



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: February 26, 2009

CBCA 1305

LIBBEY PHYSICAL MEDICINE CENTER AND HOT
SPRINGS HEALTH SPA,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Charles A. Banks and Robert W. Francis of Banks Law Firm, PLLC, Little Rock, AR, counsel for Appellant.

Charles B. Wallace, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **DRUMMOND**, and **WALTERS**.

Opinion for the Board by Board Judge **WALTERS**. Board Judge **VERGILIO** concurs.

WALTERS, Board Judge.

____ Respondent, the Department of the Interior (DOI), moves to dismiss the appeal for lack of subject matter jurisdiction, urging that the concessions contract that is the subject of the appeal is not a contract under the purview of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2006) (CDA). Appellant, Libbey Physical Medicine Center and Hot Springs Health Spa (Libbey), opposes the motion and insists that the CDA applies to the instant dispute. The Board denies the motion for the reasons set forth below.

Factual Background

DOI awarded Libbey a concessions contract, contract no. CCHOSP004 (the contract), to provide a health spa with certain accommodations, facilities, and services for the public for hydrotherapy, physical therapy, and physical fitness within the Hot Springs National Park, Hot Springs, Arkansas, for a ten-year period beginning January 1, 1988, and ending December 31, 1997. The contract was executed on behalf of the Secretary of the Interior (Secretary) by the Regional Director of the Southwest Region of DOI's National Park Service (NPS). Respondent's Motion, Exhibit A, Contract.

The contract required Libbey to pay scheduled fees to NPS for the operation of its bathhouse concession, including building use fees, thermal water and pool capacity fees, and tubbage fees. In terms of any claims or disputes that may arise under the contract, the contract contained the following Disputes clause:

(a) Except as otherwise provided in this contract, any dispute, or claim, concerning this contract which is not disposed of by agreement shall be decided by the Director, National Park Service, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Concessioner. The decision of the Director shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Concessioner mails or otherwise furnishes to the Director a written notification of appeal addressed to the Secretary. **In accordance with the rules of the Board of Contract Appeals, the decision of the Secretary or his duly authorized representative for the determination of such appeals, shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.** In connection with any appeal proceeding under this clause, the Concessioner shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute or claim hereunder, the Concessioner shall proceed diligently with the performance of the contract or as otherwise required in accordance with the Director's decision. Claims shall be considered hereunder only if notice is filed in writing with the Director within 30 days after the Concessioner knew or should have known of the facts or circumstances giving rise to the claim.

Respondent's Motion, Exhibit A, Contract § 17(a), at 19 (emphasis added).

The contract specifically contemplated that Libbey would construct and provide buildings, structures, fixtures, equipment, and other improvements for purposes of its performance under the contract, and, in this regard, recognized that Libbey would have a “possessory interest” in all such improvements. Respondent’s Motion, Exhibit A, Contract § 6, Concessioner’s Improvements, at 6. In terms of this possessory interest, the contract provided for Libbey to obtain “just compensation” for such an interest upon termination or expiration of the contract, under two alternative factual scenarios. First, where Libbey’s operations were to be continued by a successor concessioner contractor, the contract provided that Libbey was to sell and transfer the possessory interest in improvements to that successor contractor at fair value, and defined how fair value was to be measured and how any disputes regarding such a sale would be resolved -- by means of binding arbitration between the two private entities under the auspices of the American Arbitration Association. *Id.* § 12, Compensation ¶¶ (a)-(b), at 12-14. Second, where there would be no continuation of operations beyond contract termination or expiration, the contract called for DOI to purchase the possessory interest:

(c) contract expiration or termination where operations are to be discontinued:

If for any reason, including contract expiration or termination as described herein, the Concessioner shall cease to be required by the Secretary to conduct the operations authorized hereunder, or substantial part thereof, and the Secretary at the time chooses to discontinue such operation, or substantial part thereof within the area, and/or to abandon, remove, or demolish any of the Concessioner’s Improvements, if any, then the Secretary will take such action as may be necessary to assure the Concessioner of compensation for (i) its possessory interest in Concessioner Improvements, and Government Improvements, if any, in the amount of their book value (unrecovered cost as shown in Federal Income Tax Returns); (ii) the cost to the Concessioner of restoring any assigned land to a natural condition, including removal and demolition (less salvage) if required by the Secretary; and (iii) the cost of transporting to a reasonable market for sale such movable property of the Concessioner as may be made useless by such determination. Any such property that has not been removed by the Concessioner within a reasonable time following such determination shall become the property of the United States without compensation therefor.

