No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether a National Park Service regulation that states that National Park Service concession contracts are not procurement contracts within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, is facially valid.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 282 F.3d 818. The opinion of the district court (Pet. App. 35a-92a) is reported at 142 F. Supp. 2d 54.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2002. A petition for rehearing was denied on May 8, 2002 (Pet. App. 93a-94a). The petition for a writ of certiorari was filed on August 6, 2002, and granted by the Court on November 12, 2002 (J.A. 28). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, are reprinted at Add., *infra*, 1a-3a.

Relevant provisions of the National Park Service Concessions Management Improvement Act of 1998, 16 U.S.C. 5951-5966, are reprinted at Add., *infra*, 3a-9a. Relevant regulations of the National Park Service are reprinted at Add., *infra*, 10a. Relevant provisions of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, are reprinted at Add., *infra*, 10a-15a. Relevant provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. 403 *et seq.*, are reprinted at Add., *infra*, 15a-17a.

STATEMENT

This case involves a facial challenge to a regulation promulgated by the National Park Service (NPS) providing, in relevant part, that "concession contracts," *i.e.*, contracts that "authorize[] the concessioner to provide certain visitor services within a park area under specified terms and conditions," are not "contracts within the meaning of 41 U.S.C. 601 *et seq.* (the Contract Disputes Act)" and are not "procurement contracts within the meaning of statutes, regulations or policies that apply * * * [to] federal procurement actions." 36 C.F.R. 51.3. Petitioner seeks reversal of a court of appeals judgment upholding the validity of that regulation. Petitioner contends that the regulation is invalid on its face because "*every* NPS concessions contract" is a procurement contract that falls within the ambit of the Contract Disputes Act. Pet. Br. 37; see Pet. C.A. Br. 13-14.

A. The Statutory And Regulatory Framework

1. *National Park Service Concessions.* a. More than 85 years ago, Congress created the National Park Service to "promote and regulate the use of Federal areas known as national parks," and charged it with the following "fundamental purpose": "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for future generations."

An Act to Establish a National Park Service (Organic Act), ch. 408, § 1, 39 Stat. 535 (16 U.S.C. 1). So that NPS might fulfill that mandate, Congress empowered the Secretary of the Interior to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks." § 3, 39 Stat. 535 (16 U.S.C. 3). Congress specifically authorized the Secretary to "grant privileges, leases, and permits for the use of land for accommodation of visitors" within the "various parks, monuments, or other reservations" under the Secretary's authority. § 3, 39 Stat. 535.

NPS historically has authorized private concessioners, like those represented by petitioner, to provide visitors with "lodging, food, merchandizing, transportation, outfitting and guiding," and similar services. 65 Fed. Reg. 20,630 (2000); Pet. App. 49a. Concessioners typically have operated their businesses in areas of the national park system[1] pursuant to concession contracts reached with, or permits issued by, NPS. Under those contracts and permits, a concessioner pays NPS a franchise fee—generally a small percentage of its gross revenue—in exchange for the privilege of operating its business in a national park. *Id.* at 4a. Most concessioners provide guide and outfitter services (*e.g.*, river running, fishing, and guide services). Gov't Lodging 7, 9.

b. For many years, concession operations were governed only by NPS internal regulations and policies. Pet. App. 2a. In 1965, Congress enacted the National Park Service Concessions Policy Act (the 1965 Act), Pub. L. No. 89-249, 79 Stat. 969 (16 U.S.C. 20 *et seq.* (1994) (repealed 1998)), and

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[1] In this brief, the terms "national parks" and "national park system" refer to areas under the administration of the National Park Service. Such areas include national parks, national monuments, national seashores, national battlefields, and national recreation areas. See 16 U.S.C. 1. There are currently 388 units in the national park system.

"put into statutory form" many of NPS's longstanding concessions policies. S. Rep. No. 765, 89th Cong., 1st Sess. 1 (1965); H.R. Rep. No. 591, 89th Cong., 1st Sess. 1 (1965). The 1965 Act authorized the Secretary to "take such action as may be appropriate to encourage and enable * * * concessioners[] to provide and operate facilities which he deems desirable for the accommodation of visitors." 16 U.S.C. 20a (1994). The 1965 Act required NPS to grant existing concessioners a "preference in the renewal of contracts or permits and in the negotiation of new contracts or permits" (16 U.S.C. 20d (1994)), which in practice allowed an existing concessioner to match the terms of any competing proposal. 65 Fed. Reg. at 20,630. Further, although the United States retained legal title to any "structure, fixture, or improvement" built by the concessioner in a national park, the 1965 Act granted concessioners a "possessory interest" in improvements they constructed that would survive the termination of the concession contract. 16 U.S.C. 20e (1994).

c. Over time, sentiment grew that the concession system under the 1965 Act was flawed. See, *e.g.*, George C. Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 Denv. U. L. Rev. 729, 759 (1997). "[A]nti-competitive aspects of the * * * system," particularly "preferential rights [of renewal] and possessory interests," made "service improvement more difficult." *Ibid.*; see 57 Fed. Reg. 40,496, 40,508-40,510 (1992). Following a comprehensive review of NPS concessions, and after notice and comment, the Department of the Interior in 1992 issued regulations governing concession management in the national parks. The regulations clarified the scope of the preference in the renewal of contracts. See 36 C.F.R. 51.3, 51.5(b) (1993). In addition, the regulations made explicit NPS's long-held view that concession contracts "are not federal procurement contracts or permits within the meaning of statutory or regulatory requirements applicable to

federal procurement actions." 57 Fed. Reg. at 40,503; 36 C.F.R. 51.1 (1993); see 57 Fed. Reg. at 40,498 ("This statement simply clarifies the status of concession contracts, which NPS has never considered a type of federal procurement contract."); Gov't Lodging 2 (Memorandum from David A. Watts, Assistant Solicitor, Parks and Recreation, to Director, NPS (Sept. 24, 1980) ("NPS concession contracts cannot be considered as procurement contracts")).

d. In 1998, after several years of hearings, Congress enacted the National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497. Title IV of that statute (§§ 401-418, 112 Stat. 3503-3517 (16 U.S.C. 5951-5966)), entitled the National Park Service Concessions Management Improvement Act of 1998 (the 1998 Act), repealed the 1965 Act and established "a new, comprehensive concession management program." S. Rep. No. 202, 105th Cong., 2d Sess. 20 (1998). The 1998 Act provides that "the Secretary shall utilize concessions contracts to authorize private entities to provide accommodations, facilities and services to visitors to areas of the National Park System." § 403, 112 Stat. 3504 (16 U.S.C. 5952). The 1998 Act enhances competition for concession contracts by prohibiting the Secretary from extending a preference in contract renewal to existing concessioners in large concession contracts. 16 U.S.C. 5952(7)(A).[2] The 1998 Act further provides that concessioners in new concession contracts have a leasehold surrender interest (rather than a possessory interest) in capital improvements constructed on NPS lands, and provides for the valuation of that interest. See 16 U.S.C. 5954(a)(3) and (4).

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[2] The 1998 Act authorized the Secretary to continue granting a preference in contract renewal to certain outfitter and guide concessions and to concessions with anticipated annual revenues of less than $500,000. 16 U.S.C. 5952(7)(B) and (8).

In 2000, NPS issued new regulations to implement the 1998 Act. 65 Fed. Reg. at 20,630-20,631; see J.A. 157-162. The new regulations implement the limited renewal preferences and leasehold surrender interest provided by the 1998 Act. See 65 Fed. Reg. at 20,668-20,669. The new regulation slightly revised NPS's earlier regulation regarding the status of concession contracts under federal procurement law. The revised regulation provides 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 * * * procurement contracts within the meaning of statutes, regulations, or policies that apply [to] * * * federal procurement actions." 36 C.F.R. 51.3. NPS explained that "[a] procurement contract is a contract under which the government bargains for, pays for, and receives goods or services." 65 Fed. Reg. at 20,635 (quoting *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (1993)); J.A. 164-165. In contrast, "the purpose of concession contracts," as reflected in the language of the 1998 Act, was to "authorize [concessioners] to provide accommodations, facilities and services *to visitors*" and "not to procure goods and services for the government." 65 Fed. Reg. at 20,635 (emphasis added) (quoting 16 U.S.C. 5952); J.A. 164.[3]

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[3] Also during 2000, NPS promulgated three versions of its standard concession contract. See 65 Fed. Reg. at 44,894; J.A. 168. So-called "Category I" contracts are generally prescribed for situations in which "the concessioner will be required or allowed to construct or install capital improvements on park area lands," and will be required to perform maintenance on assigned concession facilities. 65 Fed. Reg. at 44,894; J.A. 170. Category I contracts typically are employed for the largest concessions. Category II contracts are prescribed for situations (*e.g.*, gift shops or snack bars) in which the "concessioner will operate on assigned land or in an assigned concession facility, but will not be allowed to construct or install capital improvements." *Ibid.* Category III contracts are prescribed for situations (typically outfitter and guide operations) in which "no lands or buildings are assigned to the concessioner" and "the

2. *The Contract Disputes Act of 1978.* The Contract Disputes Act of 1978 (CDA), Pub. L. No. 95-563, 92 Stat. 2383 (41 U.S.C. 601 *et seq.*), was enacted as part of a comprehensive process of government procurement reform in the late 1970s and early 1980s. Based on its concerns that "the procurement process is overly complex," unduly costly, and inefficient, and that "the annual expenditures for procurement * * * are so great that even small improvements promise large rewards" (1 *Report of the Commission on Government Procurement* 1 (1972)), Congress established the Commission on Government Procurement in 1969 to conduct a systematic review of government procurement practices. After an exhaustive study, the Commission released a report in 1972 setting forth 149 specific recommendations for improving government procurement. The report served as a blueprint for congressional reform, and "for the next ten to fifteen years, the Commission's findings and recommendations served as the bedrock upon which all major statutory and regulatory changes were based." James F. Nagle, *A History of Government Contracting* 491 (2d ed. 1999). The CDA was one of Congress's legislative responses to the Commission Report.

In the CDA, Congress implemented two of the Commission's central recommendations. First, the Act permits contractors to seek review of an adverse decision of a contracting officer in the United States Court of Federal Claims without first pursuing administrative appeals. 41 U.S.C. 609(a)(1). Second, the CDA allows contractors to recover pre-judgment interest on successful claims. 41

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concessioner will not be allowed to construct or install any capital improvements." *Ibid.* Because some contracts entered into under the 1965 Act are still in force, not all current concession contracts fall into these three categories of contracts. However, NPS expects that the vast majority of concessioners (approximately 78%) will be classified in Categories II and III. See Gov't Lodging 10.

U.S.C. 611. The CDA 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."[4] 41 U.S.C. 602(a).

