

the incumbent concessioner would reflect a more accurate assessment of the compensation required, rather than the use of an outside consultant or NPS estimate of this value. NPS acknowledges that the incumbent is entitled to compensation as outlined in a previous contract but that the terms of that contract allow for negotiation between parties, and should they be unable to reach a compromise, an arbitration process for the final determination of that compensable value as purchased by a new offeror.

The commenter expresses concern on the arbitration process utilized to resolve these disputes and states that an incumbent concessioner should not be expected to relinquish his or her rights to legal adjudication of the issue through the courts should it become necessary. NPS does not recognize this as a valid issue in this process as the procedure to settle these issues will not vary from established practice with the enforcement of the final regulations or standard contract language utilized herein.

The commenter acknowledged that the Concessions Management section of the prospectus had some excellent statements but that the "partnership" between NPS and the concessioner needs to be emphasized. They later note that this is emphasized in the contract language. NPS in designing the package took careful steps to avoid repetition in placing information in the prospectus and the contract as they are part of a complete presentation. The proposed contract is included in the package to illustrate the importance of all contract requirements.

Recent changes in the Utilities program as it relates to capital investments were commended.

Concern was expressed regarding the requirement that all concessioners comply with federal, state and local laws. NPS has made this a requirement of all contracts since the labor legislation was enacted. They described the problems recently encountered with the Department of Labor in a case in Nevada involving operations that fall under the Fair Labor Standards Act and the Contract Wage and Hours Standards Act. The Department of Labor has been asked to address this problem but as of yet, they have not issued a decision. This is a non-issue as it relates to this process.

Financial programs and practices were discussed as they relate to the law governing the concessions management program. They state that the NPS statement regarding Fair Return for the Operator appears misunderstood and misapplied. On Page 13 of the

prospectus, it states that "it is the responsibility of the offeror to assure itself that the terms of its offer provide it a reasonable opportunity for profit". The commenter states that while they understand that the concessioner ultimately determines by his business practices whether he will realize a profit, the whole intent of the statement in the law is that NPS should realize that its policies could prevent that profit from being realized if they were onerous and confiscatory. NPS makes this statement in the Prospectus to caution the offeror that the terms of an offer being presented must be realistic and achievable allowing a reasonable opportunity for profit. Other devices in the contract such as amendments, franchise fee reviews and arbitrations allow for adjustments necessitated through economic changes, policy review and revision.

A comment was made on the section entitled "The Park Area and Its Mission" regarding the planning documents and maintenance and operating plans for the park that are applicable. They note that plans are only as good as the commitment of those involved to carry out its terms and that no plans can be successful relating to the concession and operations and visitor services unless they involve the concessioner for meaningful input at the time of formulation. It is the standard practice of NPS to involve consultants versed in the type of operation proposed during the planning process. As the practice of awarding the contract for the operation of these facilities is a competitive process, completed at a future date, the actual concessioner cannot be involved in this pre-planning as the contract has not been executed. It is important that the planning, maintenance and operation documents be included in the prospectus so that an offeror can make an informed offer, taking the long and short term requirements into consideration.

The commenter discussed the need for flexibility in the term of the contract; Government Improvement and Capital Improvement accounts; Compensation and Possessory interest. These were issues for comment during the review of the Standard Contract Language and Final Rule for Concession Operations. These comments do not apply to this process.

The proposed application was questioned as it related to the alternatives presented for concessioner entitlement to present contract language on the Preference of renewal. NPS included the alternatives as a guide for future use of this sample. The issue of contract language change was addressed

during the review period of that subject and does not apply to this process.

The commenter states that the proposed Application seems inconsistent with the statement that the financial contributions are secondary selection factors, when in fact, additional weight in the scoring process is clearly outlined here for more generous contributions to both the Government and Capital Improvement Accounts and the amount paid in Franchise Fees. They question that if the factors are secondary, why should they be given additional weight? NPS in considering an offer, requires that all the primary factors are met before the secondary factors are considered. In this way, should all offerors satisfy the requirements of the primary factors, there can be a means of determining a better offer by utilizing the secondary factors.

A second commenter expressed concern in regards to removing the possibility of incorporating a numerically-weighted system into the proposed evaluation process. NPS feels that a numerically-weighted system would not allow the flexibility required to deal with the diverse operations it manages. Due to the diversity of the operations, specifically stated criteria are designed for each application that address the unique needs of the park and visitor. A numerically-weighted system must be standardized to be effective, and the diversity of the operations for which concessioners are solicited could not be handled in this manner. The narrative system presents in clear and concise language the exact reasons that the panel would choose one offeror over another. There is no guarantee with a numerically-weighted system to insure that the offer being presented is the best overall offer. Should there become a need to present the reasons for selection at a later time, the justification for a decision based on a numerically-weighted system is not easily presented.

The Sample Prospectus and Related Guidelines document is intended to be only a sample document. It is not meant to be a document which must be used as written in every instance. It is to be modified as appropriate to fit the needs of individual situations. Further, this document is expected to be modified and refined over time as experience indicates that changes are needed and to meet the changing needs of the concession contracting program.

EFFECTIVE DATE: February 22, 1995.

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