



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Starfleet Marine Transportation, Inc.

File: B-290181

Date: July 5, 2002

Deborah Y. Ho, Esq., David E. Frulla, Esq., and Stanley M. Brand, Esq., Brand & Frulla, for the protester.

Gretchen L. Gaston, Esq., and William P. Horn, Esq., Birch, Horton, Bittner and Cherot, for Fort Sumter Tours, Inc., an intervenor.

Sherry Kinland Kaswell, Esq., Pamela L. Barkin, Esq., Alton E. Woods, Esq., and Hugo Teufel, Esq., Department of the Interior, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest concerning the award of a concession contract is for consideration under General Accounting Office's bid protest function where the concession contract includes the delivery of property or services to the government.
2. Decision by the National Park Service to cancel a concession contract prospectus in order to review agency requirements is unobjectionable where the action was reasonable and consistent with applicable regulations.

DECISION

Starfleet Marine Transportation, Inc. protests the decision by the Department of the Interior, National Park Service (NPS), to cancel the prospectus seeking proposals for the award of a concession contract for the operation of a ferryboat transportation service for Fort Sumter National Monument, South Carolina, and to extend the contract of the incumbent, Fort Sumter Tours, Inc. (FST). Starfleet principally alleges that the decision by the NPS to cancel the prospectus lacked a reasonable basis, and was the result of improper congressional interference.

We deny the protest.

Fort Sumter, the site at which the first shots of the American Civil War were fired, is an island fort located at the entrance of Charleston Harbor, South Carolina. An

important part of our nation's history, Fort Sumter became part of the National Park Service in 1948. Prospectus, Fort Sumter National Monument, at 2.¹ Today, with more than 200,000 annual visitors, the Fort Sumter National Monument (Monument) consists of four components--Fort Sumter, Fort Moultrie, The Historic Coast Guard Station on nearby Sullivan's Island, and a new Visitor Education Center (Visitor Center) with boat dock facility at Liberty Square, located in downtown Charleston.²

The NPS has utilized concession contractors to provide Monument visitors with ferryboat transportation to and from Fort Sumter, which is only accessible by boat. For the past 40 years FST has operated the ferryboat service at the Monument. Protest at 2. The NPS entered into the present contract with FST on June 13, 1986 for a period of 15 years. Although originally to expire on December 31, 2000, the contract was extended until December 31, 2002.³ Under this contract FST has provided ferryboat service to Fort Sumter from two locations that are not part of the Monument--from the City Marina in Charleston, and from the Patriots Point Naval and Maritime Museum (Patriots Point), located across the harbor from Charleston in the town of Mount Pleasant.⁴

On December 13, 2001 the NPS issued a prospectus seeking competitive proposals for the award of a 10-year concession contract to provide ferryboat service for the visiting public within the Monument. Starfleet exhs. at 3, Commerce Business Daily: Notice of Availability of Prospectus. The prospectus was issued pursuant to the National Park Service Concessions Management Improvement Act of 1998. Pub. L. No. 105-391, § 401 *et seq.*, 112 Stat. 3497, 3503-18 (1998), codified at 16 U.S.C. § 5951

¹ The documents in this case include the prospectus, those submitted with the protest (Starfleet exhs. at 1-508), and the Agency Report (Tabs A-DX).

² The NPS completed construction and opened the Monument Visitor Center to the public on August 15, 2001. Agency Report, Tab AD, Fort Sumter Chronology, Jan. 9, 2002. It provides visitors with an opportunity to learn about the history and significance of Fort Sumter prior to visiting the Fort itself.

³ On December 21, 2000 Congress directed the NPS to extend the FST concession contract until March 15, 2001. Pub. L. No. 106-554, § 120 (2000). The NPS and FST mutually agreed to a second extension until December 31, 2001, and to a third extension until December 31, 2002. Agency Report, Tab DA, Extension of FST Contract, Mar. 14, 2001; Tab AU, Extension of FST Contract, Dec. 18, 2001.

