generally repealing the preference in renewal granted to all concessioners by the terms of the 1965 Act.

The preference in renewal granted all concessioners under the 1965 Act resulted in more than 99% of concession contract renewals being awarded to the incumbent concessioner. This was because the preference in renewal gave the incumbent concessioner the right to match the terms and conditions of any better offer made for the contract by a competitor. Because of the renewal preference, no competing offers at all were received for concession contract renewals in the vast majority of cases under the 1965 Act. Potential competitors generally considered it pointless to go to the effort of submitting a competing offer that was subject to being matched by the incumbent concessioner. The 1965 Act's preference in renewal created an enormous entry barrier to persons that wished to become NPS concessioners.

The 1998 Act requires full competition, with no advantage to an incumbent, for the award of most concession contracts with annual gross receipts in excess of \$500,000. The exception is outfitting and guide concession contracts. Approximately

175 of the existing 630 NPS concession contracts will be subject to open competition upon renewal. (This analysis assumes that the repeal applies to existing concession contract renewals as well as to the renewal of concession contracts entered into after the effective date of the 1998 Act. NPS is presently considering this issue in promulgating the proposed concession contracting regulations. However, the premises of the analysis remain the same no matter when the repeal takes effect.)

The greatest effects of the 1998 Act are likely to occur because of the 175 concessioners that will no longer receive a renewal preference. Currently, 142 of the operations of these concessioners generate gross receipts under \$5 million annually. The effects of ending renewal preferences will be experienced by incumbent firms who will face competition in the solicitation process for a new contract, particularly those that do not win the new contract. Incumbent firms will experience the effects of having to prepare competitive proposals. In order to win, they may have to take efficiency measures or trim profits. Those incumbent firms that do not win will experience the effects of losing business volume. Non-incumbent firms that choose to submit a proposal but do not win will experience the costs of bid preparation without any increase in their business volume. Non-incumbent firms that win contracts will experience an increase in their business volume. It should be emphasized that these are the normal effects of competition in the U.S. economy.

The NPS has no basis at this time for predicting the number of non-incumbent firms that will submit proposals or win no-preference concession contracts, nor does the NPS have a basis for predicting the extent of the changes that incumbents will make in order to win new contracts. It is possible however to illustrate reasonable bounds on the resulting effects. If each of the 142 concession contracts held by incumbents generating gross receipts of less than \$5 million were to face 2 new proposals, the total number of firms (of all sizes) that would be affected would be 426. If, despite the competitive process, the incumbents were all to obtain the new contracts, then only the 142 incumbents would experience any effects other than the cost of preparing proposals. If all 142 were to be replaced by new firms, then 284 firms would experience effects of changes in business volume, half-losing, half-gaining. On this basis and in light of the great number of firms in the food service, lodging, merchandising, marina and guide industries in the United

States, it does not appear that a substantial number of small entities will experience significant effects.

NPS considers that the preference in renewal reform contained in the 1998 Act will have a beneficial economic impact on small businesses as it eliminates for most larger concession contracts the entry barrier resulting from the preference in renewal.

NPS does not consider that any other provisions of the 1998 Act, or the proposed regulations, will have a significant impact on small businesses. In fact, for the most part, the proposed regulations do not "regulate" businesses at all in the usual meaning of that term. The proposed regulations in general merely describe the procedures under which concession contracts are to be awarded, describe the nature and extent of leasehold surrender interest that may be obtained by a concessioner under the terms of a concession contract, and describe various provisions that NPS must include in concession contracts.

No business of any size is under any obligation to comply with the proposed regulations unless it chooses to apply for a concession contract.

Analysis

The following analysis covers the matters that would be addressed in an initial regulatory flexibility analysis if the Regulatory Flexibility Act applies. They are as follows, together with the NPS discussion:

(1) A description of the reasons why the action is being considered;

The NPS is promulgating the proposed concession regulations in compliance with section 417 of the 1998 Act.

(2) A succinct statement of the objectives of, and legal basis for, the proposed regulation;

The objective of the proposed concession regulations is to provide regulatory implementation for applicable concession contracting provisions of the 1998 Act. The legal authority for the proposed concession regulations is section 417 of the 1998 Act.

