
ARNOLD & PORTER LLP

March 16, 2004

Earl E. Devaney
Inspector General
United States Department of the Interior
Office of the Inspector General
1849 C Street, N.W.
Washington, D.C. 20240

Re: Request for an Investigation into an Illegal Contract Being Performed on
the Washington Monument Grounds

Dear Mr. Devaney:

In awarding the current construction project that is being performed on the grounds of the Washington Monument, the National Park Service (Park Service or NPS) has acted in deliberate violation of the Competition in Contracting Act (CICA), thereby rendering the contract itself illegal. As such, it must be declared null and void and all work being performed thereunder must cease. We request that your office investigate the facts and circumstances surrounding the Park Service's conduct, and take the action necessary to end this illegal activity.

Arnold & Porter represented the National Coalition to Save Our Mall, a nonprofit corporation, in its recent litigation in D.C. District Court concerning the ongoing construction of a system of walls and sidewalks on the grounds of the Washington Monument. In the course of conducting research for that litigation, we discovered that the contract that the Park Service is using to accomplish this effort appears to be flagrantly illegal. The Park Service has attempted to circumvent CICA's statutory requirement of "full and open competition through the use of competitive procedures" (41 U.S.C. § 253 (a)) (attached as Exhibit 1) by making improper modifications to an unrelated contract. This violation of law was not presented to the court in the litigation in which our client was involved.¹ It is, however, an issue that demands your immediate attention, because the Park Service is currently intent on completing a substantial portion of this illegally-awarded contract by the end of May, and any delay in calling the Park Service to task would be tantamount to endorsing its illegal behavior.

¹ The plaintiffs in that litigation did not have the requisite standing to place this issue before the court.

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In order to provide some background, I will briefly summarize the history of this contract. In 1998, the Park Service awarded a contract to Grunley-Walsh Joint Venture, LLC (Grunley-Walsh). The contract stated that it was to “Stabilize and Preserve the Washington Monument.” *See* excerpts from 1998 contract (attached as Exhibit 2). When this contract was awarded (and when it had been announced for competitive bids), it covered repairing and cleaning the existing monument, and restoring the site after the repair and restoration work was complete. Under this contract, the Park Service regularly issued Task Orders for specific portions of the contracted work. Eventually, in the spring of 2000, the Park Service issued three Task Orders for “Site Restoration” and “Rehabilitation” of the site (indicating that the other work was complete). *See* Task Order Nos. 15, 16, and 17 (attached as Exhibits 3, 4 and 5). On June 9, 2000, the Park Service issued a press release announcing that “following completion of a two-year restoration” the monument would reopen July 31, 2000. According to the press release, the only part of the project incomplete at that time was the installation of new elevator cabs, which were to be installed the following winter. *See* NPS Press Release (attached as Exhibit 6).

In June 2001 (over a year since issuing the task orders for site restoration), the Park Service issued a new Task Order for work that was unrelated to anything that had been previously performed under the contract, or, for that matter, anything that had been included in the scope of the contract when it had been competed and awarded. This new Task Order was for \$136,803 (later raised to \$150,202) for the construction of an “interim security facility” for screening visitors to the Monument. *See* Task Order No. 18, (attached as Exhibit 7). Then, in November 2001, NPS began issuing a new series of Task Orders under the contract. *See e.g.*, Task Order Nos. 19, 20, and 22, (attached as Exhibits 8, 9, and 10). These Task Orders concerned new, security-related work, work which was in no way anticipated by the contract as it had been competed and awarded, and which was radically different from any of the work previously performed under the contract. It is under a number of these Task Orders (after Task Order 18) that Grunley-Walsh has been and is performing the current construction project.

This ploy of attempting to shoehorn a new procurement into a previous contract is not new. Neither is there any doubt that it is illegal. As the Court of Federal Claims held in *CESC Plaza Limited Partnership v United States*, 52 Fed. Cl. 91 (2002):

CICA demands ‘full and open competition through the use of competitive procedures.’ This requirement should not be avoided by using the device of a contract modification. Modifying the contract so that it materially departs from the scope of the original procurement violates CICA by preventing

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potential bidders from participating or competing for what should be a new procurement. (Internal citations omitted.)