⁴ Patriots Point, operated by the state-licensed Patriots Point Development Authority, includes such maritime attractions as the retired aircraft carrier, U.S.S. Yorktown. In 1986 FST entered into a long-term lease agreement with Patriots Point, providing it with the exclusive right to operate boat tours from the Patriots Point dock. Agency Report, Tab E, Newspaper Article, Mar. 21, 2002; Tab S, NPS Legal Memorandum, at 4.

et seq. (Supp. IV 1998) (the 1998 Act). The 1998 Act, which repealed and replaced the National Park Service Concession Policies Act of 1965 (16 U.S.C. § 20 et seq.) (the 1965 Act), had as one of its primary objectives the enhancement of competition in NPS concession contracting. See 65 Fed. Reg. 20630 (Apr. 17, 2000). Specifically, the 1998 Act established a competitive selection process for the award of concession contracts and generally eliminated the preferential right of renewal that existed for the incumbent concessioner under the 1965 Act. 16 U.S.C. § 5952.

Both the Senate and House reports on the 1998 Act--but not the statute itself--expressed the view that concession "contracts do not constitute contracts for the procurement of good and services for the benefit of the government or otherwise." S. Rep. No. 105-202, at 39 (1998); H.R. Rep. No. 105-767, at 43 (1998). Similarly, the agency regulations developed to implement the 1998 Act state that "[c]oncession contracts are not contracts within the meaning of 41 U.S.C. 601 et seq. (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions." 36 C.F.R. § 51.3 (2000).

In general terms the prospectus here requires the concessioner to provide ferryboat services to Monument visitors at rates and at minimum frequencies as determined by the NPS. Prospectus, Business Opportunity, at 2-3. The concessioner is required to operate a minimum of two boats with a seating capacity of 300 for each boat, as well as to provide food and beverage service on the tour boats. Id. at 1. The prospectus informed offerors that the agency would provide the contractor with office, storage and ticket space within the Visitor Center, as well as provide the contractor with use of the Liberty Square pier and the docks at both Liberty Square and Fort Sumter for Monument concession business. Id. at 2; Contract, exh. C, Land Assignment. The minimum franchise fee that the concessioner would pay the government for this business opportunity was 12 percent of the contractor's annual gross receipts.⁵ The initial closing date for the submission of proposals in response to the prospectus was March 13, 2002. Id., Proposal Package, at 1.

The prospectus also sets forth the services that the concessioner is required to provide the agency as part of the overall contract. The concessioner must perform maintenance, repair, and janitorial services for all facilities assigned. Id., Business Opportunity at 2; Contract at § 9(a). In particular, "the concessioner will maintain and keep clean all provided office, storage and ticket space using his own cleaning supplies, services and devices necessary to perform the janitorial functions. This

⁵ The prospectus also set forth the selection factors upon which the NPS would evaluate proposals in making its award determination. While agreement to the 12-percent franchise fee was a minimum requirement, the prospectus informed offerors that they could propose, and would be evaluated upon, a higher minimum franchise fee. Id., Proposal Package.

work includes, but is not limited to, replacing light bulbs, repairing and repainting walls, carpets, and ceilings." Id., Contract, exh. E, Maintenance Plan, at 4-5. The concessioner is also required to clean the Fort Sumter and Liberty Square docks (e.g., sweeping and removing litter daily, and cleaning handrails as necessary) and the Liberty Square pier (i.e., removing trash daily or more frequently if conditions warrant, and cleaning of stains daily). Id. at 5.

The prospectus also required that the concessioner provide the NPS with additional services in furtherance of the agency's goal of providing visitors with an interpretive program while en route to and from Fort Sumter. The concessioner is required to equip each ferry boat with a high quality public address system, including voice microphones and extension cords, and to make this available for the Park Ranger's use (the concessioner also provides the NPS staff storage space on the vessel for related literature, supplies and equipment). Id., Contract, exh. A, Operating Plan, at 15-16. The concessioner also furnishes the NPS staff with the transportation necessary to conduct the interpretive program, both while riding the ferryboat ("Rangers will rove the vessel to respond to visitor questions and interpret the Fort Sumter story") and while at Fort Sumter ("Rangers will accompany visitors into Fort Sumter and remain with them until departure time"). Id. at 16.