(3) A description of, and, where feasible, an estimate of the number of small entities to which the proposed regulation will apply;

The proposed concession regulations, when finalized, will apply to all persons holding NPS concession contracts, and, in part, to persons who seek to become an NPS concessioner by submitting a contract proposal. As of September 1999, there are approximately 630 NPS concessioners operating in 127 park areas (out of the 378 park areas NPS administers). Of this number, there are

approximately 113 food service concessioners (providing food services ranging from prepackaged food items to full service restaurants), 71 lodging concessioners (providing lodging ranging from rustic cabins to hotels), 180 merchandising concessioners (providing merchandise ranging from campstores to souvenir shops) and 41 marina concessioners. Most other concessioners are outfitters and guides, including hunting, fishing, hiking, and mountain climbing guides, guided trail rides, river runners, boat/canoe rental, snowmobile rental and bicycle rental operators. NPS generally characterizes concessioners by the primary service provided. However, most larger concessioners provide a combination of services (for example, lodging, food service, merchandising and service stations).

The application procedures of the proposed regulations apply to any person who chooses to submit a proposal for a concession contract. The number of such persons is unlimited.

In 1997 (the latest year for which complete data is available), all but 33 of the 630 concessioners had gross receipts of less than \$5 million. NPS considers a concessioner with gross receipts of \$5 million or less to be a small business for purposes of this analysis. Businesses that apply for concession contracts may be of any size.

(4) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed regulation, including an estimate of the classes of small entities which will be subject to the requirements and the type of professional skills necessary for preparation of the report or record;

The proposed concession regulations contain three classes of reporting, recordkeeping and other compliance requirements. They are applicable only to persons holding concession contracts. These are (1) the recordkeeping requirements (§ 51.111 of the proposed regulations) mandated by section 411 of the 1998 Act; (2) the information submission requirements (§ 51.100 of the proposed regulations) necessary for NPS to approve a sale or transfer of a concession contract pursuant to section 408 of the 1998 Act; and (3) the submission and recordkeeping requirements regarding leasehold surrender interests under concession contracts (subpart F of the proposed regulations) necessary for implementation of section 405 of the 1998 Act.

All new concession contracts will contain provisions concerning the first two classes of requirements.

Only persons that obtain new concession contracts that provide for construction of improvements on park land will be required to comply with the third class of requirements. It is estimated that less than 150 concession contracts will provide for construction of improvements.

The type of professional skills which will be required for compliance are accounting, and in limited circumstances, legal.

(5) An identification, to the extent practicable, of all relevant federal regulations that may duplicate, overlap, or conflict with the proposed regulation.

There are no federal regulations which duplicate, overlap, or conflict with the proposed concession contracting regulations.

(6) A description of any significant alternatives to the proposed regulation, that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed regulation on small entities.

The proposed regulations implement express, detailed provisions of the 1998 Act. Given the specificity of the 1998 Act, NPS has little flexibility as to significant alternatives to the provisions of the proposed regulations which would accomplish the objectives of the 1998 Act and which would minimize any impact of the proposed regulations on small businesses. NPS anticipates that public comment on the proposed regulations may result in adoption in the final regulation of alternative procedures in some circumstances. However, in developing the proposed concession regulations, NPS considered and adopted several alternatives for implementing provisions of the 1998 Act consistent with the spirit of the Regulatory Flexibility Act, as follows:

(1) Section 51.13 of the proposed concession regulations authorizes NPS to include in concession contract prospectuses additional solicitation or selection procedures in the interests of enhancing competition. Such additional procedures may include, but are not limited to, issuance of a two-phase prospectus—a qualifications phase and a proposal phase—and, use of a lottery system to select proposals where two or more proposals are determined to be of equal merit. This authority to utilize additional solicitation or selection procedures gives NPS administrative discretion to tailor the solicitation and award of concession contracts in a flexible manner to meet the circumstances of a particular concession opportunity. The result will be a more competitive process in special circumstances.

(2) Section 51.13 also authorizes NPS to include simplified solicitation or information requirements in concession prospectuses when it is considered that the concession contract is likely to be awarded to a sole proprietorship. This non-regulatory administrative flexibility will allow NPS to reduce the paperwork or procedural steps generally required by the regulations for many smaller concession contract opportunities.

(3) Section 406 of the 1998 Act requires that the rates charged visitors by concessioners be reasonable and appropriate and makes the rates subject to approval by NPS. NPS, in developing the proposed concession regulations, chose not to implement these requirements by regulation. Rather, the NPS rate approval process will continue to be established administratively, giving NPS more flexibility in its implementation. In this connection, NPS in recent years has been seeking to reduce paperwork and procedural steps in its rate approval process. It will continue to do so with an intention to rely on market forces to control rates whenever possible.

