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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

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

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the National Park Service (NPS) to oversee our national parks and "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; Pet. App. 49a. In furtherance of those goals, the NPS has permitted private, for-profit concessioners, like those represented by petitioner, to provide visitors with "lodging, food, merchandising, transportation, outfitting and guiding, and similar activities." 65 Fed. Reg. 20,630 (2000); Pet. App. 49a.

Concessioners operate their businesses in national parks pursuant to certain concession agreements reached with the NPS. For many years, those concession agreements were governed only by NPS internal regulations and policies. Pet. App. 2a. In 1965, Congress enacted the National Park System Concessions Policy Act (1965 Act), 16 U.S.C. 20 *et seq.*, which codified many of the NPS's longstanding concessions policies. Pet. App. 4a. Under the 1965 Act, a concessioner paid the government a franchise fee—generally a percentage of gross revenue—in exchange for the privilege of operating its business in a national park. *Ibid.* Critically, for purposes of this litigation, the 1965 Act also gave concessioners, at the time of the expiration of their concession agreements, a right of preference of renewal, which amounted, basically, to a right of first refusal. 16 U.S.C. 20d (1964 & Supp. II 1967).

In 1992, following a review of national park concessions, the Department of the Interior concluded that the right of preference in renewal enjoyed by incumbent concessioners had significantly impeded the competition for concession contracts. See 57 Fed. Reg. 40,508 (1992). Eventually, Congress stepped in, enacting the National Parks Omnibus Management Act of 1998 (1998 Act), 16 U.S.C. 5951-5966, which eliminated the preferential right of renewal and enacted other rules governing concession contracts. In 2000, the NPS, implementing the 1998 Act, issued new regulations that established the new concession contract process. 65 Fed. Reg. at 20,630-20,631. Among other things, the regulations provided that "[c]oncession contracts are not contracts within the meaning of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions." 36 C.F.R. 51.3. That regulation was supplemented by publication of a "Standard Concession Contract" in the *Federal Register*, which incorporated the changed terms. See 65 Fed. Reg. at 26,052-26,085.

2. Petitioner, an association of concessioners, brought suit in district court, alleging, *inter alia*, that the NPS regulation is contrary to the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* The district court rejected that argument. Pet. App. 67a. The district court found that the CDA is ambiguous with respect to whether concession contracts are procurement contracts for the purposes of the CDA. *Id.* at 68a. Applying *Chevron* deference, *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841 (1984), the district court upheld the NPS

regulation as a reasonable interpretation of the CDA. Pet. App. 69a. The court recognized that "the basic nature of concession contracts differs markedly from that of typical procurement contracts" in several respects. *Id.* at 68a. In concession agreements, the government is not attempting to procure chattel or services for itself; instead, it is permitting another to use its land as in a lessor/lessee relationship. *Ibid.* Furthermore, when the government procures something, it usually acts as payor, not payee as in the case of a concession contract. *Id.* at 68a-69a.

Turning to the legislative history of the 1998 Act, the court found that Congress had categorized concession contracts "as authorization contracts, not procurement contracts." Pet. App. 69a (citing 16 U.S.C. 5952). Further, the court noted that when Congress defined concession contracts as such in 1998, "the prevailing understanding was that concession contracts were not procurement contracts." *Ibid.* The court based that conclusion on the fact that NPS regulations implementing the 1965 Act had expressly stated that concession contracts were not "Federal procurement contracts," and on the holding of *YRT Services Corp.* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (Fed. Cl. 1993), that "concession contracts 'did not constitute a procurement,'" because the NPS was not paying funds, but was collecting fees in exchange for granting a permit to operate a concession business. Pet. App. 69a. The district court concluded that Congress was presumed to have known about and therefore to have adopted that view when it enacted the 1998 Act without foreclosing that interpretation. *Id.* at 69a-70a (citing *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)). Thus, Congress, in the 1998 Act, had ratified the then-prevailing view that

concession contracts were not procurement contracts. *Id.* at 70a.