B. Proceedings In This Case

1. In 2000, petitioner, an association of concessioners that provide services in the national parks, and three of its largest members—Amfac Resorts, L.L.C. (now respondent Xanterra Parks & Resorts L.L.C.), Hamilton Stores, Inc., and ARAMARK Sports and Entertainment Services, Inc.—brought suit in federal district court raising facial challenges to regulations implementing the 1998 Act. They alleged that the regulations were facially arbitrary, capricious, and unlawful for a variety of reasons, including that they (1) failed to recognize concessioners' implied rights of preference in renewal; (2) improperly valued concessioners' leasehold surrender interests; (3) violated the CDA; and (4) granted NPS unlawful authority to review and approve shareholder-level transactions that would result in the transfer or encumbrance of a controlling interest in a concessioner. See Pet. C.A. Br. 13-14. With respect to the CDA claim, petitioner and the other plaintiffs claimed that all concession contracts involve government procurement of services or the procurement of construction, alteration, re-

[4] Although the "disposal of personal property" under Section 602(a)(4) does not involve "procurement," Congress included those contracts, "generally referred to as 'surplus sales' contracts" (S. Rep. No. 1118, 95th Cong., 2d Sess. 18-19 (1978)) to conform the CDA to the scope of then-existing regulations that treated disputes over such sales "in the same manner as procurement disputes." *Ibid.* The CDA's "disposal of personal property" provision is not implicated here. See Pet. Br. 8.

pair or maintenance of real property within the scope of that Act. See 41 U.S.C. 602(a)(2) and (3). See Pet. C.A. Br. 51.

2. The district court granted petitioner summary judgment with respect to one issue relating to the preference in the renewal of contracts, and granted NPS summary judgment on all other issues. Pet. App. 35a-92a; *id.* at 60a. As relevant here, the court rejected the challenge to the NPS regulation stating that concession contracts are not procurement contracts within the meaning of the CDA. *Id.* at 67a. The court held that "concession contracts differ[] markedly" from procurement contracts (*id.* at 68a), noting that, in procurement contracts, the government "usually acts as payor" in an effort "to procure chattel or services for itself." *Id.* at 68a- 69a. By contrast, in concession contracts, NPS acts as "payee" while it "permit[s] another to use its land." *Ibid.* The court concluded from the text of the 1998 Act that Congress understood concession contracts to be "authorization contracts, not procurement contracts." *Id.* at 69a. The court also held that Congress was presumptively aware of "the prevailing understanding * * * that concession contracts were not procurement contracts," and intended to adopt that view when it enacted the 1998 Act without foreclosing that interpretation. *Id.* at 69a-70a.

3. The court of appeals affirmed the district court's holding that NPS concession contracts are not procurement contracts within the meaning of the CDA.[5] Pet. App. 27a-29a. The court reasoned that, unlike procurement contracts, under which "the government bargains for, * * * pays for,

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[5] The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. The court reversed the district court's ruling that Xanterra was not entitled to discovery on its claim that it had an implied-in-fact renewal right for the Grand Canyon concession contract. Pet. App. 18a. The court vacated the district court's decision on the merits rejecting the shareholder-approval claim, holding that the claim was unripe. *Id.* at 30a-34a. The court of appeals otherwise affirmed.

and receives goods and services" (*id.* at 27a (quoting 65 Fed. Reg. at 20,635)), concession contracts are undertaken to "authorize third parties to provide services to park area visitors." *Ibid.* The court found support for its conclusion in the language of the 1998 Act (*ibid.* (citing 16 U.S.C. 5952)), the legislative history of the 1998 Act, NPS's prior administrative interpretation, and the Court of Federal Claims's decision in *YRT Services Corp.*, 28 Fed. Cl. at 392 n.23 (holding that NPS concessions "arrangement does not constitute a procurement"). Pet. App. 28a. The fact that the government "receives monetary compensation or incidental benefits from the concessioners'" provision of services to visitors is insufficient to transform the contracts into procurement contracts. *Id.* at 29a.

SUMMARY OF ARGUMENT

The Secretary of the Interior properly exercised her regulatory authority under the Organic Act and the 1998 Act to issue the regulation stating the Department's long-held view that National Park Service concession contracts are not procurement contracts within the meaning of the Contract Disputes Act and other federal procurement laws. Since creating the Park Service in 1916, Congress has recognized that concession contracts are distinct from procurement contracts, and reaffirmed that distinction in enactments both before and after the CDA. The regulation represents the reasoned judgment of the Secretary based on over 85 years of experience both in administering the NPS concessions program *and* in implementing the requirements of federal procurement law within the jurisdiction of the Department of the Interior. The regulation also reflects the distinction Congress traditionally has drawn between NPS concession contracts and procurement contracts, and closely adheres to the meaning of "procurement contract" clearly established by federal procurement law.

The text of the Contract Disputes Act, consistent statutory and regulatory practice, and contemporaneous, closely related statutes all confirm that the meaning of "procurement" within the CDA is limited to the acquisition, *using government funds*, of "supplies or services * * * by and *for the use of the Federal government*." Ralph C. Nash, Jr. et al., *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* 6 (2d ed. 1998) (emphasis added). That was the meaning Congress gave the word in a related provision enacted just eight months before the CDA, in which it defined "procurement contract" to mean an instrument whose "principal purpose" is the acquisition "of property or services for the direct benefit or use of the Federal Government." 41 U.S.C. 503 (Supp. 1979) (recodified as amended at 31 U.S.C. 6303). Petitioner's facial challenge to the regulation must fail, because NPS concession contracts (much less *all* NPS concession contracts) do not satisfy those requirements. They do not involve the expenditure of government funds, and it has long been recognized that the purpose of concession contracts of all sorts, whether for outfitting, food services, or lodging (and whether or not involving ancillary maintenance and construction work to facilitate provision of those services), is to provide services *to visitors* at national parks, *not to the government*. Although petitioner suggests the government is procuring concessioners' services because their provision to visitors furthers NPS's interest in "provid[ing] for the enjoyment of the [parks]" (16 U.S.C. 1), courts have long held that indirectly advancing the statutory mission of an agency by providing services to a third party is not the sort of "direct benefit or use" that brings a contract within the ambit of procurement law. *E.g.*, *Delta S.S. Lines, Inc.* v. *United States*, 3 Cl. Ct. 559, 569 (1983).

The distinct regulatory scheme Congress has created and maintained for NPS concession contracts confirms that they

are not "procurement contracts" under federal law. In authorizing concession contracts, Congress has used language quite distinct from that in procurement statutes (including specific NPS procurement statutes), and regulated the two types of contracts in markedly different ways. Congress specifically exempted NPS concession contracts from general procurement-law advertising and competition requirements in 1928, but had no general exemption for statutes under which NPS itself procured property or services. The 1998 Act maintains the historical distinction between concession contracts authorized for the provision of services to visitors and procurement of goods and services by NPS itself. In the 1998 Act, Congress provided a separate regulatory scheme for the competitive selection of concessioners, while the procurement of services by the Secretary is subject to regulation under ordinary procurement law. That distinctive regulatory scheme reflects the judgment that "concession contracts * * * do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise." S. Rep. No. 202, 105th Cong., 2d Sess. 39 (1998); accord H.R. Rep. No. 767, 105th Cong., 2d Sess. 43 (1998).

ARGUMENT

THE SECRETARY CORRECTLY DETERMINED THAT CONCESSION CONTRACTS ARE NOT "PROCUREMENT CONTRACTS" UNDER FEDERAL PROCUREMENT LAW

I. THE SECRETARY'S JUDGMENT REGARDING THE NATURE OF CONCESSION CONTRACTS UNDER THE DISTINCT REGULATORY REGIME CREATED BY CONGRESS WARRANTS DEFERENCE

The Secretary acted properly in issuing a regulation setting forth the Department of the Interior's long-held view that National Park Service concession contracts are not

procurement "contracts within the meaning of * * * the Contract Disputes Act" or the other "statutes, regulations, or policies" governing federal procurement. 36 C.F.R. 51.3. That regulation reflects judgments made respecting statutes within the Secretary's regulatory authority—the National Park Service Organic Act, the 1965 Act and the 1998 Act—and concession contracts issued thereunder. Congress has addressed concession contracts repeatedly during the 86-year history of NPS, both before and after passage of the CDA. On each occasion, Congress dealt with concession contracts as a distinct matter, and not as a species of procurement contract. The Secretary's understanding of the distinctive regulatory system that she has overseen for more than eight decades warrants substantial deference.

Based on the Department of the Interior's experience in administering the NPS concessions program, the Secretary determined, first, that "NPS is not paying for the [concessioner's] services but is 'collecting fees in exchange for granting a permit to operate a concession business.'" 65 Fed. Reg. 20,630, 20,635 (2000) (quoting *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (1993)). Second, the Secretary determined that "[t]he purpose of concession contracts is not to procure goods or services for the government," but to "authorize [third parties] to provide accommodations, facilities and services *to visitors* to units of the national park system." 65 Fed. Reg. at 20,635 (quoting 16 U.S.C. 5952) (emphasis added). Based on those determinations, the Secretary concluded that the concession contracts issued under the 1998 Act and the 1965 Act are not properly considered "procurement contracts" for purposes of federal procurement law, including the CDA. That decision was correct.

Congress has vested the Secretary with broad authority to "make and publish such rules and regulations as [she] may deem necessary or proper for the use and management of

the parks, monuments, and reservations under the jurisdiction of the National Park Service." 16 U.S.C. 3; see also 16 U.S.C. 5965. The Department issued the regulation at issue in this case after formal notice and comment to embody NPS's consistently held view that concession contracts are not procurement contracts. Cf. *Barnhart* v. *Walton*, 122 S. Ct. 1265, 1270 (2002) ("[T]his Court will normally accord particular deference to an agency interpretation of 'long-standing' duration."); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996). The regulation represents the reasoned judgment of the Secretary based on years of experience both in administering the NPS concessions program *and* in implementing the requirements of federal procurement law with respect to procurement contracts within the jurisdiction of the Department of the Interior. As discussed below, not only does the Secretary's view reflect the distinction Congress traditionally has drawn between NPS concession contracts and procurement contracts, it also closely adheres to the meaning of "procurement contract" clearly established by federal procurement law. Cf. *NISH* v. *Cohen*, 247 F.3d 197, 203 n.5 (4th Cir. 2001) (although Department of Education, not Department of Defense, had interpretive authority over relevant statute, "DOD's role in implementation of the [statute] is primarily to follow the decisions of [the Department of Education]"). "[T]he well reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort to guidance." *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998). Such views warrant "serious consideration" because of the agency's "unique advantage" stemming from its "its day-to-day efforts to implement its statutory mission." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 334 (4th ed. 2002).