Unlike the current contract with FST, under which the concessioner provides ferryboat service to Fort Sumter from two departure points, the prospectus informed offerors that as part of the new contract there would now be one departure point.⁶ Specifically, it established that ferryboat service would be provided to all Monument visitors from only the boat dock facilities at Liberty Square, adjacent to the new Visitor Center.⁷ Id., Abstract, at 2-3. The NPS decision to establish a single ferryboat departure point as part of the prospectus represented the implementation of agency requirements that had been developed over an extended period of time. Agency Report, Tab DS, National Monument General Management Plan, July 6, 1998; Tab DW, Monument Commercial Services Plan, Nov. 21, 2000.

⁶ After the opening of the Visitor Center on August 15, 2001, FST began tour boat operations from Liberty Square (instead of the Charleston City Marina), while continuing to operate a second departure point from Patriots Point. Agency Report, Tab Y, Fort Sumter Visitor Information/Passenger Count, Jan. 23, 2002.

⁷ While informing offerors that Liberty Square was the only required departure point, the prospectus also stated that "[i]n the future, National Park Service may choose to authorize ferry boat services to Fort Sumter from alternate locations. National Park Service may do this through separate authorization or may choose, pursuant to a mutually agreed upon contract amendment, to authorize the concessioner to provide this service." Prospectus, Business Opportunity, at 2.

Both before and after the issuance of the prospectus, there existed an ongoing debate from many quarters regarding the NPS's decision to have visitors embark to Fort Sumter from only the Liberty Square location. Private citizens, the incumbent concessioner, other tour boat operators, the Town of Mount Pleasant, the City of Charleston, the City of North Charleston, and the Patriots Point Development Authority all took positions in favor of or opposed to the planned change. While expressing concerns about what would be in the best interest of Fort Sumter's visitors, the debate also concerned the economic impact that would result from the agency's decision to consolidate ferryboat operations at Liberty Square. As discussed further below, various members of Congress also expressed their disagreement with the NPS's plan to have a single departure point.

On March 8 the NPS extended the closing date for proposals until April 29, in order to allow it additional time to examine the language of the prospectus. Agency Report, Tab A, Statement of NPS Deputy Director, at 1. The NPS then announced on March 19 its decision to cancel the Fort Sumter prospectus in order to review the issues regarding the number of departure points, and, in the interim, to extend the current concession contract with FST until December 31, 2003. Agency Report, Tab F, NPS News Release, Cancellation of Prospectus.

On March 28 Starfleet filed its protest with our Office. Starfleet argues that the agency's decision to extend the incumbent contract violated the competition requirements of both the 1998 Act and the Competition in Contracting Act (CICA), 41 U.S.C. § 253(a)(1) (Supp. IV 1998). Starfleet also argues that the NPS's decision to cancel the prospectus lacked a reasonable basis and was the result of improper congressional interference.

Jurisdiction

Initially, the agency and intervenor argue that the protest should be dismissed as beyond the jurisdiction of our Office. Agency Report at 1-4; Intervenor's Comments at 4-5. Both the agency and intervenor argue that NPS concession contracts, conducted under the authority of the NPS Concessions Management Improvement Act of 1998, are not procurements of goods or services, but instead essentially involve the "sale" of a license or permit to operate a business on federally-owned property. FST also contends that concession contracts are not procurement contracts because the government is not paying anything of value to the concession contractor, the government is not using appropriated funds, and the government is not acquiring goods or services. Intervenor's Comments at 5.

The authority of this office to decide bid protests is based on the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (Supp. IV 1998), and encompasses "a written objection by an interested party to a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services." Our jurisdiction does not turn on whether appropriated funds are involved, West Coast Copy, Inc.; Pacific Photocopy & Research Servs.

