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Does the Contract Disputes Act Apply to Contracts Between the National Park Service and Private Concessioners?

by Ralph C. Anzivino

PREVIEW of United States Supreme Court Cases, pages 252-257. © 2003 American Bar Association.

Case at a Glance

This case concerns the applicability of the Contract Disputes Act (CDA) to concession contracts and in particular, to contracts between the National Park Service and the private concessioners that contract to provide services and maintain facilities in the national parks. The language of the CDA broadly covers all contracts entered into by a federal agency for the procurement of personal property, services, or the repair and maintenance of real property. The National Park Service has asserted by regulation that the CDA does not apply to its concession contracts.

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ISSUE

Does the Contract Disputes Act of 1978 apply to contracts between the National Park Service and private concessioners that provide services and maintain facilities (such as restaurants, lodges, and gift shops) in the national parks?

FACTS

In 1916, the National Park Service was created and was charged with two basic mandates—one, to conserve the scenery, its wildlife, and its natural and historic objects, and two, to provide for the public's enjoyment of these resources. In creating the National Park Service, Congress authorized the Secretary of the Interior to grant privileges, leases, and permits for the use of land for the accommodation of visitors to each of the various parks, monuments, or other reservations under the secretary's authority. Congress's charge to provide for the

enjoyment of the national parks is understood to require that visitors be offered various services throughout the parks. These services are generally provided in the park's commercial facilities, such as lodges, restaurants, and retail outlets. The physical facilities are owned by the federal government. Throughout its history, the National Park Service has relied on private concession contractors to build, maintain, and operate its visitor-service facilities and to provide many of the other services that the public typically associates with a national park, such as outfitter and guide services. The national parks concessions program has always been a partnership between the National Park Service and the concession contractors to provide access to the national parks for the enjoyment of the public.

Between 1916 and 1965, although Congress had specifically authorized concession contracting by the

*NATIONAL PARK HOSPITALITY
ASSOCIATION V. DEPARTMENT OF
THE INTERIOR ET AL.
DOCKET NO. 02-196*

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COLUMBIA CIRCUIT

National Park Service, there was no specific statutory scheme governing the relationship between the agency and its concessioners. In light of the growing industry and governmental concern about the National Park Service's concessions contracting policies, Congress enacted the National Park Service Concessions Policy Act of 1965 to govern concessions contracts. The 1965 act's primary purpose was to codify concession policy in order to assure concessioners that their investments and contract rights enjoyed legal protection. In 1998, Congress repealed the 1965 act and passed a replacement statute, the National Parks Omnibus Management Act of 1998.

The 1998 act altered various technical aspects of the system under which the National Park Service enters into private concession contracts. Like the 1965 act before it, the 1998 act sought to further the mission of the national park system by protecting the parks for the future while ensuring that the agency continued to provide the appropriate accommodations, facilities, and services that are necessary and appropriate for public use and enjoyment. 16 U.S.C. § 5951 (b)(1). In particular, the 1998 act specified that the National Park Service "shall utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." 16 U.S.C. § 5952. Although the 1998 act expressly addresses the applicability of certain statutes, it does not expressly exempt National Park Service concession contracts from the Contract Disputes Act (CDA). Subsequently, the National Park Service issued regulations implementing the 1998 act. One National Park Service regulation declares that "concession contracts are not contracts within

the meaning of the Contract Disputes Act." 36 C.F.R. § 51.3.

In November and December 2000, the National Park Hospitality Association, a non-profit trade association that represents many concessioners who do business in the national parks, and three individual concessioners filed separate actions challenging various aspects of the National Park Service regulations. Particularly, the petitioners challenged 36 C.F.R. § 51.3 as being contrary to the CDA. The cases were consolidated in the district court. On May 23, 2001, the district court granted summary judgment in National Park Service's favor and held that the CDA does not apply to concession contracts. *AmFac Resorts, L.L.C. v. U.S. Department of Interior*, 142 F.Supp. 2d 54 (D.D.C. 2001). The court reasoned that it was ambiguous whether the CDA applied to National Park Service concession contracts. Once an ambiguity was found, the district court afforded "Chevron deference" to the National Park Service, holding that under the doctrine announced in *Chevron v. National Resources Defense Council, Inc.*, 407 U.S. 837 (1984), 36 C.F.R. § 51.3 was a "permissible interpretation" of the CDA by the National Park Service.

