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.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES AND REGULATIONS

TABLE OF AUTHORITIES – continued

Page(s)

MISCELLANEOUS

REPLY BRIEF FOR PETITIONER

As we demonstrated in the petition, this Court's review of the D.C. Circuit's decision is warranted, because that decision (1) conflicts with decisions of the Federal Circuit, several contract boards of appeals, and the Comptroller General, (2) cannot be reconciled with the plain language of the CDA, and (3) will have an adverse effect on government contracting even far removed from the $800-million National Park Service concessions program. The government's response to each of these arguments mischaracterizes precedent, ignores important statutory language, attempts to recast the very nature of the National Park Service, and is entirely unpersuasive.

1. Respondents' attempt to wish away the circuit split between the D.C. Circuit and the Federal Circuit is singularly unsuccessful. The *only* distinction that respondents draw between this case and *Total Medical Management, Inc.* v. *United* States, 104 F.3d 1314 (Fed. Cir. 1997), is that in *Total Medical* the United States had "legal obligations" to provide medical care to military dependents. Br. in Opp. 7. But as discussed in the petition (at 4-6; see also page 5 *infra*), the NPS has a similar legal obligation to "promote and regulate the use of" the national parks by "provid[ing] for the enjoyment of the same." 16 U.S.C. § 1. Concessions contracts for the provision of food and lodging in the national parks meet that legal obligation. In any event, the spurious rationale now put forward by the government for distinguishing *Total Medical* was *not* the basis for the decision below.

The Federal Circuit plainly held in *Total Medical* that the CDA applies to government contracts that procure goods or services for the benefit of third parties rather than for the government itself. 104 F.3d at 1320. *The D.C. Circuit rejected that reading of the statute*. It held that the CDA was inapplicable here solely because the function of concessions

contracts is to procure goods or services for third parties (park visitors) rather than for the government. See Pet. App. 27a. There is a clear conflict between the D.C. Circuit and the Federal Circuit on this bedrock issue of federal procurement law.

Yosemite Park & Curry Co. v. *United States*, 582 F.2d 552 (Ct. Cl. 1978), also conflicts with the decision below. Although in *Yosemite Park* the government paid the concessioner to provide bus service to park visitors, that is irrelevant to the applicability of the CDA. Rather, the services provided in *Yosemite Park* were indistinguishable from those at issue in the typical concessions contract: in both instances, the concessioner is fulfilling the NPS's statutory mandate to provide for the public's enjoyment of the national park. And the *Yosemite Park* court specifically held that "the broad power of the Secretary of the Interior to grant concessions in the course of administering National Parks [does not] relieve[] him, and through him the NPS, from compliance with the generally acceptable procurement guidelines." *id.* at 558. As the court explained, it was "not convinced that the NPS * * * can avoid normal, legally mandated, procurement procedures, simply by characterizing the procurement of transportation services for the public as the granting of a 'concession' to a specific contractor." *Ibid.* That this holding directly conflicts with the decision below is evident merely by removing the word "transportation" from the quoted sentence.[1]

---

[1] *Oroville-Tonasket Irrigation District* v. *United States*, 33 Fed. Cl. 14 (Fed. Cl. 1995), also conflicts with the D.C. Circuit's decision. Respondents are flatly incorrect in asserting (Br. in Opp. 8 n.2) that "the Department of the Interior paid the irrigation district to operate and maintain a unit of a dam project owned by the Department of the Interior." Rather, it is clear that the contract required that the Oroville-Tonasket Irrigation District ("OTID") "operate[] and maintain[]" the dam after its construction "at

2. The decision below is also plainly wrong. As we explained in the petition, the NPS "procur[es] services" (41 U.S.C. § 602(a)(2)) when it contracts with a concessioner; this procurement enables it to fulfill its mandate to offer the public services that the NPS has solicited as being "necessary and appropriate" to accommodate visitors in the national parks. The NPS also typically "procur[es the] construction, alteration, repair or maintenance of real property" (*id.* § 602(a)(3)) in its concessions contracts; the agency retains title to all developments within the parks and requires that concessioners build and maintain these facilities. See Pet. 9-10.

a. Respondents' principal argument for why NPS concessions contracts fall outside the CDA is that "'[u]nlike traditional government contracts, [in concessions contracts] the government does not make payments to the contractor.'" Br. in Opp. 10 (quoting *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 371 (Fed. Cir. 1993)). This formalistic distinction is simply irrelevant.