(7) A discussion of certain possible significant alternatives consistent with the stated objectives of applicable statutes. The specific significant alternatives considered are set forth below together with NPS' analysis:

(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

As stated above, all but approximately 33 of the some 630 businesses to which the proposed concession regulations will apply are small businesses within the meaning of the Regulatory Flexibility Act. Accordingly, NPS has made the regulations' requirements equally applicable to both small and large businesses.

In this connection, the recordkeeping requirements set forth in § 51.111 of the proposed regulations, although required to carry out the mandate of section 411 of the 1998 Act, do not prescribe any particular records that a concessioner must maintain as a regulatory compliance matter. Rather, the regulation gives NPS the authority to prescribe recordkeeping requirements administratively. This will occur in the form of requirements of particular concession contracts.

It is NPS policy to have less burdensome recordkeeping requirements for smaller concessioners. NPS policy under consideration requires an audited financial report to be submitted to NPS only by concessioners with annual gross receipts of more than 1 million.

Concessioners with annual gross receipts between \$250,000 and \$1 million need only include a financial review with their annual report financial report and concessioners with gross receipts of less than \$250,000 are not required to submit any form of independent verification of their annual financial reports.

The information that a concessioner is to submit to NPS under § 51.100 of the proposed regulations (regarding sale or transfer of a concession contract) is not necessarily mandatory. Section 51.101 of the proposed regulations permits NPS to waive these information requirements in circumstances where particular information is considered unnecessary.

The information and recordkeeping requirements of subpart F of the proposed regulations are applicable only to those concessioners that have leasehold surrender interests. However, although mandatory, in fact the proposed regulations only mandate what a prudent concessioner would have to do in order to make sure that it receives credit for all the leasehold surrender interest to which the concessioner is entitled. This is because, under section 405 of the 1998 Act, a concessioner generally obtains leasehold surrender interest in buildings it constructs on park area lands in the amount of their initial construction cost inflated by CPI. In order to keep track of this amount, a concessioner would have to maintain the records that subpart F requires as a matter of prudent business practice. Subpart F also requires a concessioner to submit to NPS for approval plans and specifications of buildings it propose to build on park lands. This requirement is necessary in order for NPS to carry out its responsibilities under section 402 of the 1998 Act. Section 402 requires that the development of concession facilities in a park area be limited to those that are necessary and appropriate for public use and enjoyment of the park area and that are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the park area.

(2) The clarification, consolidation, or simplification of compliance and reporting requirements under the regulation for small entities;

NPS considers that the compliance and reporting requirement of the proposed regulations are quite clear. However, NPS anticipates that the clarity of the proposed regulations will be improved in the final regulations as a result of the consideration of public comments. NPS considers that the location of the compliance and reporting requirements of the proposed

regulations (in three different subparts) is appropriate as the requirements reflect the specific substantive provisions of the subpart. To consolidate them in one location would make them less clear as they would not be in context. NPS considers that the proposed regulations are as simple as possible in light of the many statutory requirements applicable to concession contracts under the terms of the 1998 Act. However, NPS anticipates that public comment may contain good suggestions for further simplification that will be reflected in the final regulations.

(3) The use of performance rather than design standards;

The proposed regulations do not dictate standards for reporting or information requirements.

(4) An exemption from coverage of the regulation, or any part thereof, for small entities.

As discussed above, almost all NPS concessioners are small businesses within the meaning of the Regulatory Flexibility Act. The proposed regulations, accordingly, do not exempt small businesses from their application.

Initial Conclusion

NPS, based on the above considerations, does not consider that the proposed concession contracting regulations, even if they are subject to the Regulatory Flexibility Act, will have a significant impact on a substantial number of small businesses, within the meaning of the Regulatory Flexibility Act. These initial determinations will be reviewed by NPS in the course of considering public comments on this analysis. As indicated above, NPS will then take appropriate final action with respect to any applicable requirements of the Regulatory Flexibility Act by the date of publication of the final concession contracting regulations. No final administrative decision on the applicability of the Regulatory Flexibility Act to the proposed concession contracting regulations or their impact will be made until after consideration of public comments received in response to this notice.

Linda Canzanelli,

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