The purpose for this rule is clear. Without it, federal agencies could evade the requirement of free and open competition in government procurement by simply giving contracts to whatever contractor they pleased, as long as that contractor had an open contract for something, anything, with that agency. Of course, this denies other contractors the right to compete for the work, and, more importantly (from the government's perspective at least) denies the government the myriad benefits of competitive contracting (*e.g.*, lower prices, better technology, innovative approaches, etc.) which lead Congress to mandate the use of competitive procedures in the first place.

Even the above brief summary makes it abundantly clear that this new work was not anticipated by the original contract to "stabilize and preserve the Washington Monument" and, at least "materially departs from the scope of the original procurement." Not only is the original contract or procurement completely devoid of any mention of the security work that has been the focus of all Task Orders the NPS has issued in the last three and a half years, but this new project is also not some *de minimis* addition. Rather, shortly after it began issuing Task Orders for this unrelated work, the Park Service raised the cost limitation on the contract from \$5 million to \$40 million, an increase of 700%. See Modification No. 7 (attached as Exhibit 11), and NPS' Justification for Other Than Full And Open Competition (attached as Exhibit 12) at p. 2.

The Park Service has tried to justify its illegal action by reliance on some of the exceptions found in 41 U.S.C. § 253(c). In particular, it has variously relied on 41 U.S.C. §§ 253(c)(2) (allowing an exception where "an unusual and compelling urgency" would otherwise seriously injure the government) and 253(c)(6) (allowing an exception where disclosure of the governments needs via the bidding process "would compromise national security"). However, neither of these narrow exceptions is applicable to the Park Service's action.

In late November of 2001 (five months after the first security-related Task Order was added to the contract) the Park Service drafted a Justification for Other Than Full And Open Competition (attached as Exhibit 12). In this document, the Park Service relied on the exception in 41 U.S.C. § 253(c)(2) to justify its decision to obtain a new acquisition without engaging in the required competitive procedures. In claiming the § 253(c)(2) exception, the Park Service pointed to the President's Proclamation of September 14, 2001 (attached as Exhibit 13) to justify its action. That Proclamation declared a national

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emergency to exist in the wake of the September 11, 2001 tragedy. However, the Park Service's reliance on this proclamation to justify its noncompetitive award of this project under § 253(c)(2) is unavailing. Indeed, the Park Service's own actions show that this exception cannot shield its avoidance of the clear Congressional mandate for free and open competition.

- First, as noted above, the first security-related Task Order for work on the Monument Grounds was issued in June of 2001, which, of course, was before September 11. Therefore, the Park Service had already decided to evade the requirements of competitive procurement by improperly modifying an unrelated contract, and had actually begun issuing task orders under that plan, months before the President issued the Proclamation upon which the Park Service later claimed to rely.
- Second, the Park Service has approached this project with anything but the urgency that the President's proclamation expressed. In contrast, it has proceeded at what can best be called a glacial pace. Although the first Task Orders on this project were issued in the summer and fall of 2001, it took well over two years for the actual work to begin. Indeed, it was not until January 2004 that there was any evidence of even site preparation work beginning on the grounds around the Monument, and at this time, the actual construction of barriers seems to be yet to begin. To characterize this as the response to a national emergency is to stretch that term to the point of meaninglessness.
- Third, the project as it currently is being constructed offers little or no security enhancements over the system of concrete barriers around the Monument that have been in place since before this contract was awarded. Those barriers, which have been in place since at least 1998, were put in place to prevent a truck-based bomb from getting close enough to the Monument to do serious damage. (With stone walls 15 feet thick at ground level, only a very large bomb could possibly do any significant damage to the Monument.) Whatever benefits may be derived from replacing those barriers with the walls and concrete terraces on the Monument Grounds (and there is little to indicate any such benefits are not outweighed by the permanent harm done to the grounds, and the safety and other problems created), the project cannot be justified on an urgent security need basis. The Park Service, of course, knows this. Indeed, if the current project is actually needed to protect the Monument, why has the Park Service left the Monument unprotected all this time?