The Secretary's views are also entitled to deference because her practical experience with NPS concession con-

tracts puts her in a unique position to determine whether they generally meet the requirements for procurement contracts, and specifically, whether, given the mission of NPS, they involve the procurement of services *for the government*. These are matters within the particular expertise of the agency. As noted in the context of the Federal Grant and Cooperative Agreements Act, "[t]he mission of the agency will influence the agency's determination" of whether a transaction constitutes "procurement" or not. S. Rep. No. 449, 95th Cong., 1st. Sess. 20 (1977). Agencies "have the flexibility of determining whether a given transaction or class of transactions is procurement," and "the agency's classification of its transactions will become a public statement for public, recipient, and congressional review of how the agency views its mission, its responsibilities, and its relationships with the non-federal sector." *Ibid.*; accord 3 *Report of the Commission on Government Procurement* 165-166 (1972) (*Commission Report*).[6]

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[6] Respondent Xanterra contends that, because Congress did not charge NPS with interpretive authority over the CDA, its regulation is "ultra vires" and void even if reasonable. Xan. Br. 10-19; see also Pet. Br. 11 n.2. That argument is without merit. In the first place, NPS was not directly interpreting the CDA, but rather determining how the special concession statutes it is charged with interpreting interact with the more general provisions of the CDA. In any event, it is well established that agencies may issue interpretive rules "to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). Such rules provide the public notice of the agency's interpretation of "the meaning and requirements of the statute" (*United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973)), inform contractors of the Department's view of the implications of procurement law on programs within its jurisdiction to assist their long-term planning, and inform NPS employees of the procedures to be followed. Although Xanterra faults the court of appeals (Xan. Br. 13-15) for failing to recognize that an "agency's power to promulgate legislative regulations is limited to the authority delegated by

II. NATIONAL PARK SERVICE CONCESSION CONTRACTS ARE NOT PROCUREMENT CONTRACTS UNDER FEDERAL PROCUREMENT LAW, INCLUDING THE CONTRACT DISPUTES ACT

A. The Text And History Of The Contract Disputes Act Demonstrate That It Applies Only To Contracts Involving The Use Of A Government Entity's Funds To Acquire Goods Or Services For Government Use

It is axiomatic that the CDA does not apply to all government contracts. *G.E. Boggs & Assocs., Inc.* v. *Roskens*, 969 F.2d 1023, 1026 (Fed. Cir. 1992). By its own terms, the application of the CDA is "limited" (*ibid.*) to contracts "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." 41 U.S.C. 602(a). Petitioner contends that NPS uses concession contracts to procure "services" and "construction, alteration, repair or maintenance of real property." Pet. Br. 8.

Although the CDA does not define the word "procurement," the word derives a particular meaning as a term of art from the text of the CDA, the historical use of the word

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Congress" (Xan. Br. 12), the court of appeals did not treat Section 51.3 as a legislative regulation, and did not purport to grant the regulation deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841 (1984). The court simply *agreed* with the Secretary's conclusion. See Pet. App. 27a-29a. The cases cited by Xanterra do not suggest the court of appeals' decision was erroneous, because all involve legislative regulations claimed to have the force of law. See *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990); *Motion Picture Ass'n of Am., Inc.* v. *FCC*, 309 F.3d 796, 801-802 (D.C. Cir. 2002); *Atlantic City Elec. Co.* v. *FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002); *Michigan* v. *EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *Kelley* v. *EPA*, 15 F.3d 1100, 1108-1109 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

"procurement" in the context of government contracting, and its use in related statutory and regulatory provisions. Those interpretive tools make clear that a procurement contract involves the procurement of property or services using government funds by and for the direct use of the government.

1. *The Language Of The Contract Disputes Act Indicates That It Applies Only To Transactions Involving The Procurement Of Property Or Services By And For The Federal Government Using Government Funds*

a. In the context of government contracting, the term "procurement contract"[7] applies only to contracts involving the expenditure of a government entity's funds to acquire property or services for the use of the federal government. See generally *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 372 (1986) (following "the rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply"). The most comprehensive dictionary on government contracting specifically defines the term "acquisition" (and the "synonymous term procurement") as "[a]cquiring by contract, *with appropriated funds*, supplies or services (including construction) *by and*

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[7] Petitioner contends that the CDA's reference to a "contract * * * for * * * procurement" is not equivalent to a "procurement contract" because "[t]he word 'procurement' appears in the CDA as a noun, rather than as an adjective describing and limiting the types of contracts entitled to the protection of the statute." Pet. Br. 12. The proposed distinction is illusory. While "procurement" appears in the CDA as a noun, that noun is part of the *adjectival* prepositional phrase "for * * * procurement," modifying the noun "contract." See generally William A. Sabin, *The Gregg Reference Manual* 558 (9th ed. 2001) (noting that a prepositional phrase "may be used as * * * an adjective"). Thus, the terms have identical meaning. Cf. *United States* v. *Poff*, 926 F.2d 588, 591 (7th Cir.) (en banc) (declining to "tease meaning from [a provision's] use of a prepositional phrase rather than an adjective"), cert. denied, 502 U.S. 827 (1991).

for the use of the Federal government." Ralph C. Nash et al., *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* 6 (2d ed. 1998) (emphasis added). That is the meaning Congress adopted when it amended a related procurement law in 1996. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4304(a), 110 Stat. 659 (defining "Federal agency procurement" to "mean[] the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds") (41 U.S.C. 423(f)(4)).

Petitioner argues that the words "procurement" and "contract" each should be read in isolation, rather than in the context of their use in the phrase "contract * * * for * * * procurement" (41 U.S.C. 602(a)) or "procurement contract." Pet. Br. 12. But "it is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Reno* v. *Koray*, 515 U.S. 50, 56 (1995); accord *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). While "procurement" alone means "[t]he act of obtaining, attainment, acquisition" (*Black's Law Dictionary* 1087 (5th ed. 1979)), and "contract" alone means "[a]n agreement * * * which creates an obligation to do or not to do a particular thing" (*id.* at 292-293), the two words together have a far more specific meaning. "Procurement contract" is "[a] government contract with a manufacturer or supplier of goods * * * or services under the terms of which a *sale* is made to the government." *Id.* at 1087 (emphasis added).

That "contract[s] * * * for * * * procurement" (41 U.S.C. 602(a)) are limited to contracts involving payment by the government is confirmed by the text of the CDA itself. The CDA provides for payment of monetary awards in favor

of a contractor out of the Judgment Fund, and in turn provides for the reimbursement to the fund "by the agency *whose appropriations were used for the contract*." 41 U.S.C. 612(c) (emphasis added). The clear implication is that only contracts involving the payment of government funds constitute "procurement."

b. When determining the meaning of undefined terms in the CDA, courts have "look[ed] for guidance to its implementing regulations," *i.e.*, the Federal Acquisition Regulation (FAR), 48 C.F.R. Ch. 1. *H.L. Smith, Inc.* v. *Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995); *Essex Electro Eng'rs, Inc.* v. *United States*, 960 F.2d 1576, 1577, 1580-1581 (Fed. Cir.), cert. denied, 506 U.S. 953 (1992). See generally *Reflectone, Inc.* v. *Dalton*, 60 F.3d 1572, 1579 n.11 (Fed. Cir. 1995) (en banc) (Office of Federal Procurement Policy "ha[s] authority to issue regulations implementing the CDA"). The FAR explicitly defines "procurement" (by cross-reference to "acquisition") as "acquiring by contract *with appropriated funds* of supplies or services * * * *by and for the use of the Federal Government* through purchase or lease." 48 C.F.R. 2.101 (emphasis added). Similarly, "contract" is defined as "a mutually binding legal relationship obligating the seller to furnish the supplies or services * * * and the buyer *to pay for them*." *Ibid.* (emphasis added); accord *Government Contracts Reference Book* 409 (defining "procurement contract" as "those instruments governed by the Federal Acquisition Regulation").[8]

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[8] Tellingly, the 3785-page FAR, which regulates with "oftentimes astonishing specificity[] how the entire contracting process will be conducted" (*Board of Comm'rs* v. *Umbehr*, 518 U.S. 668, 691 (1996) (Scalia, J., dissenting)), mentions concessions only *twice*. 48 C.F.R. 7.503(c)(17)(i) (excluding from the category of "inherently governmental functions" not to be performed by contractors the "[c]ollection of fees * * * from visitors to * * * concessions [and] national parks"); 48 C.F.R.

Petitioner does not seem to dispute that this is the meaning of "procurement" that prevails in other areas of procurement law (see *e.g.*, Pet. Br. 27; Pet. 12 n.2, 15 n.4), but simply contends that a different definition should be applied solely for purposes of the CDA. Far from "mak[ing] government procurement policy *consistent*" (Pet. Br. 11 n.2), the novel definition of "procurement" petitioner proposes would transform NPS concessioners into procurement contractors under the CDA without rendering them subject to *any other* government procurement law. That position is untenable.

2. *Consistent Statutory And Regulatory Practice Confirms That The Contract Disputes Act Applies Only To Contracts Involving The Procurement Of Property Or Services By And For The Federal Government Using Government Funds*

The prevailing definition of "procurement contract" used in the context of government contracting took shape through more than half a century of statutory and regulatory practice. In that context, the term "procurement" consistently has meant the acquisition of personal property or nonpersonal services *using government funds* (typically, appropriated funds) by and *for the use of a federal agency*.

a. *Postwar Procurement Acts.* After the explosion of government procurement during World War II, Congress enacted the Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21 (10 U.S.C. 2302 *et seq.*), as a "comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments." S. Rep. No. 571, 80th Cong., 1st Sess. 2 (1947). In that Act, Congress limited the scope of procurement to "purchases and contracts of supplies and services

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25.601(a)(3)(i)(F) (prohibiting agencies from awarding service contracts for "[a]irport concessions" to countries subject to trade sanctions).

* * * *for the use of any such agency*" and "*to be paid for from appropriated funds*."[9] § 2(a), 62 Stat. 21 (10 U.S.C. 2303(a)) (emphasis added). Two years later, Congress revised the civilian agency procurement regime by enacting the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (41 U.S.C. 251 *et seq.*) which "follow[ed] in structure," and generally was "identical in language with, the Armed Services Procurement Act." H.R. Rep. No. 670, 81st Cong., 1st Sess. 20 (1949); see Pub. L. No. 81-152, § 302(a), 63 Stat. 393 (41 U.S.C. 252(a) and (b)) (providing for procurement "of property and services for the Government"). The first comprehensive regulations implementing those statutes likewise indicated that a "procurement contract" was an agreement for the acquisition of property or services with government funds by and for government use. See 10 C.F.R. 851.102 (1948) (limiting application to "purchases and contracts made * * * for the procurement of supplies or services which obligate appropriated funds"); 41 C.F.R. 1-1.208 (1959) (defining "contract" to mean a "binding legal relation basically obligating the seller to furnish personal property or nonpersonal services * * * and the buyer to pay therefor" and included "commitments which obligate the Government to an expenditure of funds"). Those regulations were still in force when Congress was considering the CDA. See 32 C.F.R. 1-102 (1978); 41 C.F.R. 1-1.208 (1978).

b. *Commission on Government Procurement.* The specific meaning of the term "procurement" was thus well understood by the time Congress created the Commission on

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[9] Although the statute covers purchases "for the use of any [specified] agency *or otherwise*," that language simply "ma[de] the [statute's] coverage complete for supplies or services to be paid for from appropriated funds" by encompassing "one agency purchasing, or making contracts for, the use of other agencies." S. Rep. No. 571, *supra*, at 5-6.

Government Procurement in 1969, and the Act creating the Commission clearly reflected that understanding. The declared purpose of Congress in creating the Commission was "to promote economy, efficiency, and effectiveness in the procurement of goods, services and facilities *by and for the executive branch of the Federal Government*" by establishing policies that would "require the Government to acquire goods, services, and facilities * * * *at the lowest reasonable cost.*" Act of Nov. 26, 1969, Pub. L. No. 91-129, § 1, 83 Stat. 269) (emphasis added). The Report of the Commission on Government Procurement issued in 1972 likewise reflected that "the basic purpose[]" of procurement was "the obtaining of goods and services *for Government use*" and involved "a basic arms-length buyer-seller relationship" under which "the Government's role is * * * of a purchaser." (3 *Commission Report* 162 (emphasis added)); *id.* at 167, table 1 (purpose of procurement is "[p]urchase of product or service for Federal use").

