

# Federal Lands Update

News and information for federal concessioners, permittees and land users

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## **OUTFITTER PREVAILS ON THE MERITS OF ITS PROTEST OF NPS CONCESSIONER SELECTION, BUT NPS NOT REQUIRED TO COMPLY WITH THE LAW**

The Court of Federal Claims recently upheld a protest filed by an outfitter challenging a National Park Service (NPS) solicitation for winter guiding operations in Grand Teton National Park. While the outfitter's proposal had been found to be the best of those received by NPS, NPS determined that two preferred offerors had submitted responsive proposals which entitled them to match the terms of the best proposal under the applicable law. However, the outfitter claimed that the proposals by the two preferred offerors were not responsive because they had omitted material information required by the solicitation.

The Court agreed, finding that NPS had "violated applicable law, acted arbitrarily and capriciously, and abused its discretion" when NPS found the preferred offerors' proposals to be responsive and gave them an opportunity to match the best proposal. However, the Court noted that its authority with respect to NPS

concession contracts only allowed it to determine whether NPS had followed the law, but did not allow it to issue an injunction requiring NPS to follow the law. Accordingly, the Court determined that the outfitter was entitled to be compensated for its costs of preparing its proposal. However, the outfitter was not able to obtain an order requiring NPS to act consistent with the law, which would likely have resulted in NPS awarding the contract to the outfitter given that NPS's regulations stated that, in such a situation, "[t]he concession contract will be awarded to the offeror submitting the best responsive proposal."

NPS has since refused to issue the contract to the outfitter but instead elected to pay its proposal preparation costs. Doing so will enable NPS to award the contracts to the preferred offerors notwithstanding the Court's determination that their proposals were legally deficient.

## **FOREST SERVICE CAMPGROUND CONCESSIONERS FILE LAWSUIT TO IMMEDIATELY REOPEN DURING GOVERNMENT SHUTDOWN**

A group of Forest Service campground concessioners whose operations were closed during the recent Government budget impasse filed a lawsuit during the partial government shutdown claiming that their operations should not have been closed during the budget impasse because they did not rely on Government funds to operate. The Court granted an emergency hearing to address their concerns. On the day of the hearing, Congress announced that the budget impasse had been resolved. The Forest Service then asserted at the hearing that the lawsuit should be dismissed because all of the government employees were back at work.

However, after stating that the Forest Service never should have closed the

concessioners' operations to begin with, noting that "the basic problem is that the Forest Service never should have closed these [p]ermitted properties" and was "very ill-advised" to do so, the Court asked the Forest Service whether the concession operations would be immediately reopened. When the Forest Service responded that it was not sure when those operations could be reopened, the Court insisted that they be reopened immediately upon the concessioners inspecting their sites and determining if operations were safe. After initially resisting the Court's demands, the Forest Service ultimately agreed and the campground concessions were reopened within hours of the Court hearing.

## **NPS ALLOWS CONCESSIONER WHO FILED LAWSUIT TO REOPEN DURING GOVERNMENT SHUTDOWN AND AGREES TO PAY ITS ATTORNEYS' FEES**

During the contentious partial government shutdown this past Fall, the National Park Service (NPS) ordered a concessioner on the Blue Ridge Parkway to close down. After initially closing down, the concessioner decided that there was no valid reason for NPS to close it down and it reopened. NPS then sent several Park Service Rangers to physically close down the operation and block the gates. The concessioner stated to NPS that the Blue Ridge Parkway itself was still open to visitors and that its operations, which did not rely on government funds, were helpful in preserving the safety of those travelers, especially in bad weather. NPS rejected its assertions and refused to allow the concession to reopen.

The concessioner then filed a lawsuit in an effort to reopen and made the same assertions to the court. In response to it having filed a lawsuit, NPS allowed the concessioner to reopen. NPS also agreed to compensate the concessioner for its attorneys' fees if the concessioner would agree not to pursue a claim for its lost profits during the shutdown.

## **NPS WITHDRAWS CHALLENGED CONCESSION CONTRACT TERM PURSUANT TO PROTEST FILED AT THE GOVERNMENT ACCOUNTABILITY OFFICE**

In response to a protest filed by a potential offeror challenging as illegal a term which the National Park Service (NPS) had included in a prospectus for a new concession contract, NPS voluntarily withdrew the term from the contract. The term related to the Repair and Maintenance Reserve which is part of many NPS concession contracts to ensure that the concessioner retains enough funds to address its repair obligations. The challenged clause required that any balance of funds left in the reserve at the end of the contract would be paid to NPS as additional franchise fee. However, NPS's standard concession contract clause stated that any balance left in the fund should be the property of the concessioner. The protester also noted that the fund essentially was in place to ensure that the concessioner retained enough of its own funds to address its repair obligations. Under that view, in the event that the concessioner met its repair obligations, any funds remaining in the reserve account should be stay in the possession of the concessioner.

NPS disagreed with the protester, but nonetheless voluntarily agreed to withdraw the disputed clause and use its standard clause. NPS stated that it was withdrawing the clause solely to avoid any delay in the solicitation process. In most other prospectuses issued since the protest, NPS has included the challenged version of the clause.

## **COURT RULES THAT NPS CONCESSIONER ENTITLED TO THE SOUND VALUE OF ITS IMPROVEMENTS RATHER THAN BOOK VALUE**

In a recent decision, the Court of Federal Claims rejected the National Park Service's (NPS) claim that it owed a former concessioner the book value of the improvements used in the concession operations as opposed to the sound value of those improvements. Based on the definitions used in the concession contract, the sound value typically results in a much higher value than the book value of improvements. In the case, which involved concession operations at Lake Mead National Recreation Area, the original concession contract ended in 1998. NPS had requested that the concessioner continue operating, informing it that NPS was in the process of seeking a new successor concessioner. In such an event, the concessioner would be entitled to the sound value of the buildings and structures used in its operations.

The concessioner agreed to stay on, with NPS issuing one year authorizations for the next eleven years. In year six, NPS decided that it wanted to close down the concession operations once the concessioner left. Under the contract, if NPS decided to discontinue operations before the contract ended, NPS only had to pay the concessioner the book value of the buildings and structures. The concessioner disagreed and filed a lawsuit asserting that NPS could not change its mind years after the original contract had ended and pay the concessioner what would likely be a much lower value. The Court agreed with the concessioner and NPS was required to pay the concessioner the sound value of the improvements. The Court also found that the eleven one-year authorizations which NPS had issued to keep the concessioner operating at the site in fact were independent contracts as opposed to extensions of the original concession contract.

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*Editor- Kevin R. Garden*

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