Nothing in the plain language of the CDA distinguishes among contracts based on whether the government contractor is paid in cash or is compensated in some other way, such as by being afforded the opportunity to earn income.[2]

OTID's expense." 33 Fed. Cl. at 22; see also *id.* at 17 (after construction of the irrigation works OTID "will assume control of and will operate and maintain such works at its expense"). Thus, as the court explained, OTID was "carry[ing] out the obligation placed by Congress on the Secretary of the Interior to operate and maintain the project in question." *Id.* at 22. *Oroville-Tonasket* is therefore indistinguishable from the present case, and the D.C. Circuit's decision directly conflicts with that of the Court of Federal Claims.

[2] Tellingly, respondents fail to address our explanation (at Pet. 13) why *YRT* is inapposite, in that it did not purport to address applicability of the CDA – the case involved a different statute – and

Moreover, the formalistic payment distinction that respondents invoke implies that the CDA's applicability depends, not on a contract's substance, but on how it happens to be framed. Under this theory, if the government collects visitor revenues and then sends back a percentage (even a large one) to the contractor, then the CDA applies. But if, as here, a contractor collects revenues in the first instance and sends a percentage (a comparatively small one) to the government, the CDA does not apply. Congress can hardly have intended for bedrock CDA protections against agency mistreatment of contractors to turn on such whimsical distinctions – distinctions that agencies themselves are entirely at liberty to manipulate.

Finally, in a very real sense the NPS *does* pay for concessioners' services: if it did not use concessioners the NPS would provide similar services itself and would collect the profits that concessioners now earn. By using concessioners the NPS forgoes this income.

In any event, the cases respondents themselves cite show that the distinction among contracts based on whether there is an expenditure of appropriated funds is frivolous. Thus, in *Bonneville Associates* v. *United States*, 43 F.3d 649 (Fed. Cir. 1994), which respondents quote (at Br. in Opp. 10; see also *id.* at 10 n.4), the Federal Circuit defined a procurement subject to the CDA to include the "acquisition by * * * *barter*[] of property or services." *Id*. at 653 (emphasis added); see also, *e.g.*, *Bartlett & Co. Grain*, 91-1 BCA 23,415, AGBCA No. 86-187-1, 1990 WL 166521 (Oct. 18, 1990) (CDA applies to a "payment-in-kind" contract between the Commodity Credit Corporation and a contractor, involving the trade of corn for soybeans); *Coffey* v. *United States*, 626 F. Supp. 1246, 1250 (D. Kan. 1986) (CDA applies to contract

---

was expressly based on a now-repudiated understanding of the views of the Comptroller General.

involving exchange of grain for the retirement of a farm loan). Obviously, no appropriated funds are expended in a barter situation; thus, contrary to the government's key contention, the expenditure of appropriated funds cannot be critical to CDA applicability.

b. Respondents' second explanation for why NPS concessions contracts escape the CDA is that these contracts benefit "the public" rather than "the government" and that "the NPS has no statutory duty to provide services to visitors." Br. in Opp. 11. Again, this rationale finds no support in the CDA itself, which applies unambiguously to all government contracts for the procurement of goods or services or for the maintenance or construction of real property. *Nothing* in the statute turns on slippery determinations of who may be said to "benefit" from the procurement.

In any event, in making this assertion respondents again simply ignore the NPS's authorizing legislation. In fact, since its very founding the NPS has been required to

> *promote and regulate the use* of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * *, 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.

16 U.S.C. § 1 (emphasis added).[3] The 1998 Act reiterates this

[3] Thus, respondents' assertion (at Br. in Opp. 8 n.1) that "[a]t most, NPS is required to protect and preserve the environment of the parks. 16 U.S.C. 1" is disingenuous at best. It is flatly contradicted by the statutory provision respondents themselves cite, which also requires the agency to "provide for the enjoyment" of the parks.

