



RESTRICTED — Not to be released outside the General Accounting Office except on the basis of specific approval by the Office of Legislative Liaison, a record of which is kept by the Distribution Section, Publications Branch, OAS

COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D C 20548

B-168964
5-11-70

089882

Interior

RELEASED

MAY 11 1970

B-168964

Dear Senator Jordan:

This is in further response to your letter of January 27, 1970, requesting our review of and comments on the contracting for the Carlsbad Caverns National Park concession. The contract for the continued operation of the concession by the Cavern Supply Company, Incorporated (Cavern), became effective on March 6, 1970, when it was signed by the Assistant Director, National Park Service. This contract, for the period January 1, 1970, through December 31, 1989, supersedes the previous contract with Cavern which was for the period April 1, 1952, to December 31, 1971.

The new contract was initiated at the suggestion of Cavern in support of its proposed improvement program estimated to cost at least \$142,500. On June 14, 1969, notice of the Department of the Interior's intent to negotiate a contract with Cavern for the continued operation of the Carlsbad Caverns National Park concession was published in the Federal Register. The notice stated that Cavern had performed its obligations to the satisfaction of the National Park Service and therefore was entitled to preference in the negotiation of the contract but that the Secretary of the Interior was required to consider and evaluate all proposals received for operating the concession.

On June 18, 1969, the National Park Service, in response to a telephone request, furnished Pickett Food Service, Inc. (Pickett), with a copy of the fact sheet stating the terms and conditions under which the contract would be negotiated. The fact sheet, the conditions of which Cavern had previously found acceptable, included the following information:

1. Cavern had conducted its operations under the existing contract in a manner satisfactory to the Secretary of the Interior.
2. The act of October 9, 1965 (16 U.S.C. 20), provides that the Secretary of the Interior encourage continuity of operations by giving preference to concessioners who performed satisfactorily under prior contracts.

~~9/5/70~~

089882

3. Before a contract could be negotiated with anyone other than Cavern, the successor concessioner must arrange with Cavern for the purchase of any possessory interest Cavern may have in facilities on Government land or other assets used or held for use in connection with the operations.
- 4 The basis of compensation for the possessory interest.
5. Any proposal submitted by an applicant other than Cavern must be accompanied by a financial statement and other information to show that the applicant is financially able to acquire and operate the concession to the satisfaction of the National Park Service, including a purchase arrangement for acquisition of Cavern's possessory interest, adequate working capital, and substantial equity capital for the new improvement program. If it is a newly formed corporation, the applicant must show the amount of capital pledged or paid in by the stockholders and present personal financial statements of the principal individual stockholders.
6. The provision of the act of October 9, 1965, pertaining to franchise fees, noting particularly that the law provides that consideration of revenue to the United States be subordinate to the objectives of protecting and preserving the area and supplying adequate and appropriate service for visitors at reasonable rates
7. The Department of the Interior had determined that the concessioner would be required to pay a franchise fee of 6- 1/2 percent of the annual gross receipts, except those derived from the sale of genuine native and Indian handicraft, and an annual fee of \$2,575 for the use of Government-owned improvements.

On July 10, 1969, Pickett submitted to the Director, National Park Service, a letter of intent to negotiate a contract for the operation of the concession at Carlsbad Caverns National Park. The letter stated that Pickett understood and agreed with the provisions set forth in the

fact sheet and proposed a contract that would include a franchise fee of 7- 1/2 percent of annual gross receipts, with certain exceptions, and provided for an annual payment of \$3,000 for the use of Government-owned improvements

The Pickett letter also named six local citizens from the Carlsbad area who would participate as stockholders in the concession operation but did not indicate the extent of their participation. Enclosed with the letter were a current financial statement, information on insurance, and a brochure describing Pickett's operations.

An evaluation prepared by National Park Service staff of the offers received from Cavern and Pickett, included the following comment.