Although petitioner contends that the government "procures" services when it enters into agreements under which third parties perform services (Pet. Br. 19-25) to advance the government's interest in "provid[ing] for the enjoyment of the [parks]" (Pet. Br. 33 (quoting 16 U.S.C. 1) (emphasis omitted)), that was not the Commission's understanding of the meaning of procurement. The Commission explicitly distinguished procurement from other arrangements under which the government provided funding to third parties that were "endeavoring to accomplish congressionally established objectives" with federal assistance (3 *Commission Report* 171) and concluded that such arrangements should not be described as "procurement." *Id.* at 162. It is therefore unsurprising that, although some NPS concession contracts issued at the time of the Commission study required concessioners to undertake millions of dollars of construction activity, to perform maintenance on structures they oper-

ated, and to provide services to park visitors,[10] the exhaustive four-volume, 800-page Commission Report made *no mention* of NPS concessions and never cited the Organic Act or the 1965 Act governing NPS concessions. Indeed, the word "concession" does not even appear in its index. See *Commission Report* Index-Bibliography-Acronyms 1-10, 27-33.

c. *Post-Commission Reforms.* Although petitioner correctly notes that "Congress took the Commission's advice to heart" in passing the Contract Disputes Act of 1978 (Pet. Br. 18), that statute was only one of the enactments that arose from the Commission Report. The other legislative enactments that preceded the CDA unequivocally indicate that Congress understood "procurement" to mean the acquisition of property or services *using government funds* by and *for the use of federal agencies*.

Congress's first step after receiving the Commission Report was the enactment of the Office of Federal Procurement Policy Act of 1974 (OFPP Act), Pub. L. No. 93-400, 88 Stat. 796 (41 U.S.C. 403 *et seq.*), which created the OFPP and charged it with the task of "establishing a system of coordinated, * * * uniform procurement regulations" for the entire executive branch. § 6(d)(1), 88 Stat. 797. In defining the principal scope of the procurement activities that OFPP would supervise, Congress used language

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[10] See Lodging by Respondent Xanterra Parks & Resorts, L.L.C. at 328-330, 345-346 (1969 contract for Grand Canyon National Park requiring concessioner to "undertake an improvement and building program of not less than $5,000,000"); *id.* at 332 (requiring concessioner to "provide all necessary maintenance and repairs"); *id.* at 342 (requiring concessioner to carry insurance); *id.* at 361-363 (1970 contract for Yellowstone National Park requiring concessioner to "undertake an improvement and building program of not less than $1,735,000"); *id.* at 365 (concessioner must "maintain and operate [specified] accommodations"); *id.* at 367 (requiring concessioner to "provide all necessary maintenance and repairs").

strikingly similar to that used four years later in describing the scope of the CDA: OFPP was responsible for setting policy to be "followed by executive agencies in the procurement of—(A) property other than real property in being; (B) services * * * ; and (C) construction, alteration, repair, or maintenance of real property." § 6(a), 88 Stat. 797 (41 U.S.C. 405(a)). Congress reiterated its understanding of the meaning of "procurement" by stating its goal was to promote "economy, efficiency, and effectiveness of procurement *by and for the executive branch of the Federal government*." § 2, 88 Stat. 796 (41 U.S.C. 401 (Supp. 1979)) (emphasis added). Even more significantly, in addition to regulatory authority over "executive agenc[y] * * * procurement" (§ 6(a), 88 Stat. 797), Congress *separately* gave OFPP authority to regulate "executive agencies * * * *providing for* procurement by recipients of federal grants or assistance * * * to the extent required for the performance of federal grant or assistance programs." *Ibid.* (41 U.S.C. 405(i)(1)). By providing that separate authority, Congress clearly indicated that "executive agency * * * procurement" (the same phrase used in the CDA, see 41 U.S.C. 602(a)) does not itself encompass acquisition of goods or services by third parties under the direction of federal agencies, even if the acquisition is "required for the performance" of a federal program. § 6(a), 88 Stat. 797.[11]

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[11] Congress initially limited OFPP's oversight authority to "procurement payable from appropriated funds" (§ 6(c), 88 Stat. 797), but directed OFPP to conduct a study of "procurement payable using nonappropriated funds." *Ibid.* After OFPP delivered the study to Congress in late 1976, Congress eliminated the provision limiting OFPP's jurisdiction to procurement using appropriated funds. See Pub. L. No. 96-83, § 4, 93 Stat. 649 (1979). The study focused on acquisition using the non-appropriated funds *of government groups* known as non-appropriated fund instrumentalities (NAFIs). Conspicuous by its absence from the 400-page "detailed examination of nonappropriated fund * * * procurement"

Just eight months before enacting the CDA, Congress took up another of the Commission's recommendations by enacting the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA), Pub. L. No. 95-224, 92 Stat. 3, which described the "type of basic relationship" Congress "expected between the Federal government and non-federal parties." S. Rep. No. 449, 95th Cong., 1st Sess. 2 (1977). The FGCAA, which originally was codified in the United States Code alongside the CDA, see 41 U.S.C. 501-509 (Supp. 1979) (recodified at 31 U.S.C. 6301-6308), provided that, ordinarily, an executive agency "shall use a * * * procurement contract" in dealing with a nonfederal party "whenever the *principal purpose* of the instrument is the acquisition, by purchase, lease, or barter, of property or services *for the direct benefit or use of the Federal Government.*" 41 U.S.C. 503 (Supp. 1979) (emphasis added) (recodified as amended at 31 U.S.C. 6303). If the principal purpose was "to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition * * * for the direct benefit and use of the Federal Government," ordinarily the agency would use a "grant agreement" or "cooperative agreement." 41 U.S.C. 504, 505 (Supp. 1979) (recodified as amended at 31 U.S.C. 6304, 6305).

d. *The Contract Disputes Act of 1978.* Thus, when Congress enacted the CDA in the Fall of 1978, the meaning of the term "procurement contract" was well established by existing statutes and regulations governing federal procurement. Although the CDA did not explicitly define the

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(Executive Agency Nonappropriated Fund Procurement Study Group, *Study of Procurement Payable From Nonappropriated Funds* 1 (1976) (*Procurement Study*)) was *any mention* of NPS concessions activities requiring millions of dollars of construction activity, maintenance work, and other services. See note 10, *supra*; see *Procurement Study* 337-338 (discussing non-appropriated fund procurement by Department of the Interior).

phrase "contract * * * for * * * procurement" (41 U.S.C. 602(a)), Congress presumably meant to adopt the meaning used elsewhere in federal procurement law: contracts for the procurement of property or services by and *for the use of the federal government* through *the expenditure of a government entity's funds*. "[A] legislative body generally uses a particular word with a consistent meaning in a given context" and it is generally presumed that "whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972); cf. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 613 (1992). It is particularly likely that Congress used the term "procurement" consistently in the OFPP Act, the FGCAA, and the CDA, because the laws were enacted in the space of only a few years as part of a systematic effort at procurement reform. Cf. *Erlenbaugh*, 409 U.S. at 244 (application of the rule of *in pari materia* "certainly makes the most sense when the statutes were enacted by the same legislative body at the same time").

Petitioner errs in contending (Pet. Br. 13-16) that because the CDA only exempted certain types of procurement contracts from its coverage, the CDA should be applied expansively to "almost the entire gamut of government contracts." Pet. Br. 13. While Congress evidently intended to have a single dispute regime for government-wide procurement, it also clearly "intend[ed] to cover" only "*ordinary* procurement * * * contracts." 124 Cong. Rec. 36,267 (1978) (statement of Sen. Byrd) (emphasis added); see also *id.* at 36,264 (statement of Sen. Baker) (excluding certain types of Tennessee Valley Authority contracts because they were not "typical Federal procurement" contracts). Moreover, in light of Congress's passage of specific legislation regulating concession contracts in 1965, it is unclear why those contracts would be presumed to be governed by the more general provisions of the CDA, when Congress never

indicated in the CDA that they would apply and the NPS contracts do not share the basic characteristics of procurement contracts. Petitioner's reliance on the committee reports' general discussion of the CDA's intended "broad application" (Pet. Br. 9-10, 18 (quoting S. Rep. No. 1118, 95th Cong., 2d Sess. 17 (1978)) is misplaced, given that, after those reports were issued, Congress amended the legislation to delete a provision that would have expanded its scope to "any * * * contract or agreement with the United States" which included a provision expressly making the contract "subject to [the CDA's] provisions." S. Rep. No. 1118, *supra*, at 17; H.R. Rep. No. 1556, 95th Cong., 2d Sess. 16 (1978). See Robert T. Peacock, *A Complete Guide to the Contract Disputes Act* 13 (1986).

B. National Park Service Concession Contracts Do Not Come Within The Scope Of The Contract Disputes Act

Thus, to qualify as a "procurement contract," an agreement must (1) provide for the acquisition of personal property or nonpersonal services by and for the direct use and benefit of the federal government; and (2) obligate payment using government funds. Far from being "[i]nsubstantial" (Pet. Br. 26), "whimsical" (*id.* at 29), "formalistic" (*id.* at 28; Xan. Br. 25), or "flimsy" (Xan. Br. 28) distinctions, those requirements arise from the text of the CDA, closely related procurement provisions, and consistent regulatory interpretation. See *G.E. Boggs*, 969 F.2d at 1027 (CDA did not cover contract in which contractor and agency did not have a "relationship * * * of a buyer and a seller"); *Institut Pasteur* v. *United States*, 814 F.2d 624, 627-628 (Fed. Cir. 1987) (CDA did not cover contract in which there was no "buyer-seller relationship" and there was "no obligation on the part of the Government to expend funds"); *Bailey* v. *United States*, 46 Fed. Cl. 187, 211 (2000) (CDA did not cover contract, based in part on fact that "appropriated funds

[were not] to be utilized" under it); *Ervin & Assocs., Inc.* v. *United States*, 44 Fed. Cl. 646, 654 (1999) (noting that "the expenditure of government funds" is a "hallmark[] of a CDA contract").

