NPS Proposes Regulatory Revisions to Improve Administration and Delivery of Visitor Services

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The National Park Service ("NPS") is proposing significant revisions to regulations governing the solicitation, award, and administration of concession contracts for the first time in 20 years. The proposed changes seek to update and expand the provision of sustainable, high-quality, and contemporary visitor services in the national parks while reducing administrative burdens on the agency and concessioners. If finalized, these changes—some of which reflect suggestions from NPS's concessioner partners and some of which were identified by NPS—should result in important improvements in the contract solicitation and evaluation process, further incentivize concessioner investments in concessions facilities, and help improve the experience for park visitors. However, the extent to which these improvements are realized, and implications for concessioners, will depend significantly on how these changes are implemented at the park, regional, and national levels.

Comments on the proposed changes are due **September 18, 2020**.

Background on Provision of Commercial Services in National Parks

NPS contracts with concessioners to provide commercial services to national park visitors at over 100 units of the National Park System under the authority of the Concessions Management Improvement Act of 1998 ("1998 Act") and the 2016 National Park Service Centennial Act. Examples of these services include lodging, food, retail, marinas, transportation, and guided recreation. The regulations governing the solicitation, award, and administration of concession contracts, 36 CFR Part 51, were promulgated in 2000 and have not been significantly revised since that time. On July 20, 2020, NPS published in the Federal Register a proposed rule to revise these regulations. The proposed revisions are part of the Department of the Interior's implementation of Executive Order 13777, *Enforcing the Regulatory Reform Agenda*, Secretarial Order 3366, *Increasing Recreational Opportunities on Lands and Waters Managed by the U.S. Department of the Interior*, and in response to input from the public and from NPS's existing concessioners regarding ways to improve the existing concessions regulations.

The 12 proposed changes to the regulations fall under four categories: Solicitation, Selection, and Award Procedures; Leasehold Surrender Interest; Concession Contract Provisions; and Assignment or Encumbrance of Concession Contracts. Some proposed changes would apply only to new contracts, while others would apply to both new and existing contracts. The proposed rule is supported by a Regulatory Impact Analysis (RIA) and Initial Regulatory Flexibility Analysis (IRFA) assessing the costs and benefits of the proposed rule and its impacts on small businesses, which we can provide upon request.

Overview of Key Proposed Changes

Solicitation, Selection, and Award Procedures

- **Planning for new concession opportunities**. The proposed rule would add new provisions to recognize NPS planning to address evolving visitor needs, such as wi-fi, through new commercial services not provided under current concession contracts. These provisions would require NPS to establish procedures for soliciting and considering suggestions from the public; set forth the standard and relevant criteria to be applied by NPS in evaluating new opportunities; clarify that suggesting a new service does not provide any preference to the entity that submitted the suggestion; and preserve NPS's authority to amend an existing contract to provide new or additional services in certain circumstances.

- **Timing of prospectus issuance**. NPS proposes to eliminate the existing restriction that prohibits the agency from issuing a prospectus for a concession contract earlier than 18 months prior to the expiration of a related existing concession contract. NPS believes that this change could increase competition by giving more lead time to potential offerors to acquire necessary personal property (such as vessels), to obtain financing, or to manage reservations. Whether that would be the case, however, is likely also to hinge on other factors, including the timing of the award decision and the overall terms of the business opportunity.

- **Scoring of offers**. The proposed rule would change how NPS weighs the five primary selection factors and any secondary selection factors in evaluating the merits of proposals submitted in response to a prospectus. Rather than specifying maximum scores for each selection factor in the regulations, as is current practice, the proposed regulations would give NPS flexibility to set the maximum score of each selection factor on a case-by-case basis, recognizing that some factors may be more important to NPS than others depending upon the contract, subject to the following: the maximum score for the franchise fee factor may not be higher than the maximum score for any of the other principal selection factors; the maximum score for the only enumerated secondary factor (furthering the protection, conservation and preservation of park area and other resources through environmental management programs and activities) cannot exceed the maximum score for any principal selection factor; and the maximum aggregate scores for any additional secondary selection factors cannot be higher than the maximum score for any primary selection factor.

Leasehold Surrender Interest (LSI)

- **Major rehabilitations**. To further encourage capital investment by concessioners in NPS-owned concession facilities, NPS proposes to expand the definition of what constitutes a "major rehabilitation," allowing more construction projects to qualify for increased LSI. Specifically, based on industry standards, the proposed rule would decrease the construction cost threshold for LSI eligibility from 50% of the pre-rehabilitation value to 30% of the pre-rehabilitation value. NPS also proposes to eliminate the requirement that rehabilitation projects generally be completed within 18 months from the start of work. As proposed, this change would apply only to future contracts. Notably, NPS seeks public comment on other ways to incentivize concessioners to make capital investments that improve the quality of facilities for the public.