Id. ¶ (c), at 14. The contract provided for compensation for the possessory interest, even in the event of a contract termination by reason of the concession contractor’s default in performance. *Id.* ¶ (d), at 14.

Beyond its scheduled expiration on December 31, 1997, the contract was extended by the parties by eight successive one-year extensions, the last of which expired on December 31, 2005. On September 16, 2005, NPS notified Libbey that it would not issue another extension. Thereafter, DOI advises, for several months, the parties engaged in an exchange of correspondence regarding the procedure for Libbey's submission of a claim for recovery of compensation due for any possessory interest in improvements it may have acquired under the contract. Ultimately, on June 27, 2006, Libbey submitted a formal "Claim on Concession Contract CCHOSP-004-88" (the claim). The claim, in the total amount of \$253,056.34, was accompanied by a certification of Dewey Crow, an owner, operator, and authorized representative of Libbey, stating: "This claim is made in good faith and represents, to the best of my knowledge and belief, an accurate and fair amount of the government's liability for improvements that were made in connection with running Libbey Memorial. The exhibits attached hereto are, to the best of my knowledge, accurate and complete." Supplement to Appellant's Response to Motion to Dismiss, "Claim on Concession Contract CCHOSP-004-88."

DOI relates that Libbey's claim was denied in its entirety by the Regional Director of the NPS Southwest Region (Director), "[i]n accordance with the terms of the disputes clause." Respondent's Motion at 3. This denial was effected by letter to Libbey's counsel dated January 3, 2007. Respondent's Motion, Exhibit B.

On February 1, 2007, i.e., within the thirty-day appeal period specified under the Disputes clause, Libbey sent a written "Notice of Appeal" to the Secretary. After what DOI describes as "an internal Departmental delay," it notified Libbey by letter of October 18, 2007, that its appeal would be decided by the Assistant Secretary for Fish and Wildlife and Parks (Assistant Secretary). In this connection, Libbey was advised that it would be afforded the opportunity to submit additional evidence and to appear before the Assistant Secretary for oral presentation. Respondent's Motion, Exhibit C. On February 14, 2008, Libbey submitted a supplement to its claim, providing additional argument and support. By letter dated May 16, 2008, the Assistant Secretary affirmed the Director's decision, again denying Libbey's claim in its entirety. The letter stated that it was to "serve as the final and conclusive decision" of the claim, "pursuant to [Contract] Section 17 [the Disputes clause]." Respondent's Motion, Exhibit D. Thereafter, on August 5, 2008, an appeal was filed with this Board from the decision of the Assistant Secretary.

The present motion to dismiss for lack of subject matter jurisdiction was filed on October 20, 2008, and Libbey's response was filed on November 24, 2008. A DOI reply was filed on December 11, 2008. As explained below, the parties also filed supplemental briefs on January 23, 2009, in response to a Board request.

Discussion

DOI maintains that the instant contract, a concessions contract, falls outside the scope of the CDA and thus is beyond this Board's subject matter jurisdiction. The CDA, as DOI correctly states, applies to disputes arising out of or relating to express or implied contracts of federal executive agencies for:

- (1) the procurement of property, other than real property;
- (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).

Here, the 1987 concessions contract, an express contract, clearly called for the procurement of construction, alteration, repair, and maintenance of real property, title to which vested in the Government. A dispute regarding such procurement thus is nothing other than a dispute to be addressed and resolved under the CDA. 41 U.S.C. § 602(a). Congress has never amended the CDA to carve out an exception for disputes arising out of the valuation of concessioner's interests in facilities constructed, altered, repaired or maintained under DOI concessions contracts.