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- Most significantly, 41. U.S.C. § 253(c)(2) does not allow sole-source contracts to be awarded whenever there is some emergency that is related to the subject matter of the contract. If that were true, it would exempt (among other things) every procurement of military supplies or services related to anticipated or current combat, and would therefore largely gut the requirement for competitive procedures, at least for Defense Department procurements. (Certainly, there is a demonstrable national security benefit to obtaining all military supplies and services in the most expeditious manner possible.) Rather, the statute allows a narrow exception to the requirement of competitive procedures if the need is “of such an unusual or compelling urgency that the Government would be seriously injured” if competitive procedures were used. In this case, it is incredible that allowing competitors to bid on this multi-million dollar project would have seriously injured the government, particularly given the extended period between the justification and the actual initiation of construction work.

Possibly because it realized the indefensibility of its prior reliance on 41. U.S.C. § 253(c)(2), in the course of the recent litigation the Park Service appeared to have switched the basis for its claimed exemption, and instead relied on 41 U.S.C. § 253(c)(6). *See* Excerpts From Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary Injunction (“Defendants’ Opposition”) (attached as Exhibit 14) at p. 40, note 15. Unfortunately for the Park Service, this provision affords even less support for its illegal action. As the Park Service correctly states, § 253(c)(6) allows an exception to competitive procurement procedures when disclosure of the government’s needs by the use of competitive procurement procedures “would compromise national security.” Surprisingly, in the same document in which the Park Service attempts to rescue this illegal action by reliance on this provision, it also conclusively proves that this provision is totally inapplicable. As the NPS states, the government’s needs, far from being kept secret, were broadly publicized by the Park Service and others.

Articles [announcing the planned project] appeared in both the Washington Post and Washington Times [in August 2003]. On August 29, 2003, NPS issued a press release announcing the start of site preparation and describing additional first-phase work to follow completion of site preparation work. These activities were visible to even a casual observer of the Washington Monument grounds. Defendants Opposition p. 17.

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In other words, the Park Service claims that the government's desire to build this system of walls and sidewalks was so secret that even the limited notice of this desire that would have resulted from following the statute-mandated competitive procurement procedures "would compromise national security", but the NPS admits that, months before any work began, the nature and scope of the project was described in two major newspapers and a Park Service press release, and states that it can be easily discerned by even casual observers. In addition to this, the Park Service admits that the details of the current project were the subject of a public Environmental Assessment process that included a published description and analysis of the project before it began, and public meetings discussing the details of the project (*See e.g.*, Defendants Opposition p. 20) and extensive discussions with a wide variety of organizations concerning the lasting effects the project will have on the historic landscape and usage of the Monument Grounds (*See e.g.*, Defendants Opposition pp. 32-33). Yet the Park Service avoided the clear statutory mandate for competitive award of this multi-million dollar project on the basis that the minimal information that would be thus made available would compromise national security. Clearly, the Park Service is stretching to justify its actions, but the facts simply do not support its arguments.

Finally, even a cursory consideration of the other possible statutory exceptions (those not yet claimed by the Park Service as its basis) shows that each of those is equally inapplicable to the Park Service's illegal action. The statutory bases are listed in 41 U.S.C. § 253(c), and include:

- Only one viable source (41 U.S.C. § 253(c)(1)). This is undoubtedly inapplicable, as several other companies bid on the original contract, and these and others were fully able to bid on this project if they had been given the chance.
- A non-competitive award is necessary to keep a needed source viable (41 U.S.C. § 253(c)(3)). This analysis is inapplicable, as there is no indication that Grunley-Walsh is a critical source, nor that failing to obtain this project would have endangered their viability.
- A non-competitive award is required by treaty (41 U.S.C. § 253(c)(4)) or statute (41 U.S.C. § 253(c)(5)), or the agency notifies Congress in advance of a special reason for a particular procurement (41 U.S.C. § 253(c)(7)). All of these are clearly inapplicable to this project.