1. National Park Service concession contracts do not meet those requirements. To begin with, they do not involve the expenditure of government funds: It is undisputed that concessioners *pay the government* for the privilege of operating concessions in national parks.[12] Pet. App. 27a; *id.* at 69a. Petitioner cannot evade the fact that money flows in the opposite direction than under procurement contracts by analogizing concession contracts to the barter arrangements some courts have held to be procurement contracts. See Pet. Br. 28-29. While barter transactions do not require the payment of government funds, they nevertheless do require the government to pay for services through the in-kind exchange of services or "specific property susceptible of valuation." *Institut Pasteur*, 814 F.2d at 628 (quoting *Black's Law Dictionary* 1200 (5th ed. 1979)). But while concessioners

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[12] To be sure, as Xanterra notes (Xan. Br. 26), if a concessioner with a leasehold surrender interest (LSI) in capital improvements ceases providing concession services at a park, and the government is unable to locate a new concessioner to pay the old concessioner the value of the LSI on a timely basis, the government must ensure that the concessioner is reimbursed the value of the LSI. However, those circumstances arise quite infrequently. The fact that, in rare cases, a concessioner will receive a payment from the government (as is *always* the case under procurement contracts) does not alter the reality that the money in concession contracts generally flows in the opposite direction, and does not assist petitioner in this facial challenge. Moreover, because reimbursing the LSI interest to a departing concessioner based on that contingency is not the purpose of entering a concession contract, it cannot be said that a contractual provision providing for such a payment renders the entire agreement a procurement contract for property. See *G.E. Boggs*, 969 F.2d at 1027 n.* (CDA does not cover acquisition of property that is "only incidental to, and not the purpose of those agreements").

provide property or services *to park visitors* under concession contracts, the government provides neither property nor services in exchange, only "access to government-owned properties and the opportunity to earn a profit" (Pet. Br. 28)—in other words, a license or permit. See *Black's Law Dictionary* 829 (5th ed. 1979). But the government's interest in a license before its issuance is not property, but rather a "purely regulatory" interest. *Cleveland* v. *United States*, 531 U.S. 12, 22 (2000). That is certainly true here, where Congress specifically adopted the current concession scheme to prevent "unregulated and indiscriminate use" (16 U.S.C. 5951(a)) and requires the Secretary to emphasize interests in "protecting, conserving and preserving [park] resources" in selecting concessioners. 16 U.S.C. 5952(5).[13]

2. Furthermore, NPS concession contracts are not procurement contracts because they do not involve the procurement of services by and for the government. It has long been observed that "contracts made with [concession] operators in the national parks are made not for the service to be furnished to the Government but for service to be furnished to the public who go to the parks." 69 Cong. Rec. 3710 (1928) (statement of Rep. Cramton). Because concession contracts

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[13] The inclusion of barter transactions within the scope of "procurement" is intended to prevent the ready circumvention through in-kind exchange of procurement laws designed to protect the public fisc—not, as petitioner contends, to sweep into the federal procurement regime every contract under which a private party receives consideration of *any* sort (whether or not property or services, see Pet. Br. 28) in exchange for property or services. The cases cited by petitioner, which involve the in-kind exchange of one readily valued agricultural commodity for another (or in exchange for debt retirement) are inapposite. See *Bartlett & Co. Grain*, No. 86-187-1, 1990 WL 166521 (ASBCA Oct. 18, 1990); *Coffey* v. *United States*, 626 F. Supp. 1246, 1250 (D. Kan. 1986). Petitioner cites no authority for the strained assertion that a government's issuance of a license in exchange for the provision of services to third parties constitutes "barter."

are not for the "principal purpose" of providing goods and services "for the direct benefit or use" of the National Park Service (31 U.S.C. 6303), they are not "procurement contracts" under federal procurement law. See *YRT Servs. Corp.*, 28 Fed. Cl. at 392 n.23 (NPS concession contract "does not constitute a procurement").[14]

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[14] The cases cited by the petitioner (Pet. Br. 25-26, 30) and Xanterra (Xan. Br. 4-5, 27) are not to the contrary. The government itself paid for the services performed in both *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552, 559 (Ct. Cl. 1978) (government paid for shuttle bus to encourage use of mass transit), and *Total Medical Management, Inc.* v. *United States*, 104 F.3d 1314 (Fed. Cir.), cert. denied, 522 U.S. 857 (1997). See 32 C.F.R. 199.1(e) (government to finance medical care using "appropriated funds furnished by the Congress"). And as the Federal Circuit noted in *Total Medical*, the United States also had an enforceable "legal obligation[]" (104 F.3d at 1320) to provide health care to military dependents, making the contract one "for the use of" the United States in providing benefits to its employees. See 10 U.S.C. 1076(a)(1) (stating that "[a] dependent * * * is entitled * * * to the medical and dental care" prescribed by Title 10). Nor are the Armed Service Board of Contract Appeals cases cited by petitioner (see Pet. Br. 25-26 nn.14-18) persuasive authority to the contrary. In only one of the cases was the issue of CDA coverage actually litigated and resolved by the board. See *Hernandez*, No. 53,011, 2000 WL 1844742, at *1 (ASBCA Dec. 12, 2000). There, the ASBCA held the CDA covered an individual's agreement with the Defense Commissary Agency to work as a grocery bagger at one of the agency's grocery commissaries. See *id.* at *8-9. However, the court noted that the "primary function" of the contract was to provide services *to the commissary* (see *id.* at *1-2; *id.* at *8), which was a government-created entity whose primary customers were federal employees and their dependents, not members of the general public as in this case. Likewise, in *Pound* v. *United States,* No. 94-496C (Fed. Cl. Aug. 30, 1996), the applicability of the CDA was not contested. Moreover, the *Pound* court's basis for acquiescing in a claim of CDA jurisdiction was based *not* a "procurement," but on a "disposal of personal property" under 41 U.S.C. 602(a)(4). See *Pound*, slip op. 10 n.2; Pet. App. 99a. Petitioner has not asserted that as a basis for CDA coverage. See Pet. Br. 8.

Although petitioner emphasizes the variety of services concessioners perform under the largest concession contracts (Pet. 22-23), it offers no satisfactory explanation of how the government receives "direct * * * use" (31 U.S.C. 6303) of those services.

Outfitting. Petitioner errs in contending that concession contracts "usually * * * involve the procurement of work related to government-owned facilities." Pet. Br. 8. In fact, most of the approximately 600 NPS concession contracts simply involve the provision of guide or outfitter services (for example, river rafting services).[15] Such operations typically do not use facilities within the park (*id.* at 23 n.10), are responsible for no maintenance, usually both pick up and drop off their customers outside park boundaries, and only use the park as a place to ply their trade. See, *e.g.*, *Concessions Reform: Hearings Before the Subcomm. on National Parks, Forests and Public Lands of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. 141 (1993) (statement of David Brown). Park visitors receive "direct * * * use" of such outfitters' services (31 U.S.C. 6303), and any use or benefit the government receives is ancillary to that. *National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 103d Cong., 1st

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[15] Petitioner and Xanterra likewise err in claiming that the Grand Canyon and Yellowstone contracts, which involve the operation of numerous hotels and other facilities, are "typical" of NPS concession contracts. Pet. Br. 20 & n.8; Xan. Br. 23. In fact, each of the concession contracts specifically discussed by petitioner (Pet. Br. 20 n.8)—for the South Rim of the Grand Canyon, Yellowstone National Park, and Antelope Point in Glen Canyon National Park—is among the small handful of the largest NPS concession contracts. Most concession contracts involve the provision of far fewer services on a much smaller scale. See generally Gov't Lodging 6.

Sess. 44 (1993) ("the customer, in the case of the national parks, [is] the visitor") (statement of J. Richard Hill).

Food, Merchandise, Lodging. Although food and merchandise sales and the provision of lodging typically involve the use of park buildings, the "primary purpose" of concession contracts for those services is the provision of services directly to park visitors at visitor expense. Although concessioners typically are required to maintain the facilities they use, that is secondary to the main purpose of providing service to visitors. Commercial leases typically are subject to similar maintenance requirements, and those are not ordinarily considered to be contracts for maintenance services to the lessor.[16] Cf. *Abernethy* v. *Cates*, 356 S.E.2d 62, 63 (Ga. Ct. App. 1987) (commercial lease provided that tenants were "responsible for maintaining and repairing the leased premises").

Construction of facilities. Petitioner also argues that because some concessioners build or renovate property, the government is procuring construction under those concession contracts. Pet. Br. 23. Since the beginning of the national park system, however, many concessioners have been responsible for building their own facilities, see, *e.g.*,

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[16] The cases cited by Petitioner (Pet. Br. 36) are inapposite. All involved the expenditure of government funds to maintain a building operated by a government entity, rather than a private lessee as here. See *Grunley Constr. Co.*, No. 6327, 1998 WL 835156 (Army Corps Eng'rs BCA Nov. 20, 1998) (Kennedy Center for the Perfoming Arts, a unit of the Smithsonian Institution); *Niko Contracting Co.* v. *United States*, 39 Fed. Cl. 795 (1997) (Cooper-Hewitt Museum, a unit of the Smithsonian Institution), aff'd, 173 F.3d 437 (Fed. Cir. 1998) (Table); *Libra Eng'g Inc.*, No. 1182-17, 1984 WL 13526 (NASABCA July 13, 1984) (Freer Gallery, a unit of the Smithsonian Institution); *J&J Maint., Inc.*, No. 59,984, 2000 WL 199758 (ASBCA Feb. 15, 2000) (military installations). See generally 20 U.S.C. 41 (establishing Smithsonian Institution); 20 U.S.C. 53a (authorizing appropriation of funds for maintenance and repair of buildings).

H.R. Rep. No. 591, 89th Cong., 1st Sess. 7 (1965) (statement of Stewart L. Udall, Secretary of the Interior), and yet historically, it has been recognized that such services were not "to be furnished to the Government but * * * to the public who go to the parks." 69 Cong. Rec. at 3710 (statement of Rep. Cramton) (discussing private developments at Mount Rainier National Park). That is because such buildings are built not for the "principal purpose" (31 U.S.C. 6303) of providing a building for the direct use of a government agency, but because buildings are necessary for concessioners to provide certain facilities to park visitors. Although, as petitioner notes (Pet. Br. 23), the government maintains legal title to improvements—because neither the Organic Act nor the 1998 Act empower the Park Service to cede land to concessioners in national parks—successive concessioners who acquire a leasehold surrender interest in a building retain a compensatory interest in it equal to its depreciated construction cost.

Even if petitioner were correct that some subset of concession contracts were properly considered a procurement of services, petitioner's "facial challenge[]" (Pet. C.A. Br. 13-14) to 36 C.F.R. 51.3 still must fail. Petitioner and respondent Xanterra do not challenge a particular application of the regulation. "To prevail in such a facial challenge," petitioner "must establish that no set of circumstances exists under which the [regulation] would be valid." *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)); accord *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("That the regulation may be invalid as applied * * * does not mean the regulation is facially invalid because it is without statutory authority."). Petitioner has not made—and cannot make—the showing that "*every* NPS concessions contract" is a procurement contract. Pet. Br. 37. Most of the approximately 600 NPS concession contracts require neither

construction nor upkeep of government-owned facilities; most require only that the concessioner operate for the term of the agreement.[17] Some do not require concessioners to provide services, but merely *permit* them to do so. For example, one typical concession contract provides as follows: "Required Services: None. Authorized Services: Sport hunting guide services within [specified] portion of Denali National Preserve." See Gov't Lodging 16 (Concession Contract No. CC-DENA904-02). Many concession permits issued under the 1965 Act (which come within the NPS definition of "concession contracts," see 65 Fed. Reg. at 20,635; J.A. 167) likewise do not require the provision of services. See Gov't Lodging 52 (NPS concession permit No. LP-WRST-016-98, for outfitter services in Wrangell-St. Elias National Park and Preserve). And as Xanterra evidently acknowledges (Xan. Br. 22-23), contracts and permits that do not require the provision of services are not procurement contracts, even under the expansive definition of the term it advocates. See *Crystal Cruises, Inc.*, No. B-238, 1990 WL 277630, at *1 (Feb. 1, 1990) (concession permit for cruise-ship entry into park "is not a procurement of property or services") aff'd on reconsideration, 1990 WL 278100 (Comp. Gen. June 14, 1990).