B-254044, B-254044.2, Nov. 16, 1993, 93-2 CPD ¶ 283 at 5, or on whether the competition requirements of CICA apply. On the other hand, our jurisdiction generally does not extend to challenges concerning the sale or lease of government property.⁸ Meyers Cos., Inc., B-275963 et al., Apr. 23, 1997, 97-1 CPD ¶ 148 at 4; Fifeco, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534.

In discerning the nature of a contractual transaction, we have found that the government need not commit to the payment of funds or incur any monetary liability in order for there to be a procurement. See Century 21-AAIM Realty, Inc., B-246760, Apr. 3, 1992, 92-1 CPD ¶ 345 at 3-4 (the absence of a direct cost to the agency did not negate the fact that the Army acquired relocation assistance services for its military personnel). Likewise, the government need not receive money in order for a contractual transaction to constitute a sale. See Government of Harford County, Maryland, B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81 at 4 (proceeds from the sale of government property were subsumed by other parts of the transaction). We also recognize that certain transactions, including concession contracts, can involve both a sale and a procurement. For example, in Government of Harford County, Maryland, *supra*, the Army's privatization of utility systems constituted such a mixed, or bundled, transaction and simultaneously involved both the sale of government property and the procurement of services. Id.

Where a mixed transaction includes the delivery of goods or services to the government, the contract is one for the procurement of property or services within the meaning of CICA, and therefore is encompassed by our bid protest jurisdiction. Thus, for example, our Office has assumed jurisdiction over a protest against the award of a contract involving both a sale of government property and a procurement of services where the services to be received by the government were one of the transaction's main objectives. Id. Similarly, where the award of a concession contract included the provision of numerous services to the government, which the agency might otherwise have had to purchase or perform itself, we found that the solicitation involved a procurement of services. See Alpine Camping Servs., B-238625.2, June 22, 1990, 90-1 CPD ¶ 580 at 4-5. On the other hand, where a concession or similar type contract does not include the delivery of goods or services to the government, the contract is not one for the procurement of property or services as envisioned by CICA. Thus, for example, where the agency's issuance of concession permits merely allowed entry by visitors into a national park, and did not also include the provision of services to the government, we did not exercise jurisdiction. Crystal Cruises, Inc., B-238347, Feb. 1, 1990, 90-1 CPD ¶ 141, aff'd, B-238347.2, June 14, 1990, 90-1 CPD ¶ 560.

⁸ Our Bid Protest Regulations, 4 C.F.R. § 21.13(a) (2002), provide for consideration of protests involving sales when the federal agency awarding the contract agrees in writing to have us do so.

In support of its argument that concession contracts are not procurement contracts within the meaning of CICA, regardless of whether they involve delivery of property or services to the government, the NPS cites to the Senate and House reports that accompanied the 1998 Act. The report language to which the agency cites is not binding legal authority and any reliance thereupon must be placed cautiously.⁹ The agency also cites to the NPS regulations implementing the 1998 Act. The NPS cannot by regulation limit the authority of our Office to decide bid protests. Moreover, it is our Office, not the NPS, that has interpretative authority over the bid protest provisions of CICA.

The NPS also cites Amfac Resorts, L.L.C. v. United States Dep't of the Interior, 282 F.3d 818 (D.C. Cir. 2002), which upheld the agency regulations excluding concession contract from coverage under the Contract Disputes Act.¹⁰ In Amfac, the court concluded that as the "primary purpose of concessions contracts is to permit visitors to enjoy national parks in a manner consistent with preservation of the parks," the government's receipt of "incidental benefits from the concessioner's performance" is insufficient to give rise to a procurement contract. *Id.* at 835.

In reaching its conclusion and holding, the court seems to have assumed that all concession contracts result in no more than "incidental benefits" to the government. In its brief discussion of this issue, the court also appears to have assumed that the primary purpose of a contractual transaction makes it exclusively a sale or a procurement. In our opinion, the court's view that a concession contract cannot also involve the procurement of property or services within the meaning of CICA does not take into account the specific facts of each situation.¹¹ We therefore decline to extend the Court's holding in Amfac to bid protests brought pursuant to our jurisdiction under CICA, where the challenged

⁹ The Claims Court has written in this regard, "[w]e note that with the swiftly growing use of the staff system by Congress, many congressional documents may be generated that are not really considered fully by each or perhaps by any legislator. Thus, committee reports and the like are perhaps less trustworthy sources of congressional intent than they used to be . . ." Conlon v. United States, 8 Cl. Ct. 30, 33 (1985), quoting Hart v. United States, 585 F.2d 1025, 1033 (1978).