Concession Contract Provisions

- **Term of Concession Contracts**. The proposed rule would clarify that NPS may issue contracts for shorter or longer than 10 years (up to the 20-year statutory maximum) depending on the contract and remove the current stated preference that contract terms be "as short as is prudent." Significantly, NPS also proposes to allow for contracts to include option years of one year or more, provided that the total term of the contract including option years does not exceed 20 years. Option years would be intended to incentivize and reward concessioners with "favorable" annual ratings and who meet other specified performance criteria, but they could also be exercised when there has been a substantial interruption or change in operations due to reasons beyond the control of the concessioner, such as natural events or government-ordered interruptions. This change would apply to current concession contracts if the contract is amended, as well as to future contracts. If this part of the rule is finalized as proposed, whether NPS would consider amending existing contracts to include one or more option years to address the interruption or change to many operations as a result of the ongoing COVID-19 pandemic is unclear.

- **Concessioner Rates**. The current rate approval process can impose a significant administrative burden on both NPS and concessioners, sometimes resulting in delays in rate approvals. To lessen this burden, NPS is proposing several changes to the rate approval process that would apply to both current and future concession contracts. The proposed rule would update the regulations to reflect language in the 1998 Act to clearly state that NPS will approve reasonable and appropriate rates in a manner as prompt and unburdensome as possible, relying on market forces to establish the reasonableness of rates and charges to the maximum extent possible. It would require NPS to identify the rate approval method for each category of facilities, goods, and services in the prospectus. It would require rates to be based on a competitive market declaration when NPS determines that market forces are sufficient to establish the reasonableness of rates and charges, and only allow use of other rate approval methods if NPS determines that market forces are inadequate to establish the reasonableness of rates and charges. NPS could change the rate approval method during the term of the contract to reflect changes in market conditions, which would allow NPS to respond to market pressures on concessioner services rates. Finally, new language would require that NPS issue a response to an existing concessioner's request for a rate change within 30 days and explain in writing any denial of such a request. Concessioners should be aware that, to the extent NPS determines use of competitive market methods will result in increased rates and revenue, NPS could impose higher minimum franchise fees or other contract requirements to account for the additional financial opportunity.

- **New or Additional Services.** The proposed rule would align the regulations with language in the NPS Centennial Act, which gives NPS the authority to amend an existing contract to provide new and additional services if those services do not represent a material change to the required and authorized services under the contract. This change, which NPS says could "provide new opportunities to enhance commercial services under existing contracts allowing concessioners to meet changing visitor needs where appropriate," would apply to both existing and future concession contracts.

- **Setting Franchise Fees.** The proposed rule would add new language explaining how NPS will set the minimum acceptable franchise fee in a prospectus. Specifically, it would state that the minimum fee is to be set at a level that NPS determines will encourage competition and in a manner so that "concessioners can provide necessary and appropriate visitor services to the public." It would also require NPS to use data, including data from the hospitality industry for similar operations, when determining the minimum franchise fee and to provide the basis for this determination in the prospectus. NPS says that these additions are consistent with current NPS practice but would further transparency in published prospectuses. Given that NPS historically has been very reluctant to share information regarding the basis for its minimum franchise fee determinations, whether and to what extent these additions would have the stated result is uncertain.

- **Special Accounts.** Existing regulations allow NPS to require concessioners to set aside a percentage of gross receipts in a repair and maintenance reserve to be used at NPS's direction for maintenance and repair of real property improvements used in concession operations. The proposed rule would replace the term "repair and maintenance reserve" with "component renewal reserve" to clarify that the reserve is not intended for routine maintenance and repair activities, but rather to fund projects to replace systems and components that have reached the end of their design life, are non-recurring within a seven-year time frame, and are not part of an LSI-eligible capital improvement project. This change would apply to current concession contracts if the contract was amended, as well as future contracts. NPS also seeks public comment on other ways to incentivize concessioners to complete component renewal activities, such as whether contracts could contain provisions that allow the concessioner to deduct from its periodic franchise fee payments amounts that were expended by the concessioner during the preceding period for component renewal activities.

Assignment or Encumbrance of Concession Contracts

- Many assignments or encumbrances of concession contracts require prior NPS approval. Current regulations do not restrict the ability of a concessioner to seek approval of an assignment following the start of a new contract. The proposed rule would prohibit assignments within 24 months after the effective date of a contract, unless the requested assignment is compelled by circumstances beyond the control of the assigning concessioner. According to the proposed rule, this change would apply to current concession contracts that are amended after the effective date of this rule, as well as to future contracts.

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Conclusion

NPS's proposed rule, if finalized, should lead to important benefits for NPS, its concessioner partners, and park visitors: reducing administrative burdens for NPS and concessioners; increasing competition; providing additional flexibility to add new visitor services; and further incentivizing concessioner investment in visitor service facilities. The extent to which these benefits are ultimately realized, as well as the implications of these changes for concessioners, however, will depend significantly on how these changes are implemented at the park, regional, and national levels. Concessioners, and others potentially interested in pursuing concession opportunities, should consider how these changes might affect their interests, and strongly consider sharing their views in comments on the proposed regulations.

FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on concessions-related and other issues involving NPS. If you would like more information on how these changes may impact your business, please contact Jonathan Simon or Melinda Meade Meyers at (202) 298-1800.

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