Although petitioner suggests that concessioners' provision of services to park visitors constitutes a procurement because it furthers NPS's interest in "provid[ing] for the enjoyment of the [parks]" (Pet. Br. 33 (quoting 16 U.S.C. 1) (emphasis omitted)), furthering the statutory mission of an agency by permitting a third party's provision of services to the public is not the sort of "direct benefit or use" (31 U.S.C. 6303) required under procurement law. Just a few years

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[17] See, *e.g.*, Gov't Lodging 61 (NPS concession permit CP-OZAR025-97 allows rental of up to 60 canoes and 150 inner tubes on the Ozark National Scenic Riverways; no maintenance required).

after the passage of the CDA, the Claims Court rejected a similar argument in a case involving the provision of subsidies for U.S.-built and -flagged ships, which took place under a program based on a congressional finding that the existence of such ships was "necessary for the national defense" for use during national emergencies. As the court noted in rejecting the claim, Congress intended the CDA to cover only "*the conventional contract for the direct procurement of property, services and construction, to be used directly by the Government*." *Delta S.S. Lines, Inc.* v. *United States*, 3 Cl. Ct. 559, 569 (1983) (emphasis added); *Blanco-Mora Enters., Inc.*, No. 94-5-136-C5, 1994 WL 248163, at *10 (HUDBCA June 10, 1994) (agreement under which landlord made housing available at reduced rents to low-income tenants in exchange for federal mortgage insurance, and agreement to pay rent subsidies to landlords for tenants, not covered by CDA; "improved availability of housing" for the poor "is, at most, an indirect benefit" to HUD) (collecting authorities); see generally *New Era Constr.* v. *United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989).[18] If petitioner were correct that the acquisition of

[18] Petitioner cites Congress's provision for CDA review for the Long-Term Care Security Act of 2000 as an indication that the "CDA applies to contracts that are not for the direct benefit of the government." Pet. Br. 30. However, Congress is free to provide for CDA coverage of new categories of contracts by specific legislation. Indeed, Congress's explicit discussion of the CDA in the Act may be an indication of doubt that the CDA would have applied of its own terms. Cf. Pub. L. No. 100-472, Tit. II, § 206, 102 Stat. 2294 (1988) (adding provision stating that "[t]he Contract Disputes Act * * * shall apply to self-determination contracts"); see S. Rep. No. 274, 100th Cong., 2d Sess. 34-35 & n.26 (1988) (noting that amendment was designed to overrule court decision holding that such contracts were not covered by CDA). In any event, the Long-Term Care Security Act expressly provides a benefit (insurance) to government employees and their dependents, and in that regard provides employee welfare services akin to those traditionally covered by the CDA.

property or services by third parties that generally furthers federal objectives constitutes "executive agency * * * procurement" (41 U.S.C. 602(a)), it would drastically expand the scope of federal procurement law.[19]

3. The Interior Board of Contract Appeal (IBCA) cases petitioner cites (Pet. Br. 24; see also Xan. Br. 4-6) are not persuasive authority that concession contracts are subject to the CDA. To begin with, the decisions of agency boards on questions of law are not binding on any federal court. *B.D. Click Co.* v. *United States*, 614 F.2d 748, 752 (Ct. Cl. 1980); 41 U.S.C. 609(b). Moreover, as the court of appeals correctly observed, the IBCA's "rationale for determining that concession contracts are procurement contracts is flawed." Pet. App. 28a. The first of the opinions, *R & R Enterprises*, No. 2417, 1989 WL 27790 (IBCA Mar. 24, 1989), was based on three manifestly false premises. First, as the court of appeals noted (Pet. App. 28a), the IBCA incorrectly believed that the CDA covered not only specific categories of "contracts * * * for * * * procurement" (41 U.S.C. 602(a)), but also all "procurement-*type activities*" *unless specifically excluded by statute.* 1989 WL 27790, at *24 (emphasis added). But the CDA does not extend to "procurement-*type*" contracts, and in light of Congress's specific attention to NPS concession contracts both before and after passage of

[19] Under petitioner's definition, for example, the CDA would include plea agreements under which the government "obtained" the "services" of a criminal defendant as a witness. But cf. *Janowsky* v. *United States*, No. 92-5004, 1993 WL 36863, at *2-3 (Fed. Cir. Feb. 17, 1993) (agreement to perform as confidential informant not covered by CDA). Similarly, an agreement for a corporation to infuse assets into a failing financial institution in exchange for the government's agreement to permit that corporation to treat "supervisory goodwill" as a capital asset for a certain period would seem to be included. But see *Winstar Corp.* v. *United States*, 21 Cl. Ct. 112, 117 (1990) (agreement not covered by CDA), aff'd, 64 F.3d 1531 (Fed. Cir. 1995), aff'd, 518 U.S. 839 (1996).

the CDA, there is no warrant for presumptively sweeping that distinct category of contracts within the terms of the CDA.

Second, without examining the meaning of "procurement contracts" in government contract law, or analyzing the text of any of the relevant NPS concession or government procurement statutes, the IBCA created a false dichotomy by assuming that contracts involving acquisition must either be a federal assistance program under the FGCAA or a procurement contract covered by the CDA. 1989 WL 27790, at *24. Because the government disavowed any interest in "assisting" the concessioner under the FGCAA, the IBCA assumed that the government's "sole contractual purpose *must therefore be* to 'acquire' the services of a private contractor * * * to provide goods or services to the general public." *Ibid.* (emphasis added). The board paid no heed, however, to FGCAA's language stating that procurement contracts must be for the "direct benefit or use" of the agency. Finally, the IBCA simply assumed, without citing to any statute, regulation, evidence in the administrative record, or historical practice, that NPS concession contracts were "for services that the Government itself would otherwise provide." *Id.* at *25. However, NPS has not traditionally provided services of the sort offered by concessioners and is not required to provide concession services at parks. Indeed, concession services are not offered at *most* properties administered by NPS.[20] See Gov't Lodging 6. Both *National Park Concessions, Inc.*, No. 2995, 1994 WL 462401 (IBCA Aug. 18, 1994), and *Watch Hill Concession*,

[20] The decision in *Starfleet Marine Transportation*, No. B-290, 2002 WL 1461877, at *5 (Comp. Gen. July 5, 2002), cited by petitioner (Pet. Br. 36), similarly erred by assuming that NPS "might otherwise have had to purchase or perform [concession services] itself" in determining that concession contracts were procurement contracts.

Inc., No. 4284-2000, 2001 WL 170911 (IBCA Feb. 16, 2001), (written by the author of *R&R Enterprises*) rest principally on that flawed decision.

C. Concession Contracts Do Not Implicate The Purposes That Animated The Contract Disputes Act

Congress enacted the CDA to implement two central recommendations of the Commission on Government Procurement to correct specific flaws in the then-existing disputes resolution system. First, as petitioner notes (Pet. 18, 19), Congress allowed contractors to bypass administrative proceedings in favor of going directly to the U.S. Claims Court (as it was then known) for a "fully judicialized totally independent forum." S. Rep. No. 1118, *supra*, at 11; see 41 U.S.C. 609(a)(1). Second, Congress provided contractors prejudgment interest, in recognition of the fact that contractors were ordinarily required to continue performing under the contract during the pendency of any dispute, and, even if successful, ordinarily would receive payment only at the end of the dispute. 41 U.S.C. 611; see also 4 *Commission Report* 3, 29, 31-32. Justifying that extraordinary remedy, Congress emphasized the "unique" (S. Rep. No. 1118, *supra*, at 32) position of contractors providing goods and services to the government under procurement contracts:

> [T]hey have been required by the language of the contract * * * to perform the work as directed by the government without stopping to litigate. * * * *Since the contractor has been compelled to perform the work with its own money—in the total absence of contract payments or progress payments*—there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. The cost of money to finance this additional work while pursuing

> the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.

Ibid. (emphasis added).

Neither of those concerns is implicated here. Contrary to petitioner's claims, recognition of the fact that the CDA does not encompass NPS concession contracts will not deny contractors procedural "due process protections" (Pet. Br. 19) nor "direct access to courts." *Id.* at 18. Whether a concession contract is covered by the CDA or not, the claimant has, in either U.S. District Court or the Court of Federal Claims, access to a "fully judicialized totally independent forum" for the resolution of disputes arising out of the concession contract. S. Rep. No. 1118, *supra*, at 11 (quoting 4 *Commission Report* 23-24). Aside from congressionally mandated arbitration of certain issues under the 1998 Act, see 16 U.S.C. 5954(b)(2) (respecting value of possessory interest under 1965 Act); 16 U.S.C. 5956(b) (respecting adjustment of franchise fee), a concessioner would be able to bring claims relating to a contract in federal court under the Tucker Act or Little Tucker Act. See *YRT Servs. Corp.*, 28 Fed. Cl. at 370 n.2; *Bailey* v. *United States*, 46 Fed. Cl. at 211-212 (although the alleged agreement "falls outside the reach of the CDA" it was "within Tucker Act contract jurisdiction"). Indeed, some courts have permitted review of concessioners' claims in District Court under federal-question jurisdiction. See, *e.g.*, *Hamilton Stores, Inc.* v. *Hodel*, 925 F.2d 1272, 1277-1278 (10th Cir. 1991); *Fort Sumter Tours, Inc.* v. *Andrus*, 564 F.2d 1119, 1124 (4th Cir. 1977). NPS concessioners, then, regardless of the CDA's applicability, will have their "right to a day in court." S. Rep. No. 1118, *supra*, at 11.

Nor do concession contracts implicate Congress's rationale for providing prejudgment interest. Concessioners are not in the "unique" (S. Rep. No. 1118, *supra*, at 32) position

of contractors providing goods or services under a procurement contract, who ordinarily must obtain financing to continue performing, without payment, during the pendency of the dispute. Concessioners can continue to operate (and collect revenues from park visitors) during the pendency of disputes unless and until the contract has been terminated. Of course, concessions operations may be suspended "to protect [park] visitors or to protect, conserve and preserve [park] resources" (J.A. 107; see also 65 Fed. Reg. at 26,072; *id.* at 44,905; *id.* at 44,916), or terminated (after a contractually prescribed cure period) to protect visitors or resources or for material breach. See J.A. 107-108; 65 Fed. Reg. at 26,072; *id.* at 44,905; *id.* at 44,916-44,917. But suspension and termination obviate the duty to continue performance. Furthermore, suspensions in operations have been quite rare, and terminations rarer still. Thus, far from "be[ing] compelled to perform the work with its own money—in the total absence" of payments (S. Rep. No. 1118, *supra*, at 32), during the pendency of most concession contract disputes, concessioners will continue to earn revenue.

D. Recognizing That The CDA Does Not Cover Concession Contracts Will Not Lead To Abuses

Petitioner and Xanterra argue that, if their claims are rejected, agencies would be "entirely at liberty to manipulate" (Pet. Br. 29; see also *id.* at 19; Xan. Br. 1) the terms of payment under their contracts and could "freely * * * exempt themselves from[] the CDA," posing "mortal dangers to the CDA regime." Xan. Br. 1. That concern is illusory. To begin with, the definition of procurement petitioner resists undisputedly applies throughout the rest of procurement law, most notably the FAR. See Pet. Br. 27. If petitioner were correct that agencies are able to manipulate the funding of procurement programs, the burden of compliance with the detailed provisions of FAR would provide a

far greater incentive to do so than the mere prospect of paying prejudgment interest on some future contract claims (the only substantive difference stemming from CDA coverage, from agencies' viewpoint). Furthermore, if petitioner's concerns were valid, such abuses presumably would already be widespread, because courts have been making this very distinction for years. See, *e.g.*, *YRT Servs.*, 28 Fed. Cl. at 392 n.23; *Institut Pasteur*, 814 F.2d at 627-628.