"fundamental purpose" of conserving the parks "and providing for their enjoyment." See 16 U.S.C. § 5951(a). Thus, it is manifest that the NPS has an obligation to provide services to national park visitors. In fact, the 1998 Act requires the NPS to allow *only* those public facilities that "are *necessary* and appropriate for public use and enjoyment" of the national parks. See *id.* § 5951(b)(1) (emphasis added).[4] By authorizing a concessioner to offer any given service the NPS is determining that that service forms a necessary part of the agency's mandate to provide for the public's enjoyment of the national parks.[5]

Moreover, respondents offer virtually no response to the argument that, assuming "benefit to the government" does matter under the CDA, the government is plainly the principal beneficiary of the contractual provisions requiring concessioners to construct, maintain and repair real property. Respondents' answer – buried in a footnote (Br. in Opp. 12 n.5) – that the NPS has only an incidental interest in the maintenance and development of real property in the national parks is frivolous. As we have explained (at Pet. 10), the NPS controls what is built in the national parks, when it is built, how it is built, and how it is maintained; more importantly, the government retains title to all real property in the national parks.

---

[4] Congress made this mandate abundantly clear when it additionally imposed numerous requirements for the solicitation, award and administration of these contracts in the 1998 Act, proclaiming that, in "selecting the best proposal, * * * consideration of revenue to the United States shall be *subordinate* to the objectives of * * * providing necessary and appropriate facilities to the public at reasonable rates." See 16 U.S.C. § 5952(5)(A)(iv) (emphasis added).

[5] See also Standard Concession Contract, 65 Fed. Reg. 26,052, 26,063 (May 4, 2000) (reiterating statutory purpose and providing that contract is "necessary and appropriate for the public use and enjoyment of the Area").

Under the government's logic, the CDA would not apply if a contractor "construct[s], alter[s], repair[s] or maint[ains] real property" (41 U.S.C. § 602(a)(3)) owned by the government if that property is used heavily by the general public. *Nothing* in the text of the CDA supports such a limitation, and it is flatly contradicted by precedent. The CDA has long been held to apply to contracts for the maintenance and repair of, among other public facilities, the Kennedy Center and the Smithsonian Museums. See Pet. 11.[6]

c. Respondents proffer a hodgepodge of other reasons to justify the court of appeals' decision, but none has merit. That the decision below is "consistent with the NPS's long-standing regulatory position and the legislative history of the 1998 Act" (Br. in Opp. 12) is irrelevant. As we have discussed (at Pet. 12-13) – and as respondents acknowledge (at Br. in Opp. 13-14) – the NPS's earlier regulations were consistently rejected by the expert IBCA. To the extent Congress is presumed to be aware of prior law (*id.* at 12-13), the relevant prior law was the consistent holding of those entrusted with the authority to implement the CDA – the IBCA, as well as the Court of Federal Claims and the Federal Circuit – that concessions contracts are, in fact, governed by the CDA. However, Congress need not have been aware of *any* prior

---

[6] *New Era Construction* v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989) – (cited at Br. in Opp. 11) – is not to the contrary. The contract at issue in *New Era* was not covered by the CDA for the straightforward reason that the United States was not a party to that contract. See *id.* at 1154. Rather, the contractor entered into a construction contract with the independent housing authority of an Indian tribe, which in turn had a separate financing contract with the Department of Housing and Urban Development. See *ibid*. To the extent *New Era* can be said to require services to be for the *direct* benefit of the federal government, that holding does not survive the Federal Circuit's later holding in *Total Medical* that where a contractor assists the government in fulfilling a legal obligation to the public, that contract is covered by the CDA.

law, because the CDA was not addressed in the 1998 Act.

The isolated statements in the legislative history of the 1998 Act that "'[t]he Committee consider[ed]'" concessions contracts not to be procurement contracts (Br. in Opp. 13 (quoting S. REP. No. 105-202, at 39) (first alteration supplied)) are entitled to no weight. The issue in this case is the proper interpretation of the *CDA*, not the 1998 Act. Hence, this legislative history is of no moment. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993) (subsequent legislative history regarding one statute deserves no weight in interpretation of entirely different pre-existing statute); *Watch Hill Concession Inc.*, IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911, at *5 (Feb. 16, 2001).