The District of Columbia Circuit affirmed the district court, but on a different basis. *AmFac Resorts, L.L.C. v. U.S. Department of Interior*, 282 F.3d 818 (D.C. Cir. 2002). The court of appeals reasoned that the National Park Service does not administer the Contract Disputes Act and that therefore it does not have interpretative authority over its provisions. Accordingly, the National Park Service was not entitled to *Chevron* deference in its interpretation of the CDA. Nevertheless, the court of appeals upheld the agency's determination

that the CDA does not apply to the National Park Service's concession contracts. The court reasoned that the primary purpose of concession contracts is to permit visitors to enjoy the national parks in a manner consistent with the preservation of the parks. The fact that the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep the contracts into the ambit of the Contract Disputes Act. In other words, the concession contracts do not fall within the CDA because their purpose is to benefit the "park visitors" rather than the government. A timely petition for a writ of certiorari was filed and granted on November 12, 2002. *National Park Hospitality Association v. U.S. Department of Interior et al.*, 123 S.Ct. 549 (2002).

CASE ANALYSIS

The Contract Disputes Act of 1978 provides an alternative forum to resolve government contract disputes. Rather than seeking judicial relief in the Court of Federal Claims, a contractor may appeal decisions by a contracting official to an administrative board within that agency. 41 U.S.C. § 607. The board's decision may then be appealed to the U.S. Court of Appeals for the Federal Circuit. Section 3(a) of the Contract Disputes Act, 41 U.S.C. § 602(a) provides that "unless otherwise specifically provided herein, this chapter applies to any express or implied contract ... entered into by an executive agency for (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property." The National Park Service regulation issued pursuant to the 1998 act expressly states that

(Continued on Page 254)

concession contracts are not contracts within the meaning of the Contract Disputes Act. 36 C.F.R. § 51.3. Therefore, the question of whether the National Park Service concession contracts fall within the coverage of the CDA is squarely presented. A straightforward question of statutory interpretation is at hand.

The petitioners maintain that the CDA applies to all government contracts, including the National Park service concession contracts. The text and history of the Contract Disputes Act make clear that Congress intended the statute to be comprehensive. The act was designed to end the previous uncertainty about which dispute-resolution regime would govern any specific contract dispute by imposing uniform procedures on virtually every government contract. Thus, with only a few carefully delineated exceptions, the CDA covers all disputes between the government and those with whom it contracts for the procurement of goods, services, or the maintenance of real property. Only by ignoring the CDA's plain language, and inappropriately creating new exceptions to the statute, could it be found that the National Park Service concession contracts fall outside the statute's scope.

The CDA by its plain terms applies to virtually all government contracts for the procurement of goods or services. In this and all statutory construction cases, the Supreme Court must begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent. The CDA's plain language applies to *any* express or implied contract entered into by "an executive agency" for "the pro-

urement of" (1) property, other than real property in being, (2) services, or (3) the construction, alteration, repair, or maintenance of real property—unless the CDA specifically provides otherwise. The National Park Service does not deny that concessions contracts are "contracts" and that it is an "executive agency." Nor does it claim that the CDA itself specifically exempts concession contracts from its coverage. Thus, since the CDA expressly applies to procurement contracts, the National Park Service must convince the Court that concession contracts are not procurement contracts. The petitioners maintain that there are a number of significant problems with this interpretation.

First, the CDA does not limit its scope to a category of contracts known as "procurement contracts." The word "procurement" appears in the CDA as a noun, rather than as an adjective describing and limiting the types of contracts entitled to the protections of the statute. Accordingly, the National Park Service ascribes far too much significance to the catchphrase "procurement contracts" in its construction of the statute. Moreover, "procurement" is a broad term. Its dictionary meaning is the act of getting or obtaining something. The CDA applies any time an agency contracts to get or obtain any item of personal property or any service. In other words, Congress has dictated that the CDA applies to virtually the entire gamut of government contracts, unless expressly exempted by statute.

Second, the entire scheme of the CDA confirms the expansive nature of the term "procurement." In determining the meaning of a statutory term, a court must look to the structure and language of the statute as a whole. The overall structure of the CDA—and in par-

ticular the narrowness of the statutory exceptions to the CDA's coverage—demonstrate the act's broad applicability to include the petitioners' contracts. Congress expressly exempted a few specific categories of procurement contracts from the CDA's scope. However, Congress also mandated that only those exceptions "specifically provided" within the CDA could operate to exclude a contract from the CDA's dispute-resolution mechanisms. It is undisputed that none of the statutory exceptions exempt the National Park Service concession contracts from the CDA. Given this statutory mandate, neither agencies nor courts have the authority to graft additional exceptions onto the CDA. When Congress provides exceptions in a statute, it follows that courts do not have the authority to create others. The proper inference is that Congress considered the issue of exceptions and, in the end, limited the exceptions to those set forth.