The court acknowledged petitioner's citations to decisions of certain administrative tribunals that reached contrary conclusions, but concluded that most of the cases pre-dated Congress's ratification of the view that concession contracts are not procurement contracts. Pet. App. 70a. As for the one administrative decision issued after the 1998 Act, the court noted that it was not bound by that tribunal's determination. *Ibid.*

3. The court of appeals affirmed the district court's ruling concerning the validity of the NPS regulation, concluding that NPS concession contracts are not procurement contracts within the meaning of the CDA. The court of appeals acknowledged that the district court may have decided the case on an incorrect ground, noting "the Park Service does not administer the Contract Disputes Act, and thus may not have interpretive authority over its provisions." Pet. App. 27a. However, it concluded that the NPS's regulatory determination that concession contracts are outside the ambit of the CDA is supported by the clear language of both the CDA and the 1998 Act. *Ibid.*

Noting that a procurement contract is one in which "the government bargains for, and pays for, and receives goods and services," the court of appeals concluded that "[c]oncession contracts are not of that sort." Pet. App. 27a (quoting 65 Fed. Reg. at 20,635). Rather, under the 1998 Act, NPS was empowered to enter into concession contracts "'to authorize a person, corporation, or other entity to provide accommodations, facilities and services to' visitors to national parks." *Ibid.* (quoting 16 U.S.C. 5952). The court found yet more support for the NPS's understanding of its concession contracts in *YRT Services Corp.*, 28 Fed. Cl. at 392 n.23,

which, examining concession contracts under a different statutory regime, held that "this arrangement does not constitute a procurement, but is a grant of a permit to operate a business." Pet. App. 28a.

Like the district court, the court of appeals acknowledged that the Interior Department Board of Contract Appeals (IBCA) had reached the opposite conclusion. However, the court also took note of that administrative panel's authorizing legislation, the CDA, which stated that the decisions of the IBCA "on any question of law shall not be final or conclusive." 41 U.S.C. 609(b); Pet. App. 28a. The court further found that the "IBCA's rationale for determining that concession contracts are procurement contracts is flawed." *Ibid.* It noted that the IBCA's first decision on the issue recognized that the CDA "does not cover all contracts but then assumed that the Act *does* apply unless coverage is explicitly foreclosed." *Ibid.* "Nothing in the Act," said the court of appeals, "suggests such a sweeping presumption." *Ibid.* In response to another IBCA opinion which had held that the CDA must apply if any benefit can be traced to the government, the court reasoned that "[the fact] [t]hat the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep these contracts into the ambit of the Contract Disputes Act." *Id.* at 29a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of any other court of appeals or, for that matter, any other federal court. Accordingly, further review is not warranted.

1. Petitioner asserts that the decision below conflicts with a decision of the Federal Circuit, *Total Medical*

Management, Inc. v. *United States*, 104 F.3d 1314, cert. denied, 522 U.S. 857 (1997), and a decision of its predecessor, the Court of Claims, *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552 (Ct. Cl. 1978). Petitioner's reliance on those cases is misplaced.

a. *Total Medical Management* concerned agreements between the military and a private health care company to provide health care to the dependents of servicemen. As noted by petitioner, in holding that the agreement at issue was a procurement contract subject to the CDA, the Federal Circuit relied upon the fact that the United States had "legal obligations to military dependents" to provide health care. Pet. 17 (quoting *Total Med. Mgmt.*, 104 F.3d at 1320). Petitioner's claims notwithstanding, the NPS has no similar "legal obligations" to park visitors.

Petitioner maintains that the NPS has a "statutory duty to provide 'accommodations, facilities and services that * * * are necessary and appropriate for public use and enjoyment' of the national parks," Pet. 9 (quoting 16 U.S.C. 5951(b)(1)). However, a cursory view of the statutory provision cited by petitioner reveals that there is no such "statutory duty" on the NPS. Section 5951(b), entitled "Policy", states that, to the extent that there is any development of "public accommodations, facilities, and services" within the national parks, that development "shall be *limited* to those accommodations, facilities and services that are * * * *necessary* and *appropriate* for public use and enjoyment" of the national park. 16 U.S.C. 5951(b)(1) (emphasis added). Far from imposing a statutory mandate for the provision of services to visitors, the statute cited by petitioner stands as a *limitation* on the pro-

vision of such services.[1] That limitation is quite different from the legal obligation of the military to provide health care in *Total Medical Management.* See Dependents' Medical Care Act, ch. 374, 70 Stat. 250 (codified at 10 U.S.C. 1071-1106); 10 U.S.C. 1076(a)(1) ("A dependent * * * is entitled * * * to the medical and dental care prescribed by section 1077 of this title.").[2]

b. *Yosemite Park & Curry Co.* also presents no conflict with the decision below. While the plaintiff in that case did have a concession agreement with the NPS, see 582 F.2d at 554 ("they executed a concession contract"), the contract at issue was *not* a concession agreement. Rather, it was a simple contract for the procurement of transportation services. "[P]laintiff agreed to provide bus service to the public without charge and defendant agreed to reimburse [plaintiff] for its actual expenses plus a reasonable profit for pro-

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[1] At most, NPS is required to protect and preserve the environment of the parks. 16 U.S.C. 1.