Petitioner's failure to point to any real-world examples of such abuse demonstrates the second flaw in its argument: There simply is not significant opportunity for manipulation. There are very few circumstances under which the government now purchases goods or services under which contractors would be willing to provide them at no cost (or to pay the government to provide them). Cf. *Notices: Office of Management and Budget*, 55 Fed. Reg. 45,893, 45,894 (1990) (noting low likelihood of receiving offers to pay the government to perform required services). Whatever the risk of manipulation generally, it is not present in this case. This case does not involve an agency's recent effort to avoid procurement laws by structuring transactions in a novel way. Rather, Congress itself created, and has maintained, a distinct regime under which private parties provide services to park visitors at private expense through concession contracts. See *ibid.* (distinguishing between when services "would, under normal circumstances, be expected to be paid for by the Government from appropriated funds" and "contracts which do not evolve from the appropriation process (*e.g.*, * * * *concessions*)") (emphasis added).

III. CONGRESS'S HISTORICALLY DISTINCT REGULATORY SCHEME FOR NPS CONCESSIONS CONFIRMS THAT CONCESSION CONTRACTS ARE NOT "PROCUREMENT CONTRACTS" UNDER FEDERAL PROCUREMENT LAW

A. Congress Has Historically Distinguished Between NPS Concession Contracts And Procurement Contracts

Congress traditionally has drawn a distinction between concession contracts for the provision of services to park visitors and the procurement of services or property by the Park Service itself. In 1927, the Comptroller General rendered a decision holding that concession contracts let by the Department of the Interior came within the general federal procurement law requiring public advertising and competitive bidding for "[a]ll purchases and contracts for supplies and services." Rev. Stat. § 3709 (1875); see also Rev. Stat. § 3710 (1875). Congress acted promptly to reverse the "strained" decision of the Comptroller General (*Interior Department Appropriation Bill: Hearings Before a Subcomm. of the Senate Comm. on Appropriation*, 70th Cong., 1st Sess. 180 (1928) (statement of Sen. Hayden)) by amending the Organic Act to make clear that concession contracts were not subject to the existing procurement laws. Congress authorized the Secretary to grant "said privileges, leases, and permits" to permit visitor facilities and services in the national parks and to "enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids." Act of Mar. 7, 1928, ch. 137, § 1, 45 Stat. 235. The sponsor of the legislation explained that application of the general procurement law was inappropriate because "*contracts made with these operators in the national parks are made not for the service to be furnished to the Government but for*

service to be furnished to the public who go to the parks." 69 Cong. Rec. at 3710 (statement of Rep. Cramton) (emphasis added).

Congress traditionally has used markedly different language when authorizing NPS to procure goods or services on its own behalf, distinguishing between concession contracts "grant[ing] privileges, leases, and permits * * * for accommodation of [park] visitors" for the public benefit, and "contract[s] for services" and goods to be provided directly to the government. The 1965 Act, like the Organic Act, did not speak in terms of the government procurement of services, but simply authorized the Secretary to "take such action as may be appropriate to encourage and enable * * * concessioners[] to provide and operate facilities * * * for the accommodation of visitors." 16 U.S.C. 20a (1994). By contrast, procurement statutes involving the Park Service plainly speak of acquiring, procuring, "contract[ing] for," or "hir[ing]" services for NPS. See, *e.g.*, 16 U.S.C. 1a-2(f) (authorizing Secretary to "[a]cquire * * * air-conditioning units for any Government-owned passenger motor vehicles used by the National Park Service"); 16 U.S.C. 17i (authorizing Secretary to "hire * * * work animals and animal-drawn and motor-propelled vehicles"). See Act of May 26, 1930, ch. 324, § 3, 46 Stat. 382 (authorizing the Secretary to "contract for services" with concessioners "for the furnishing of * * * services or accommodations *to the Government*" when NPS officials were visiting national parks) (emphasis added) (16 U.S.C. 17b); 72 Cong. Rec. 9159 (1930) (statement of Horace M. Albright, Director of NPS); H.R. Rep. No. 948, 71st Cong., 2d Sess. 3 (1930). The Secretary specifically noted that distinction in promulgating Section 51.3. See 65 Fed. Reg. at 20,635; J.A. 165.

B. The Text Of The 1998 Act Reflects The Historical Distinction Between Concession Contracts And Procurement Contracts

The language of the 1998 Act likewise reflects the distinction between concession contracts and the procurement of services for NPS. The Act provides that "the Secretary shall utilize concession contracts to authorize private entities to provide accommodations, facilities and services to visitors to areas of the National Park System." Pub. L. No. 105-391, § 403, 112 Stat. 3504 (16 U.S.C. 5952). That language differs from procurement statutes in two significant respects. First, in keeping with Congress's traditional practice in authorizing NPS concessions, it speaks in terms of authorizing third parties to "provide" visitor accommodations, facilities and services. In contrast, the two basic government procurement statutes—the Armed Services Procurement Act of 1947, 10 U.S.C. 2302 *et seq.*, and the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 251 *et seq.*—directly authorize "[t]he head of an agency" to "provide for *the procurement of property or services*." 10 U.S.C. 2304(b)(1); accord 10 U.S.C. 2304(b)(2); 41 U.S.C. 252(a) ("[e]xecutive agencies shall make purchases and contracts for property and services" in accordance with provisions of particular subchapter of Title 41); 41 U.S.C. 253(b)(1) ("[a]n executive agency may provide for the procurement of property and services"). The difference is telling.[21]

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[21] Petitioner notes (Pet. Br. 6) that the 1998 Act contains an express exemption from the statutory requirement that "the leasing of buildings and properties shall be for a money consideration only" (40 U.S.C. 303b (2002), recodified at 40 U.S.C. 1302), and which explicitly prohibits reduction in rents for tenants who perform repairs to a structure. Although petitioner implies that that specific exemption suggests Congress intended concession contracts to be covered by the CDA, its inclusion will not bear that inference. Section 303b would of its own terms explicitly have applied to some concessions, which may involve a form of "lease."

Second, the 1998 Act specifically provides that those services will be provided to someone *other* than the government, *i.e.*, "*to visitors*." In stark contrast, procurement statutes commonly specify that the property or service will be "procure[d] *by [the] agenc[y]*, *for its use*." See, *e.g.*, 10 U.S.C. 2303(a) (emphasis added); 41 U.S.C. 5 ("purchases and contracts for supplies or services *for the Government* may be made" under specified circumstances) (emphasis added); 41 U.S.C. 252(b) (setting forth policy that a portion of the "total purchases and contracts for property and services *for the Government*" shall be placed with small businesses) (emphasis added). Cf. 31 U.S.C. 6303 (procurement contracts are for "direct benefit or use of the United States Government").

That Congress intentionally drew the concessions provision of the 1998 Act to distinguish concession contracts from procurement contracts is plain from other provisions of the 1998 Act. In response to concerns that some NPS employees lacked technical business skills to administer the concessions program effectively, the 1998 Act authorized the Secretary to "[c]ontract[] for services" to "conduct or assist" in the management of the concessions program and "to assist the Secretary" with specified aspects of the program. 16 U.S.C. 5959(a)(1) and (2). That provision both uses conventional procurement language, cf. 41 U.S.C. 5 (authorizing "contracts * * * for services"); 41 U.S.C. 252(b) (same), and plainly indicates that those services are obtained by and for the use of NPS. Congress presumably was aware of the historic distinction it had drawn between the authorization of third parties to provide services to visitors and the direct procurement of goods and services by NPS, and intended to

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There was no need for a similar textual provision to exclude concession contracts from the scope of the CDA, which does not by its own force apply to them.

employ that distinction in the Act. See *Erlenbaugh*, 409 U.S. at 244 ("whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject").[22]

The implication is clear. As the committee reports of the 1998 Act stated, "concession contracts * * * do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise." S. Rep. No. 202, 105th Cong., 2d Sess. 39 (1998); accord H.R. Rep. No. 767, 105th Cong., 2d Sess. 43 (1998).

C. Congress Has Ratified The National Park Service's Long-Held View That NPS Concession Contracts Are Not Procurement Contracts Under Federal Procurement Law

Although respondent Xanterra disparages the expressions of congressional intent in the 1998 Act's committee reports to be mere "orphaned statement[s]" that were "planted in the * * * legislative history," Xan. Br. 28, they actually reflect Congress's awareness of and agreement with NPS's longstanding interpretation of the role of concession contracts in the procurement system and ratification of it. Shortly after Congress first began hearings on the legislation that ultimately became the 1998 Act, NPS amended its definition of concession contract to "clarif[y] the status of concession contracts, which NPS has never considered a

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[22] Other aspects of the 1998 Act are also inconsistent with the notion that concession contracts are a type of procurement subject to the CDA. For example, Congress provided that two of the most likely subjects of dispute—valuation of possessory interests under the 1965 Act and adjustments in franchise fees—would be subject to binding arbitration. 16 U.S.C. 5954(b)(2) (possessory interest), 5956(b) (franchise fees). Although (if petitioner is correct) such disputes would have been subject to resolution in administrative board of contract appeals hearings or in court, neither the 1998 Act nor its legislative history mentions the CDA or any reason why Congress would have decided not to apply usual CDA procedures in this instance.

type of federal procurement contract." 57 Fed. Reg. at 40,498; see also 36 C.F.R. 51.1 (1993); Gov't Lodging 2. Because the 1992 NPS regulations also included provisions to increase competition in concession contracting, the regulations were a frequent topic of hearings and committee reports.[23] Although most of the discussion of the regulations concerned preferential renewal rights and possessory interests in property, the record clearly indicates that the regulations as a whole were reviewed by Congress in considering the reforms that became the 1998 Act. *E.g.*, *National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, *supra*, at 54 (statement of Sen. Bumpers).

Moreover, one of the central concerns before Congress in developing the legislation that became the 1998 Act was how closely concession contracting—which historically had not been subject to general procurement laws—should follow the model of competitive procurement. See, *e.g.*, S. Rep. No. 202, *supra*, at 20; H.R. Rep. No. 767, *supra*, at 21-22. As part of the 1998 Act, Congress eliminated the concession contracts' statutory exemption from requirements of advertisement and competitive bidding. See Pub. L. No. 105-391, Tit. IV, § 415(b)(1), 112 Stat. 3515 (1998). But in creating a replace-

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[23] See, *e.g.*, *National Park Service Concessions Policy Reform Act of 1991: Hearings Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, 102d Cong., 2d Sess. 31-32 (1992); *id.* at 37-38, 44, 63 (noting "considerable dialogue" on 1992 regulations) (statement of James D. Santini); *id.* at 64-66, 126, 189-193; *National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, *supra*, at 24-25, 54 (statement of Sen. Bumpers); H.R. Rep. No. 767, *supra*, at 22; S. Rep. No. 202, *supra*, at 20.

ment for the old system of concessioner selection, Congress rejected the procurement model (cf. 10 U.S.C. 2304(a)(1); 41 U.S.C. 253(a)(1)) in favor of a unique regulatory system that "subordinate[d]" monetary considerations to the "objectives of protecting, conserving, and preserving" park resources and making services available "to the public at reasonable rates." 16 U.S.C. 5952(5)(A)(iv). That was based in part on considerable testimony from NPS officials, environmentalists, and concessioners themselves arguing that the procurement model was inappropriate in the concessions context. The chairman of the Conference of National Park Concessioners (as petitioner NPHA was then named, see *National Park Service Concessions Policy Reform Act of 1993: Hearing Before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources*, *supra*, at 38) urged Congress to reject the procurement model and instead to consider concessioners akin to a "regulated utility" providing goods and services to the public under NPS supervision. *National Park Concessions Measures: Hearing Before the Subcomm. on National Parks and Public Lands of the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. 92 (1991) (statement of Rex Maughan) ("should the National Park Service be made to conduct the contracting for concessions in the same way GSA would order paper clips or elastic bands for the government? * * * Or is contracting with the National Park Service more analogous to a highly regulated utility * * *? Clearly, the history of National Park concessions indicates that the latter is more clearly what has been sought and for good reason."). Other industry witnesses likewise echoed the theme that concessioners should be considered akin to "public utilities" providing "goods and services[] for visitors to national parks." *National Park Service Concessions Policy Reform Act of 1991: Hearings Before the Subcomm. on Public Lands, National Parks and*

Forests of the Senate Comm. on Energy and Natural Resources, 102d Cong., 2d Sess. 76 (1992) (statement of George E. Campsen, Jr.). And in discussing the need for competition, one of the sponsors of the Competition in Contracting Act (a statute that, like the CDA, grew out of the recommendations of the Commission on Government Procurement) explicitly drew a distinction between "the Government's acquisition of goods and services" under the procurement laws and "the Government's contracts with concessionaires who bid for the right to provide goods and services *to the millions of people who visit our national parks every year*." 140 Cong. Rec. 5518 (1994) (statement of Sen. Cohen) (emphasis added).

