



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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June 18, 1980

Van Ness, Feldman & Sutcliffe  
Counsel to Gray Line Water Tours, Inc.  
1220 Nineteenth Street, N.W. - Suite 500  
Washington, D.C. 20036

Attention: Howard J. Feldman, Esq.

Gentlemen:

We refer to your inquiry on behalf of Gray Line Water Tours, Inc. (Gray Line) with respect to the award of a ten-year concession contract by the National Park Service, Department of the Interior to Fort Sumter Tours, Inc. (FST) for the boat transportation service concession at Fort Sumter National Monument in Charleston, South Carolina. You are concerned with the fact that the contract's terms include higher rates to the public and a lower franchise fee to the Government than proposed by Gray Line.

We find no basis to conclude that the award was improper.

The record shows that FST was the incumbent concessioner for the service. The new contract was awarded pursuant to the Concession Policy Act § 5, 16 U.S.C. § 20d (1976), which provides:

"Renewal preference for satisfactory performance; extensions; new contracts; public notice. The Secretary [of the Interior] shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or may grant a new contract or permit to the same concessioner upon the termination

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or surrender before expiration of a prior contract or permit. Before doing so, however, \* \* \* the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result thereof."

The notice of the intention to negotiate the new contract with FST issued by the Secretary of the Interior pursuant to 16 U.S.C. § 20d advised of the preference to be given FST in view of FST's satisfactory performance as the incumbent contractor. The preference was described as "a preference in the negotiation of the contract" if FST's offer is "substantially equal" to any others received and the right to meet the terms and conditions of any "superior" proposals. Offers from firms that were interested in the contract were to be submitted within 30 days of the notice's publication.

Further, the "Fact Sheet" published in conjunction with the notice essentially repeated the notice's provisions and set forth the terms and conditions for the new contract. It also prescribed the rates to be charged the public, and stated that:

" \* \* \* any alternative rate schedules [i.e., rates to be charged the public] submitted by offerors will not be considered in the evaluation of proposals received due to the fact that such rates are necessarily subject to change during the term of the contract when approved by the Secretary."

The Fact Sheet also provided that "managerial competence as well as financial ability" would be the "prime" evaluation factors, and advised that:

"[t]erms and conditions of proposals which are different from or exceeding the requirements of this Fact Sheet will be considered by the Secretary only if considered necessary and desirable for contract and operational objectives."

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As you point out, in a proposal submitted in response to the notice your client offered lower rates to the public and a higher franchise fee for the Government than those listed in the Fact Sheet and reflected in FST's proposal, which essentially repeated the Fact Sheet terms and conditions. Nevertheless, after evaluation the National Park Service advised Gray Line that its proposal was "not superior to" FST's and that a new contract would be negotiated with the incumbent. That position is the reason for your inquiry.

However, although in accordance with 16 U.S.C. § 20d the Secretary of the Interior was compelled to issue notice of the intention to award the contract to FST and to evaluate proposals received in response, the Secretary also was authorized by the statute "at any time in his discretion" thereafter to award the concession contract to FST. There is no suggestion in 16 U.S.C. § 20d or its legislative history that a contract with a concessioner whose performance has been satisfactory should not be renewed in the exercise of that discretion simply because another firm offers to perform the service on better financial terms. To the contrary, those materials clearly establish the importance of the "continuity of operations and operators" in awarding concession contracts. Both the House and Senate reports on the legislation that resulted in the statute contain the following comment:

"Sixth, the bill provides that established concessioners who have performed satisfactorily shall be given preference in the renewal of old contracts and in the negotiation of new contracts. \* \* \*

"Neither the preference just spoken of nor the right to extend or renew is absolute. The bill requires the Secretary to give public notice of his intentions to extend or renew and to consider and evaluate all proposals received as a result thereof. This is not, and is not intended to be, a bidding procedure, with the award automatically going

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to the high bidder, but it is intended to bring to the attention of the public, the Secretary, and all interested parties the situation and to assure all concerned that in negotiating the new contract all relevant factors are taken into account. One of these factors, of course, and a very important one, is the desirability of continuity of operations and operators." (Emphasis added.)

H.R. Rep. No. 591, 89th Cong., 1st Sess. 5 (1965);  
S. Rep. No. 765, *supra*, 4-5. See also 49 Comp. Gen.  
88 (1969); B-176431, December 21, 1972.

Here, Gray Line's proposal was evaluated, and its proposed rates to the public and franchise fee were noted. However, consistent with the terms of the Fact Sheet it was determined that these factors did not override the preference established in the statute to continue contracting with FST on financial and other terms and conditions acceptable to the Secretary of the Interior. In view of the above, we cannot say that there was an abuse of discretion under 16 U.S.C. § 20d in that respect.

Sincerely yours,



Acting Comptroller General  
of the United States