[2] Similarly, another case cited by petitioner (Pet. 18), *Oroville-Tonasket Irrigation District* v. *United States*, 33 Fed. Cl. 14 (Fed. Cl. 1995), yields no support for its argument. There, the agreement between the Department of the Interior and the irrigation district was not a concession agreement; it was a contract whereby 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. Moreover, as in *Total Medical Management*, the Department of the Interior was under a statutory mandate to perform those tasks; Congress ordered the Department of the Interior "to construct, operate, and maintain" that unit of the dam project. See *id.* at 21 ("Acts of October 9, 1962 and September 28, 1976 authorized the Secretary of the Interior to construct, operate and maintain the project unit in question to supply irrigation."); Reclamation Authorizations Act of 1976, Pub. L. No. 94-423, § 201, 90 Stat. 1325; Act of Oct. 9, 1962, Pub. L. No. 87-762, 76 Stat. 761.

viding this service." *Ibid.* That is a typical procurement contract. Accordingly, the court held that the NPS was not exempt from procurement regulations, but was "bound by the procurement laws in the purchase of services, be they transportation services or some other variety, from a private contractor, whether that contractor is otherwise a 'concessioner' or not." *Id.* at 559. *Yosemite Park*, therefore, stands for the proposition that the existence of a concession agreement between the government and a party does not alter the character of a separate ordinary procurement contract. It does not suggest that a concessions contract is itself a procurement contract or is otherwise indistinguishable from a procurement contract, and indeed its premise is to the contrary. In any event, as the concession agreement in this case involves no payment by the government for services, but rather the payment of fees by the concessioner in exchange for a permit to operate of a business, it is quite obviously distinguishable from *Yosemite Park*.

2. The court of appeals' conclusion that the CDA does not apply to NPS concession agreements was correct. The CDA applies only to procurement contracts, and the NPS's concession contracts are not procurement contracts.

a. It is axiomatic that the CDA is not applicable to all government contracts. *Schickler* v. *Davis*, 10 Fed. Appx. 944, 946 (Fed. Cir.) (per curiam), cert. denied, 122 S. Ct. 277 (2001); *G.E. Boggs & Assocs., Inc.* v. *Roskens*, 969 F.2d 1023, 1026 (Fed. Cir. 1992); *Coastal Corp.* v. *United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). Contracts within the scope of the CDA are limited to those "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); see *Coastal Corp.*, 713 F.2d at 730 ("scope of the Act thus is limited to express or implied contracts for the procurement of services and property and for the disposal of personal property"). For purposes of the CDA, a "procurement" is "an acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the federal government." *Bonneville Assocs.* v. *United States*, 43 F.3d 649, 653 (Fed. Cir. 1994); see *New Era Constr.* v. *United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989).

Thus, concession contracts like the NPS's Standard Form Concession Contract differ markedly from procurement contracts in at least two respects. First, "[u]nlike traditional government contracts, the government does not make payments to the contractor." *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 371 (Fed. Cl. 1993). Rather, "contractors, known as concessioners, charge for services provided to the public, and, in turn, pay NPS a fee for the right to operate a concession business." *Ibid.*[3] Thus, in a concession contract, "the government is not committing to pay out government funds or incur any monetary liability." *Id.* at 392 n.23.[4] In this case, it is undisputed that NPS does not

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[3] Accordingly, the Court of Federal Claims concluded that a NPS concession contract for lodging facilities issued pursuant to the 1965 Concessions Policy Act was "unique from a standard government contract," and was not subject to procurement contracts laws. *YRT Servs. Corp.*, 28 Fed. Cl. at 393.

[4] Petitioner criticizes the court of appeals for quoting this phrase because "CDA coverage explicitly does not depend on the expenditure of appropriated funds." Pet. 12 n.2 (citing 41 U.S.C. 602(a)). Petitioner's criticism is off the mark. While the CDA does

make payments to concessioners under its concession contracts.