In light of this history, the only reasonable interpretation is that, in passing the 1998 Act without changing NPS's existing regulation that concession contracts are "not federal procurement contracts or permits within the meaning of statutory or regulatory requirements applicable to federal procurement actions" (57 Fed. Reg. at 40,503), Congress ratified that understanding. Cf. *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) ("when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress"); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). The statements in the committee reports thus were not isolated statements "planted" (Xan. Br. 28) by a congressional staffer, but reflected Congress's conscious design, apparent in the particular language Congress chose for the separate concession and procurement sections of the 1998 Act, that the Act and regulations issued thereunder *alone* governed concession contracts. As both committees indicated, "the policies and procedures of this title as implemented by the Secretary's regulations"—and not federal procurement law—"are the governing require-

ments for concession contracts." S. Rep. No. 202, *supra*, at 39; accord H.R. Rep. No. 767, *supra*, at 43.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ADDENDUM

1. 16 U.S.C. 1 provides:

Service created; director; other employees

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall have substantial experience and demonstrated competence in land management and natural or cultural resource conservation. The Director shall select two Deputy Directors. The first Deputy Director shall have responsibility for National Park Service operations, and the second Deputy Director shall have responsibility for other programs assigned to the National Park Service. There shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

2. 16 U.S.C. 3 provides:

Rules and regulations of national parks, reservations, and monuments; timber; leases

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2 and 4 of this title shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months, or both, and be adjudged to pay all cost of the proceedings. He may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations. No natural,[1] curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public: *Provided, however*, That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park, monument, or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park: *And provided further*, That the Secretary of the Interior may grant said

[1] So in original.

privileges, leases, and permits and enter into contracts relating to the same with responsible persons, firms, or corporations without advertising and without securing competitive bids: *And provided further*, That no contract, lease, permit, or privilege granted shall be assigned or transferred by such grantees, permittees, or licensees without the approval of the Secretary of the Interior first obtained in writing.

3. 16 U.S.C. 5951 provides:

Congressional findings and statement of policy

(a) Findings

In furtherance of sections 1, 2, 3, and 4 of this title, which directs[2] the Secretary to administer units of the National Park System in accordance with the fundamental purpose of conserving their scenery, wildlife, and natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation and conservation of park resources and values requires that such public accommodations, facilities, and services as have to be provided within such units should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that—

(1) visitation will not unduly impair these resources and values; and

(2) development of public accommodations, facilities, and services within such units can best be limited to locations that are consistent to the highest practicable degree with the preservation and conservation of the resources and values of such units.

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[2] So in original.

(b) Policy

It is the policy of the Congress that the development of public accommodations, facilities, and services in units of the National Park System shall be limited to those accommodations, facilities, and services that—

(1) are necessary and appropriate for public use and enjoyment of the unit of the National Park System in which they are located; and

(2) are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the unit.

4. 16 U.S.C. 5952 provides in pertinent part:

Award of concessions contracts

In furtherance of the findings and policy stated in section 5951 of this title, and except as provided by this subchapter or otherwise authorized by law, the Secretary 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. Such concessions contracts shall be awarded as follows:

(1) Competitive selection process

Except as otherwise provided in this section, all proposed concessions contracts shall be awarded by the Secretary to the person, corporation, or other entity submitting the best proposal, as determined by the Secretary through a competitive selection process. Such competitive process shall include simplified procedures for small, individually-owned, concessions contracts.

(2) Solicitation of proposals

Except as otherwise provided in this section, prior to awarding a new concessions contract (including renewals or extensions of existing concessions contracts) the Secretary shall publicly solicit proposals for the concessions contract and, in connection with such solicitation, the Secretary shall prepare a prospectus and shall publish notice of its availability at least once in local or national newspapers or trade publications, and/or the Commerce Business Daily, as appropriate, and shall make the prospectus available upon request to all interested parties.

* * * * *

(5) Selection of the best proposal

(A) In selecting the best proposal, the Secretary shall consider the following principal factors:

(i) The responsiveness of the proposal to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities and services to the public at reasonable rates.

(ii) The experience and related background of the person, corporation, or entity submitting the proposal, including the past performance and expertise of such person, corporation or entity in providing the same or similar facilities or services.

(iii) The financial capability of the person, corporation, or entity submitting the proposal.

(iv) The proposed franchise fee, except that consideration of revenue to the United States shall be subordinate to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities to the public at reasonable rates.

(B) The Secretary may also consider such secondary factors as the Secretary deems appropriate.

(C) In developing regulations to implement this subchapter, the Secretary shall consider the extent to which plans for employment of Indians (including Native Alaskans) and involvement of businesses owned by Indians, Indian tribes, or Native Alaskans in the operation of a concession, contracts should be identified as a factor in the selection of a best proposal under this section.

* * * * *

5. 16 U.S.C. 5954 provides in pertinent part:

Protection of concessioner investment

* * * * *

(b) Special rule for existing possessory interest

(1) A concessioner which has obtained a possessory interest as defined pursuant to Public Law 89-249 (commonly known as the National Park Service Concessions Policy Act; 16 U.S.C. 20 et seq.), as in effect on the day before November 13, 1998, under the terms of a concessions contract entered into before November 13, 1998, shall, upon the expiration or termination of such contract, be entitled to receive compensation for such possessory interest improve-

ments in the amount and manner as described by such concessions contract. Where such a possessory interest is not described in the existing contract, compensation of possessory interest shall be determined in accordance with the laws in effect on the day before November 13, 1998.

(2) In the event such prior concessioner is awarded a new concessions contract after the effective date of this subchapter replacing an existing concessions contract, the existing concessioner shall, instead of directly receiving such possessory interest compensation, have a leasehold surrender interest in its existing possessory interest improvements under the terms of the new contract and shall carry over as the initial value of such leasehold surrender interest (instead of construction cost) an amount equal to the value of the existing possessory interest as of the termination date of the previous contract. In the event of a dispute between the concessioner and the Secretary as to the value of such possessory interest, the matter shall be resolved through binding arbitration.

* * * * *

6. 16 U.S.C. 5956 provides in pertinent part:

Franchise fees

(a) In general

A concessions contract shall provide for payment to the government of a franchise fee or such other monetary consideration as determined by the Secretary, upon consideration of the probable value to the concessioner of the privileges granted by the particular contract involved. Such probable value shall be based upon a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract. Consideration of revenue to the United States shall be subordinate to the objectives of

protecting and preserving park areas and of providing necessary and appropriate services for visitors at reasonable rates.

(b) Amount of franchise fee

The amount of the franchise fee or other monetary consideration paid to the United States for the term of the concessions contract shall be specified in the concessions contract and may only be modified to reflect extraordinary unanticipated changes from the conditions anticipated as of the effective date of the contract. The Secretary shall include in concessions contracts with a term of more than 5 years a provision which allows reconsideration of the franchise fee at the request of the Secretary or the concessioner in the event of such extraordinary unanticipated changes. Such provision shall provide for binding arbitration in the event that the Secretary and the concessioner are unable to agree upon an adjustment to the franchise fee in these circumstances.

* * * * *

7. 16 U.S.C. 5959 provides in pertinent part:

Contracting for services

(a) Contracting authorized

(1) To the maximum extent practicable, the Secretary shall contract with private entities to conduct or assist in those elements of the management of the National Park Service concessions program considered by the Secretary to be suitable for non-Federal performance. Such management elements include each of the following:

(A) Health and safety inspections.

(B) Quality control of concessions operations and facilities.

(C) Strategic capital planning for concessions facilities.

(D) Analysis of rates and charges to the public.

(2) The Secretary may also contract with private entities to assist the Secretary with each of the following:

(A) Preparation of the financial aspects of prospectuses for National Park Service concessions contracts.

(B) Development of guidelines for a national park system capital improvement and maintenance program for all concession occupied facilities.

(C) Making recommendations to the Director of the National Park Service regarding the conduct of annual audits of concession fee expenditures.

* * * * *

8. 16 U.S.C. 5962 provides:

Use of nonmonetary consideration in concessions contracts

Section 303b of Title 40, relating to the leasing of buildings and properties of the United States, shall not apply to contracts awarded by the Secretary pursuant to this subchapter.

9. 36 C.F.R. 51.3 provides in pertinent part:

How are terms defined in this part?

To understand this part, you must refer to these definitions, applicable in the singular or the plural, whenever these terms are used in this part:

* * * * *

A concession contract (or contract) means a binding written agreement between the Director and a concessioner entered under the authority of this part or the 1965 Act that authorizes the concessioner to provide certain visitor services within a park area under specified terms and conditions. Concession 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. Concession contracts will contain such terms and conditions as are required by this part or law and as are otherwise appropriate in furtherance of the purposes of this part and the 1998 Act.

10. 41 U.S.C. 602 provides in pertinent part:

Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) 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.

* * * * *

11. 41 U.S.C. 605 provides in pertinent part:

Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle,

compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * * * *

12. 41 U.S.C. 606 provides:

Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

13. 41 U.S.C. 607 provides in pertinent part:

Agency boards of contract appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall

have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

* * * * *

(d) Jurisdiction

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

* * * * *

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

* * * * *

14. 41 U.S.C. 609 provides in pertinent part:

Judicial review of board decisions

(a) Actions in United States Court of Federal Claims; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

* * * * *

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

* * * * *

15. 41 U.S.C. 611 provides:

Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate

established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

16. 41 U.S.C. 612 provides in pertinent part:

Payment of Claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

* * * * *

17. 41 U.S.C. 405 provides in pertinent part:

Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Admini-

strator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section, the Administrator shall, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

* * * * *

(f) Oversight of regulations promulgated by other agencies relating to procurement

The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned, may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to procurement if the Administrator determines that such rule or regulation is inconsistent with any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

* * * * *

(i) Recipients of Federal grants or assistance

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance, the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

* * * * *