¹⁰ The language defining the scope of the Contract Disputes Act ("contract for the procurement of property or services"), 41 U.S.C. § 602(a), is the same as that defining the scope of our jurisdiction under CICA ("contract for the procurement of property or services"). 31 U.S.C. § 3551.

¹¹ We note, for example, that in the appeal of National Park Concessions, Inc., IBCA No. 2995, 94-3 BCA ¶ 27,104, which is cited in the Amfac decision, the concession contract included the contractor undertaking approximately \$3 million of building construction and improvement of government facilities.

contract is a mixed transaction, including both a procurement element and a concession element.

The interests to be protected here by our review of a contract involving the government's procurement of property or services—the integrity of the competitive bidding system, enabling the public to have confidence that the government will award contracts fairly—are the same regardless of whether the transaction is exclusively a procurement. Where the government invites private offerors to compete for a business opportunity, the performance of which also involves the delivery of property or services to the government, all elements necessary to invoke our jurisdiction are present. See West Coast Copy, Inc.; Pacific Photocopy & Research Servs., supra.

Here, as part of performing the 10-year contract, the concessioner is required to provide maintenance, repair, and janitorial services for the facilities assigned to it. The contractor must clean the assigned office, storage, and ticket space within the Visitor Center using its own cleaning supplies and equipment, replace light bulbs, and repair and repaint walls, carpets, and ceilings. The concessioner is also responsible for providing janitorial services for the assigned docks and pier, including sweeping, removing litter daily, cleaning stains, removing trash, and cleaning handrails. The contractor also provides the agency with other benefits which extend, directly and indirectly, in support of the NPS's mission requirements. In order to accomplish the NPS goal of providing Monument visitors with an interpretive program while en route to Fort Sumter, the concessioner must equip each ferryboat with a public address system and make it available to the Park Ranger, who is also provided with transportation by the concessioner. These contractor services permit the Park Ranger to introduce the story of Fort Sumter prior to the visitors' arrival at Fort Sumter, and provide visitors with an opportunity for dialogue with Park Service staff, both on the ferryboat and at Fort Sumter. While delivery of services that are clearly de minimis would not rise to the level of a procurement for purposes of our bid protest jurisdiction, the extent of the services to be provided here is adequate to warrant our review.

Extension of the Incumbent Contract

Starfleet first protests that the NPS decision to extend the contract with FST until December 31, 2003 was improper and violated the competition requirements of both the 1998 Act and CICA. Starfleet argues that by repeatedly extending the FST concession contract the agency thwarts the very purpose of these laws, namely, the enhancement of competition. Protest at 1.

In its report on the protest the NPS asserts that it has not in fact extended the current contract with FST beyond December 31, 2002, notwithstanding the agency's statement to the contrary when it canceled the prospectus. Agency Report at 6. In its comments on the agency report, Starfleet does not dispute the agency's factual revision. Instead, in light of the new revelation, the protester argues that, given the

agency's prior record of acquiescence to congressional demands, "it is almost a forgone conclusion that [the NPS] will again . . . extend FST's contract once this bid protest proceeding ends." Protester's Comments at 18. We find that the change in facts renders Starfleet's protest here premature. Starfleet's assertion that the agency will at a future time improperly extend an incumbent's contract does not give rise to a basis of protest because it merely anticipates adverse agency action that has not yet taken place.¹² See Zell Partners, Ltd., B-248489, Aug. 31, 1992, 92-2 CPD ¶ 141 at 3 n.1.