Although it is true that IBCA decisions are not *binding* on courts (Br. in Opp. 14), that is a flimsy reason to *ignore* them. Rather, this persuasive authority from the expert Boards charged with implementing the CDA consistently concludes that the CDA does apply to NPS concessions contracts.[7] And respondents' attempt (Br. in Opp. 15 n.6) to distinguish its own argument in *Pound* – that concessions contracts *are* covered by the CDA because they involve the repair or maintenance of real property (see Pet. 15) – is feeble. That the government there made its argument in the alternative is true but irrelevant, as is the fact that the contract was with the Army Corps of Engineers instead of the NPS. As we have explained, our argument is not NPS-specific, but rather applies to all similar contracts. Under the government's position in *Pound* the CDA would apply to the con-

[7] Respondents' attempt to distinguish some of the IBCA's specific decisions because they predated the 1998 Act and its regulations (Br. in Opp. 14-15) is both irrelevant – the IBCA has reiterated this view since those regulations were enacted (see *Watch Hill*, 2001 WL 170911) – and incompatible with their separate argument (Br. in Opp. 12-13) that passage of the 1998 Act did not affect the CDA's applicability to NPS concessions contracts.

cessions contracts at issue in this case.[8]

3. Finally, respondents' self-serving assurances (Br. in Opp. 16) that the decision in this case is of "no special importance" are wrong for at least three reasons. First, the fact that NPS concessioners are in limited circumstances authorized to engage in bid protests, binding arbitration, or Tucker Act litigation under the 1998 Act (*ibid.*) in no way undermines the importance of the independent protections of the CDA. As we have explained (at Pet. 3-4), Congress passed the CDA because it considered agency-supplied avenues for resolving contractual disputes to be inadequate. It therefore provided distinct rights to contractors from whom the government procures the goods and services that support its functions, including *de novo* review of agency decision-making and entitlement to interest after a successful CDA challenge. See 41 U.S.C. §§ 609(a)(3), 611. This case will thus "influence[] how, whether, and at what prices [contractors such as national park concessioners will] compete for Government contract business." S. REP. NO. 95-1118, at 4.

Respondents' attempt to limit this case's applicability solely to NPS concessions likewise fails. We have never asserted that the court of appeals' decision will affect government contracts for goods and services each year. Compare Pet. 19 with Br. in Opp. 15. But the decision *will* affect the vast array of concessions contracts and similar arrangements entered into by various government agencies – ranging from the Department of Defense (*Total Medical*, *supra*) to the Army Corps of Engineers (Pet. 20 n.7) to the NPS. It is criti-

---

[8] Respondents *completely ignore* the recent decision of the Comptroller General, in which he disagreed with the decision of the D.C. Circuit in this case, and explained why NPS concessions contracts are covered by statutes like the CDA. See *Starfleet Marine Transp,, Inc.*, B-290181, 2002 U.S. Comp. Gen. LEXIS 90 (July 5, 2002); Pet. 14-15.

cal that government agencies not be afforded unfettered power to exempt themselves unilaterally from the scope of the CDA simply by attempting to alter the terms of their contracts to fall within the D.C. Circuit's decision in this case. See S. REP. NO. 95-1118, at 17.

Finally, even were this case to apply only to NPS concessions contracts it would warrant this Court's review. The NPS concessions industry generates over $800 million in revenue annually (see http://www.nps.gov/legacy/business.html#concessions) – providing significant financial benefits to the government. More importantly, these concessioners provide vital assistance to the NPS in serving the literally millions of Americans who visit the national parks each year. By depriving NPS concessioners of any meaningful dispute resolution rights, the court of appeals' decision will at a minimum have a substantial effect on this entire industry.

* * * * *

In sum, by virtue of conflicting decisions of the D.C. Circuit, the Federal Circuit, and the Comptroller General, massive confusion now exists over the coverage of a federal statute that is critical to the government procurement process. The court of appeals erred by failing to recognize the NPS's attempts to use empty formalisms improperly to eviscerate substantive CDA protections – protections that Congress was careful to provide as shields against wrongdoing by contracting agencies like the NPS. The decision also upsets prior understandings and rewards the government's inconsistent litigating positions, to the detriment of a "fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. REP. NO. 95-1118, at 1. Further review by this Court is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
RICHARD B. KATSKEE
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

OCTOBER 2002