Second, in a concession contract, the contractor provides a benefit directly to the public (or some other third-party), whereas in a procurement contract, the benefit is provided to the government. *New Era Constr.*, 890 F.2d at 1157 (contract was not a procurement contract within meaning of CDA because contract was not for benefit of the federal government). Here, the services concessioners offer for sale benefit, first and foremost, the concessions' customers. As demonstrated above (pp. 7-8, *supra*) the NPS has no statutory duty to provide services to visitors. Thus, the only benefits obtained by the government from the provision of services by concessioners are those that emanate from providing a more enjoyable stay for park visitors. Such benefits are incidental in nature, flowing only

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indeed extend to the contracts of "nonappropriated fund activities described in [the Tucker Act]"—to wit, military exchanges, see 28 U.S.C. 1346(a)(2), 1491(a)(1); *Pacrim Pizza Co.* v. *Pirie*, No. 00-1534, 2002 WL 31103521, at *1 (Fed. Cir. Sept. 23, 2002)—that provision has nothing to do with this case. The NPS, unlike a military exchange, is an appropriated fund instrumentality, and thus the CDA applies to its procurement contracts. Thus, the question is not whether "CDA coverage * * * depend[s] on the expenditure of appropriated funds." Pet. 12 n.2. Rather, the relevant inquiry is whether an expenditure by the government is required for there to be a procurement. The Federal Circuit, at least, has answered in the affirmative. *Bonneville Assocs.*, 43 F.3d at 653; *YRT Servs. Corp.*, 28 Fed. Cl. at 392 n.23. If the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, and the Davis-Bacon Act, 40 U.S.C. 276a(a) (repealed by Act of Aug. 21, 2002, Pub. L. No. 107-217, § 3(e)(2), 116 Stat. 1299 (to be codified at 40 U.S.C. 3142)), do not apply to NPS concession agreements, it is not because the NPS is a non-appropriated fund activity, but rather because NPS concession contracts entail no expenditure by the government that would trigger either statute.

indirectly to the government. The acquisition of such incidental and intangible benefits cannot convert that concession contract into a procurement contract.[5]

b. The court of appeals' decision is also consistent with the NPS's longstanding regulatory position and the legislative history of the 1998 Act. The NPS's regulatory position that concession contracts are not procurement contracts within the scope of the CDA is well-established and long pre-dates the 1998 Act. *E.g.*, 57 Fed. Reg. 40,496 (1992); 36 C.F.R. 51.1 (1993); 65 Fed. Reg. 20,635 (2000) (preamble to the 2000 regulation). Normally, Congress is presumed to be aware of an administrative interpretation of a statute and to have adopted that interpretation when, in enacting a new statute, it incorporates portions of the prior law subject to the administrative interpretation. See *Lorillard* v.

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[5] Petitioner's argument that the NPS, through its concession contracts, procures "construction, alteration, repair or maintenance of real property" does not alter the analysis. Pet. 10. To be sure, the United States has title to all real property constructed by concessioners on NPS land. 16 U.S.C. 5954(d). However, concessioners hold a leasehold surrender interest in any capital improvement they make on NPS land, equal in value to the construction cost, plus inflation, "less depreciation * * * as evidenced by the condition and prospective serviceability in comparison with a new unit of like kind." 16 U.S.C. 5954(a)(1) and (3). To the extent that petitioner complains that normal upkeep and maintenance costs are not added to the leasehold surrender value, and, therefore, the NPS "procures" that benefit in a concession contract, any benefit falls to the NPS only incidentally. The primary beneficiaries of the maintenance and upkeep of the concession's real property are the concessioner (as it minimizes the depreciation of its leasehold surrender interest and allows for the continued successful operation of its for-profit business) and the concession's customers (who may continue to have safe enjoyment of the concession).

Pons, 434 U.S. 575, 580-581 (1978). The legislative history confirms that Congress likewise distinguished concession contracts from ordinary procurement contracts. "The Committee considers that * * * [concessions] 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). In light of that presumption and legislative history, the textual reference to "concessions contract" should be understood as distinguishing such contracts from procurement contracts. See 16 U.S.C. 5952 ("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").