Third, consistent with the plain language and the statutory structure, the background against which the CDA was enacted also warrants a broad and comprehensive reading of the act's coverage. Before the CDA was passed, the manner of resolving government contract disputes had become exceedingly complex and unworkable. Each executive agency was left to its own devices to fashion a system of dispute resolution. Many of these systems failed to meet the needs of either contractors or the government and frequently gave agencies far too much authority to determine the correctness of their own contract actions.

In November of 1969 Congress established the Commission of Government Procurement to promote the economy, efficiency, and effectiveness of procurement by the executive branch of the federal government. The commission studied

all aspects of government procurement and eventually released a four-volume report that became the basis of the CDA. The commission found that patchwork solutions to procurement problems would no longer suffice and that there was an urgent need for a unified approach to procurement. In particular, the commission found that contractors should be afforded direct access to the courts, which historically have been the forum for the adjudication of contract rights and duties.

Congress accepted the commission's recommendation. In the CDA, Congress sought to protect a government contractor's right to independent review in court. Under the act, a contractor may bring an action on a claim directly in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary. The Senate Report explained that direct access to the courts was critical to the fair resolution of disputes between the government and its contracting partners. The Senate Report further explained that Congress designed the CDA to have broad application in order to unify the diverse and often inconsistent procedures existing among the many procuring agencies. It was essential to Congress's design that all contract disputes be resolved according to the same set of procedures. The petitioners contend that because two of the critical goals of the CDA were to protect the right of government contractors to seek *de novo* review in court and to unify dispute-resolution mechanisms, the Supreme Court should not countenance the National Park Service's attempt to defeat congressional intent by excepting these concession contracts from the CDA.

The petitioners believe there are ample reasons to conclude that the

National Park Service's concession contracts fall squarely within the scope of the CDA. First, when the National Park Service contracts with concessioners, it plainly procures a wide range of "services" that have been sought by the government. Concessioners provide direct and indirect services to visitors to the national parks. For example, the Grand Canyon concessioner will be required to run 12 hotels or lodges that together contain 922 rooms; to staff and operate nine gift shops; to operate scheduled bus tours; to provide locksmithing services; to operate a laundromat; and to run 10 food-service locations, ranging from a "Limited Snack Bar" to a "Gourmet/Fine Dining Restaurant." These are paradigmatic examples of "services" and are typical of the kinds of services that the government procures from concessioners, both large and small, that operate throughout the national park system. It thus seems beyond question that the National Park Service is procuring services under this and other concession contracts that exist to support visitation to the national parks.

Second, in many concession contracts, the National Park Service also procures the "construction, alteration, repair, or maintenance of real property." For example, under the Grand Canyon concessioner's contract, the concessioner is required to undertake and complete an improvement program, including building apartments for employees, relocating a maintenance facility, and renovating a service station, a watchtower, an auto shop, and a lodge. The concessioner is required to perform all of these construction and maintenance services despite the fact that the United States retains title and ownership to all the concession facilities. Clearly this activity falls within the scope of the CDA.

Third, the Department of the Interior's Board of Contract Appeals (IBCA) has consistently held that the National Park Service concession contracts are procurement contracts subject to the CDA. The IBCA reasons that the concession contracts are for services that the government itself would otherwise be required to provide, and there is no statutory exemption from CDA coverage. Finally, the fact that National Park Service concession contracts are subject to the CDA is confirmed by the fact that many other federal agencies routinely accept the applicability of the CDA to similar concession contracts used to procure a wide range of goods and services. For example, the CDA has been applied without challenge to disputes involving concession contracts with the Army and Air Force Exchange Service, Army Corps of Engineers, the Navy, and the State Department. The fact that these other agencies comply unhesitatingly with the CDA is strong evidence that National Park Service's concession contracts also fall within the scope of the statute.

The petitioners further assert that the reasons offered by the National Park Service for exempting concession contracts from the CDA are unpersuasive. First, the National Park Service claims that the CDA does not apply to its concession contracts because under many of these contracts the government makes no direct monetary payment to concessioners. The National Park Service's claim, however, is statutorily irrelevant. Unlike various other procurement statutes and regulations, CDA coverage is not conditioned on the expenditure of any specified amount of money. The act applies so long as the government provides its contracting partner with something of value in exchange for the procurement of goods or services.

(Continued on Page 256)

Second, the National Park Service claims that these contracts are not subject to the CDA because the procurements benefit the public rather than the government. CDA coverage, however, does not depend on whether the benefit of contractual goods or services is provided to the government, the public, both, or neither. There is no textual basis for this judicially created exception to the statute. Rather the CDA on its face applies to any contract for the procurement of goods and services, regardless of who directly benefits from that procurement. Likewise, nothing in the background or legislative history of the CDA supports the proposition that the act's applicability turns on subjective determinations of who may be said to have benefited from a government procurement.