Cancellation

Starfleet protests that the NPS's decision to cancel the Fort Sumter prospectus lacked a reasonable basis and was the result of improper congressional interference. Starfleet alleges that the agency's stated reasons for canceling the prospectus—"to allow additional review time for the prospectus and the overall planning process" because the NPS "concluded that issues have arisen regarding the number of departure points to the monument"—were mere pretexts. The protester argues that the sole reason for the agency's decision to cancel the prospectus was improper congressional interference in the competitive procurement process. Protest at 18.

In support of its contention, Starfleet points to Congressional correspondence and other communication with the NPS related to the prospectus and the departure point issue, including from committees with oversight authority for the NPS and the Department of the Interior, urging that the agency withdraw or amend the prospectus.

The agency does not deny that various members of Congress were interested in the prospectus, or that the agency received a number of inquiries regarding the ferryboat departure point issue. Agency Report at 5, 8. The agency also acknowledges that in making her decision to cancel the prospectus, the NPS Director took the concerns of legislators into account. Agency Report at 8. Nonetheless, the agency argues that the decision by the Director to cancel the Fort Sumter prospectus was in accordance with its own regulations and did not constitute an abuse of discretion.

While CICA governs most procurements, it exempts "procurement procedures that are otherwise expressly authorized by statute." 41 U.S.C. § 253 (a)(1). The 1998 Act provides for such a procedure since it establishes the processes that are

¹² Moreover, to the extent that Starfleet believes that the prior extensions by the NPS of the FST contract were improper (see Protester's Comments at 18), such protest is untimely. Our Bid Protest Regulations require that protests be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2).

to be followed when the NPS awards a concession contract. Where, as here, CICA and the implementing Federal Acquisition Regulation (FAR) (see FAR §§ 1.104, 2.101) do not apply to procurements that are within our jurisdiction, we review the record to determine if the agency's actions were reasonable and consistent with any statutes and regulations that do apply. Quick! The Printer, B-252646, July 20, 1993, 93-2 CPD ¶ 42 at 4. Here, the regulations implementing the 1998 Act set out the following standard for cancellation of a prospectus: "The Director may cancel a solicitation at any time prior to award of the contract if he determines in his discretion that this action is appropriate in the public interest."¹³ 36 C.F.R. § 51.11. Applying the standard set forth in the regulation, based on the record here, we see no basis to object to the agency's decision to cancel the prospectus.

Subsequent to the filing of the agency report, the NPS provided a statement from the Director in which she set out her rationale for canceling the prospectus. The Director states that she was aware of the NPS's planning documents that provided for a single ferryboat departure point at Liberty Square; she also became aware, through significant Congressional input, of the concerns of various constituencies whose access to Fort Sumter may be adversely affected by the NPS decision. Because she had questions about the process, the Director concluded that it would be in the public interest for NPS to review its planning documents in greater detail on the departure point issue, and to modify the prospectus if necessary. In order to provide sufficient time for this review, the Director made the decision to cancel the prospectus.¹⁴

We find that the agency reasonably determined that cancellation of the prospectus here was appropriate in the public interest. While Starfleet argues that the NPS has already considered at length the ferryboat departure point issue, we note that this issue has also met with controversy at previous steps along the way. Quite simply, the Director's decision to cancel the prospectus provided the NPS with an additional opportunity to review its requirements without affecting the competitive positions of

¹³ In our review of solicitation cancellations for which no regulatory guidance exists, we have found that an agency has broad authority to decide whether to cancel a solicitation; there need be only a reasonable basis for the cancellation. Lackland 21st Century Servs. Consol., B-285938.7, B-285938.8, Dec. 4, 2001, 2001 CPD ¶ 197 at 5.

¹⁴ We also disagree with Starfleet's assertion that the Director's statement constituted a post hoc rationalization of the agency's rationale, or that it is somehow inconsistent with the agency's decision to cancel the prospectus. We believe this statement provides a detailed rationale for the contemporaneous decision to cancel by filling in previously unrecorded details. See NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

offerors. We see no reason to object to a decision to cancel the prospectus for this purpose.

The protest is denied.

Anthony H. Gamboa
General Counsel