"Pickett Food Service, Inc , indicated an acceptance of all conditions of the fact sheet; however, its offer did not include information as to how it is proposed to meet the financial obligations of purchasing the interest of the existing concessioner and the construction and improvement program proposed. The consolidated financial statement of Pickett and its subsidiaries as of June 30, 1968, indicated existing financial strength to meet the requirement of one-third equity capital, however, it is obvious that additional capital would be required, either through additions to equity capital, or deficit financing. In addition, there was no indication as to the participation or ability on the part of the Carlsbad businessmen, either financially or managerially. Also, there was no indication as to any negotiations with the existing concessioner with respect to the purchase of its assets as stated in the fact sheet would be required to establish a satisfactory financial arrangement "

In a letter dated September 26, 1969, the Director of the National Park Service informed Pickett that careful consideration had been given to its proposal, but, since the incumbent concessioner had performed satisfactorily and had expressed willingness to meet the requirements of the fact sheet in all material respects, under the law it was entitled to a preference in the negotiation of the contract. The Director stated

that, accordingly, he had approved the negotiation of a new contract with Cavern

Since Pickett's proposal provided for a franchise fee of 7- 1/2 percent of gross receipts and an annual rental of \$3,000, whereas the contract with Cavern, effective on March 6, 1970, provided for a franchise fee of 6- 1/2 percent of gross receipts and an annual rental of \$2,575, we questioned the basis for the National Park Service's action. National Park Service officials advised us that they had considered the totality of the proposals and not merely the franchise fees. They stated that, since the legislation provides that preference be given to those concessioners who had performed satisfactorily under prior contracts and that consideration of revenues be subordinate to supplying adequate service to visitors at reasonable rates, generally incumbent concessioners were awarded new contracts or renewals of contracts.

The protested award of a contract to an incumbent concessioner was the subject of a decision by our Office (B- 166725, August 11, 1969) In that case, the National Park Service allowed the incumbent concessioner, in effect, to agree to match the additional investment proposed by the other party, if the National Park Service decided the additional investment was warranted. After considering the matter, including the pertinent statute and its legislative history, we could not conclude that the Department of the Interior had misapplied the preference provisions of the 1965 act. Similarly, in the case of the new contract with Cavern for the continued operation of the concession at Carlsbad Caverns National Park, we cannot conclude that the Department of the Interior misapplied the preference provisions of the 1965 act.

As noted in the decision of August 11, 1969, although the award of the contract under the circumstances presented would have been highly questionable under the normal competitive rules applicable to awarding Federal contracts, there is nothing in the statute that requires that the contract be awarded under the normal rules. Section 5 of the act was not intended by the Congress to set up a bidding procedure but only to assure all interested parties that in negotiating the contract all relevant factors would be taken into account. Although the act vested broad discretion in the Secretary of the Interior in awarding renewal contracts

B- 168964

to concessioners, it was recognized that the Congress considered the desirability of maintaining continuity of operations and operators a very important factor in awarding renewal contracts.

In our letter to the Secretary of the Interior enclosing a copy of the August 1969 decision we stated:

"While, as the decision notes, we have concluded that the award of the contract was in conformance with your authority under 16 U.S.C. 20d, we nevertheless believe that much of the controversy in this case could have been avoided had your Department made known in advance the ground rules for the evaluation and consideration of proposals and the manner in which your Department applies the preference provision in 16 U.S.C. 20d. In the interests of fairness to all parties who may wish to submit a proposal on a renewal contract, we feel that all future fact sheets should specify in detail the basis upon which their proposals will be evaluated and how the preference provision will be applied."

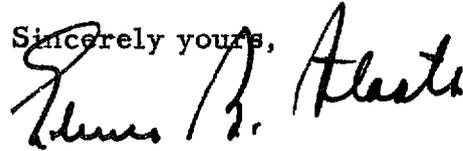
In the case of the new contract with Cavern, the notice of intent was published in June 1969, prior to our suggestion. We expect that future fact sheets will be more explicit by specifying in detail the basis on which proposals will be evaluated and how the preference provision will be applied.

We are returning the correspondence file on the National Park Service concession contract which you included with your letter of January 27, 1970. Also we are enclosing a copy of our decision of August 11, 1969, which may be of interest to you. We have not furnished copies of this report to the Department of the Interior or to others; but we have notified Department officials of the subject matter of this report and the date of its release.

B- 168964

If you desire any further information on the matter, do not hesitate to call upon us

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Thomas A. Blount". The signature is written in black ink and is positioned to the right of the typed name.

Comptroller General
of the United States

Enclosures - - 2

The Honorable Len B. Jordan
United States Senate