Finally, the National Park Service claims that, if the CDA governs contracts that benefit both the public and the government, it is applicable only to those contracts that the agency is statutorily required to provide. However, Congress's decision not to limit the CDA to contracts that benefit only the government rather than the public is perfectly sensible. What government contract for the procurement of goods or services does not also benefit the public? The CDA does not remotely support such a parsing of contracts.

The respondent maintains that the CDA expressly applies only to government "procurement contracts" and that the National Park Service concession contracts are not "procurement contracts." Therefore, the National Park Service regulation stating that concession contracts are not covered by the CDA is valid. The respondent asserts two alternative theories to support the proposition that the National Park Service

concession contracts are not "procurement contracts."

Its first theory is that the act applies to any "express or implied contract" for the "procurement" of property or services. Federal regulations define a procurement contract as a contract by which the government bargains for, pays for, and receives goods and services. Concession contracts, however, do not fit that definition. The function of a concession contract is not to procure services or goods *for the government*. Rather, concession contracts authorize third parties to provide services to park visitors. The primary purpose of concession contracts is to permit visitors to enjoy the national parks in a manner consistent with the preservation of the parks. The fact that the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep those contracts into the ambit of the Contract Disputes Act.

The respondent maintains that this interpretation is supported by ample authority. The 1998 act provides that the National Park Service may enter into concession contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to national parks. 16 U.S.C. § 5952. The concession contracts benefit the visitors, not the government. The committee reports accompanying the 1998 act also state that concession contracts do not constitute contracts for the procurement of goods and services for the benefit of the government. This is also the position the National Park Service had consistently maintained with respect to concession contracts under the 1965 act. Finally, the Court of Federal Claims has consistently ruled that a concession contract is not a procurement

but rather is a grant of a permit to operate a business. The Court of Claims's rationale is based on the fact that the government is not committing to paying out government funds or to incurring any monetary liability.

The respondent's second theory maintains that the National Park Service's interpretation of the CDA is a reasonable interpretation of the statute and therefore is entitled to *Chevron* deference. Once it is determined that the language in a statute is reasonably subject to two different meanings, courts must give deference to the interpretation of the administering agency. *Chevron v. National Resources Defense Council, Inc.*, 407 U.S. 837 (1984). The respondent argues that it is ambiguous whether "concession contracts" are "procurement contracts" under the CDA.

The respondent believes that the basic nature of a concession contract is markedly different from that of a procurement contract. First, in a concession contract the government is not attempting to procure any chattel or service for itself but is rather granting another to use government land as in a license or lessor/lessee relationship. Second, when the government procures something, it assumes the role of the payor. These concession contracts place the government in the role of a payee. Therefore, it is ambiguous whether concession contracts qualify as procurement contracts under the CDA. Under *Chevron*, once it is determined that statutory language is ambiguous, the courts must defer to the agency's interpretation of the statute provided there is a reasonable basis for their interpretation.

The respondent offers a number of reasons that support its interpreta-

tion that concession contracts are not procurement contracts. First, the 1998 act, which is the enabling law for the National Park Service, provides that “the Secretary shall utilize concession contracts to *authorize* a person ... to provide accommodations, facilities, and services to visitors to units of the National Park System.” 16 U.S.C. § 5952. In other words, the concession contracts are *authorization* contracts, not procurement contracts. Second, the National Park Service regulations that implemented the 1965 act expressly stated that concession contracts are not procurement contracts. This has been the long-standing interpretation by the National Park Service. And finally, since 1993, the Court of Federal Claims has consistently held that concession contracts are not procurement contracts. Since Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it enacts a statute, the National Park Service’s interpretation is entitled to the *Chevron* deference. Ergo, the concession contracts are not procurement contracts covered by the CDA.

SIGNIFICANCE

Several interesting issues are raised by the case. First, the scope of the Contract Disputes Act will be determined. Do government concession contracts qualify as procurement contracts? If so, thousands of concessioners who provide goods and services to the government will be able to use the Contract Disputes Act. Second, is it ambiguous under the CDA and the 1998 act whether concession contracts are procurement contracts? If so, the *Chevron* doctrine, which accords deference to an agency’s interpretation of a statute, will be applicable. And finally, under *Chevron*, is there a significant basis to support the National Park Service’s construction of the federal statute? The answers to these questions will be key to clarifying the CDA’s meaning.

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