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Although, as I stated above, this issue was not litigated in the case that was recently brought by our client, it could still become the subject of litigation. Any contractor that would have been likely to bid on the current project if the Park Service had followed the statutory requirements and opened it for bids can, upon learning of the illegal manner in which this project has been handled, bring an action in the Court of Federal Claims challenging the Park Service's action. If this happens, upon proof of the illegality of the NPS's actions, the court will order the Park Service to halt the illegal contract and re-open it for bids. *See, e.g. CCL Inc. v. United States*, 39 Fed. Cl. 780 (1997) (court found CICA violation and ordered the government not to accept any of the products it had contracted for, and to rebid the contract.); *Abel Converting, Inc. v. United States*, 679 F.Supp. 1133 (D.D.C. 1988) (court ordered entire contract rebid due to CICA violation). In addition to the significant additional costs this may entail (e.g., the government would still have to pay Grunley-Walsh for the costs it incurred up to the stop-work order), such a case, because of its subject matter, would almost certainly attract significant media attention. Needless to say, with such a clear violation of law involved, this publicity could be quite embarrassing to the Park Service in particular, and to the Government in general.

Certainly, the Park Service knows the requirements of CICA well, and I presume it ordinarily follows them appropriately. This raises the question of why the Park Service has thus far insisted on justifying such a flagrant violation of the law. Its reasons are known only to key decision makers within the Park Service, but it may be that the Park Service has simply been trying to get this project done while attracting as little oversight as possible. It appears as though the Park Service is attempting to use the current international situation to push through a plan that it has wanted for years. Indeed, the Park Service has been proposing Monument Grounds revisions that featured an underground visitors' center from time to time since the 1970's, and has quite formally and consistently pushed for an underground visitors' center since 1993. *See e.g.*, August 16, 1993 Letter from the NPS Regional Director summarizing planned changes to the Monument Grounds (attached as Exhibit 15). Congress has consistently rejected each of these schemes, and has passed various statutes designed to prevent the construction of such things on the National Mall. Congress most recently and explicitly rejected such a scheme in December 2003. (*See* Commemorative Works Clarification and Revision Act of 2003, Pub. L. No. 108-126 § 202(c), 117 Stat. 1348, 1349 (2003) (attached as Exhibit 16). However, when the network of walkways and walls that the Park Service is about to build was designed, and when it was reviewed (e.g. for environmental impact) it was an integral part of a system, the most prominent and significant feature of which was a controlled, underground entrance to the Monument.

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Moreover, in the course of the recent litigation between our client and the Park Service, whenever we asked the Park Service whether it had dropped the underground visitor center part of their plan, it consistently refused to provide a straight answer. Each time the Park Service evasively responded with something like “at this time” the underground components of the plan are not being built, or there are no “immediate plans” to build that portion of the project. *See e.g.*, NPS letter of January 12, 2004 (attached as Exhibit 17). However, the Park Service also argued that, because it had started planning the underground visitor’s center before Congress amended the Commemorative Works Act in 2003 to prohibit such structures, if it decides to complete the project, it (the Park Service) will determine whether the proposed underground entrance and visitor center is covered by the definition of “visitor center” in the Act. Further, the Park Service repeatedly suggested that the underground visitor center project is somehow “grandfathered” and thus exempt from the clear prohibition of Congress. *See, e.g.* Defendants’ Opposition pp. 15-16. Of course, all this only further demonstrates the Park Service’s pattern that it has consistently shown in regards to all facets of this project: intentional evasion of statutory requirements; hostile attitude toward the clear intent of Congress; and a desire to do what it pleases regardless of clear Congressional intent to the contrary. In fact, it should not greatly surprise anyone if, in a few years, the Park Service “discovers” that the system of walls it is now preparing to build creates a myriad of safety, crowd control, and pedestrian flow problems without really adding much to security, and it then proposes to fix these problems by restricting public access to the grounds by building an underground entrance to the Monument (so visitors to the Monument can be kept separate from visitors to the grounds). At that time, with the walls in place, and facing safety and security issues, Congress may well find itself with no viable choice but to approve the NPS’s long-desired underground entrance and visitor’s center.

I urge you to investigate this illegal procurement as soon as possible, and to put a stop to such activity on such an important and symbolic site.

Sincerely,

Joseph D. West

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cc: Mary K. Adler
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