Petitioner's reliance on *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred International, Inc.*, 122 S. Ct. 593, 598 (2001) (utility patents for plants); *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984) (breadth of the term "jurisdiction" in 18 U.S.C. 1001); and *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 222 (1945) (scope of the Public Vessels Act), is also misplaced. These cases stand for the unremarkable proposition that a court of appeals may not "add limiting language to a statute that Congress intended to be broad and comprehensive." Pet. 12. However, in upholding the NPS regulation, the court of appeals did not attempt to add limiting language to the CDA, but rather faithfully interpreted the language of the 1998 Act. Congress's actions there spoke authoritatively as to its view as to whether concession agreements are within the scope of the CDA.

c. Petitioner asserts that the court of appeals' decision conflicts with the administrative decisions of the

Department of the Interior Board of Contract Appeals and the contract appeals boards in other federal agencies. That argument does not aid petitioner.

It is a sufficient response to petitioner's argument to note, as the court of appeals did, that the boards of contract appeals in federal agencies are creatures of the CDA and their decisions are not binding on the D.C. Circuit or any other Article III court. 41 U.S.C. 609(b) (the decision of such boards "on any question of law shall not be final or conclusive"); *Caldwell & Santmyer, Inc.* v. *Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995) ("In reviewing the decision of an agency board on any question of law, we are not bound by the conclusions of the board."). Whether procurement contracts include concession contracts is, of course, a matter of law. *Pasteur* v. *United States*, 814 F.2d 624 (Fed. Cir. 1987).

Moreover, many of the administrative decisions petitioners invoke pre-date the 1998 Act and the regulations subsequently promulgated by the NPS. See, *e.g.*, *National Park Concessions, Inc.*, 94-3 B.C.A. (CCH) ¶ 27,104 (1994) (holding that National Park concession contract is subject to the CDA whenever the government obtains any benefit; refusing to consider the Department of the Interior's regulation stating that concession contracts are not procurement contracts, 57 Fed. Reg. at 40,496 (codified in 36 C.F.R. 51.3 (1993)), because it was published after the date of the contract and settlement agreement at issue); *R & R Enters.*, 89-2 B.C.A. (CCH) ¶ 21,708 (1989) (holding that a NPS concession contract was subject to the CDA because it was for services the government would otherwise provide and because no statutory exemption from the Act or exclusionary intent by Congress is evident). Still others did not concern concession contracts at all. See, *e.g.*, *Libra Eng'g Inc.*, NASA B.C.A. No. 1182-17, 1984

WL 13526 (July 13, 1984) (appeal of Smithsonian Institution's termination for default of a construction contract and related claims; appeal dismissed after settlement); *Grunley Constr. Co.*, 99-1 B.C.A. (CCH) ¶ 30,138 (1998) (contractor on contract with Army Corps of Engineers for repair of the Kennedy Center roof terrace and penthouse sought equitable adjustment because the government directed it to provide a specific type of granite; Board assumed jurisdiction pursuant to the CDA).[6]

3. Petitioner's assertion that this case has implications beyond NPS concession contracts, including "a significant portion of *all* government procurement contracts," Pet. 19, is off the mark. While it may well be true that the "government contracts to purchase more than $220 billion in goods and services each year," Pet. 18, those government procurement contracts will not be affected by the outcome of this case. This case will have no significant impact on the body of law governing the purchase of goods and services because this case does not involve the purchase of goods and services. It concerns only NPS concession contracts.

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[6] Petitioner contends that the Department of Justice took a contrary position in *Pound* v. *United States*, No. 94-496C (Fed. Cl. Aug. 30, 1996). Pet. 15-16. However, there are numerous distinctions between the instant case and *Pound*. First, as referred to in the petition (Pet. 16 n.5), the parties in *Pound* agreed the CDA applied because at issue there was Pound's lease of land–his possession and control of government property–not his permit to operate a business. Second, Pound's lease was with the Army Corp of Engineers, not the NPS, and thus NPS regulations were not implicated. Third, even if the NPS regulations did have application, Pound entered into his lease in 1981, many years before the 1998 Act amended the rules concerning NPS concessions.

Moreover, even without access to a board of contract appeals, petitioner and the concessioners it represents will continue to have access to neutral forums for the resolution of disputes with the NPS over concession agreements. First, disappointed bidders on concession contracts have the right to engage in a bid protest. 28 U.S.C. 1491(b). Second, the 1998 Act itself provides in two instances for the resolution of disputes through binding arbitration. See 16 U.S.C. 5954(b)(2), 5956(b). Finally, depending on the amount of money at issue, a concessioner may bring a claim in the Court of Federal Claims under the Tucker Act or in the district court under the Little Tucker Act. 28 U.S.C. 1346, 1491. Therefore, contrary to petitioner's assertions, this case has no special importance that merits certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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