DOI argues that, because the "primary purpose" of a concessions contract such as the one at issue is to obtain services for the benefit of park visitors, the CDA cannot apply to the present dispute. In support of its position, DOI cites to a decision of the United States Court of Appeals for the District of Columbia Circuit which held, generally, that NPS concessions contracts do not fit within the ambit of the CDA. *See Amfac Resorts, L.L.C. v. Department of the Interior*, 282 F.3d 818, 835 (D.C. Cir. 2002). DOI also cites to decisions of the United States Court of Federal Claims. *See Frazier v. United States*, 67 Fed. Cl. 56, 59 (2005); *YRT Services Corp. v. United States*, 28 Fed. Cl. 366, 393 (1993). None of these decisions is persuasive, nor is any binding precedent for this Board; we are a part of the Federal Circuit, not the District of Columbia Circuit, and the Court of Federal Claims is a coordinate, rather than a superior, tribunal. The United States Supreme Court, whose decisions obviously are binding precedent for the Board, declined to resolve whether the CDA applies to NPS concessions contracts, since it found the controversy it faced involving

such contracts not ripe for resolution. *See National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803 (2003).¹

Though it has yet to deal directly with disputes relating to concessions contracts, our appellate court, the Court of Appeals for the Federal Circuit, indicated that it would apply the CDA to a contract having multiple purposes, where at least one of those purposes is to secure repair, construction, or other services that benefit the Government and where the parties' rights and responsibilities regarding such services are readily identifiable and separable within the contract. *See Bonneville Associates v. United States*, 43 F.3d 649 (Fed. Cir. 1994). Here, the work Libbey undertook to construct, repair, and maintain facilities and other concessioner improvements clearly benefited the Government and was a condition of its permitted access to and use of the premises at the Hot Springs National Park. Moreover, NPS took great pains to define the parties' rights and responsibilities regarding such facilities and concessioner improvements, under separate sections of the contract, i.e., sections 6 and 12.

The instant case is unlike the situation the Federal Circuit faced in *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), where it found the CDA inapplicable. That case involved a contract under which the Government was furnishing, not procuring, services, i.e., uranium enrichment services that the Government was selling to various utility companies. Although there the Government temporarily acquired title² to lower grade uranium (U²³⁵) feed material from the utility companies so as to process and

¹ Although NPS regulations contain a statement asserting that concessions contracts are not contracts subject to the CDA, 36 CFR 51.3 (2000), because NPS "is not empowered to administer the CDA," the Supreme Court discounted that statement as "nothing more than a 'general statemen[t] of policy' designed to inform the public of NPS' views on the proper application of the CDA." *National Park Hospitality Ass'n*, 538 U.S. at 809.

² In *Florida Power*, the Government (Department of Energy) would take title to feed material from several utility company purchasers, and would process such feed material and deliver enriched uranium to the various purchasers, without keeping track of whose material was being processed and delivered since, as the Court explained, all such material was "fungible." In contrast, the improvements involved in this case clearly were constructed and maintained specially by Libbey for the instant contract and could not be considered fungible. Also, whereas in *Florida Power*, the transfer of title back and forth between the Government and the purchaser was necessary, integral, and incidental to the Government's performance of its enrichment services, the possessory interest title transfer here with regard to Libbey's improvements at the park was not part of or incidental to Libbey's performance of services for park visitors, but only was to occur after those services were no longer required.

enrich it for them into higher grade (U²³⁸) product, which it ultimately delivered to the utility companies, and although the Government also retained title to and disposed of waste materials (so-called “tailings”), the Court did not find any such title acquisition and disposal to constitute either a procurement or disposal of personal property that would be subject to the CDA. Instead, the Court found all such title acquisition and disposal to be incidental to and part of a “single transaction,” the Government’s sale of uranium enrichment services. *Florida Power*, 307 F.3d at 1374. The Court distinguished the facts in *Florida Power* from those in *Bonneville*, where it had found the contract to have provided for two separate transactions: (1) the Government’s acquisition of real property (something expressly excluded from CDA coverage); and (2) the contractor’s performance, as a precondition to the real property acquisition, of specified alteration services (something expressly covered by the CDA).

In the present case, like *Bonneville*, there were at least two transactions contemplated and separately provided for under the contract: (1) Libbey’s provision of health spa, therapy, and physical fitness services to national park visitors; and (2) the Government’s acquisition, upon contract expiration, of title to Libbey’s possessory interest in facilities and improvements it was required to construct and maintain. Valuation of, payment for, and transfer of title to Libbey’s possessory interest, although provided for within the same contractual document as the grant of a concession for operation of Libbey’s health spa facility, theoretically could have been covered by a completely separate (albeit related) contractual document. Also, unlike *Florida Power*, where the dispute related to the pricing of the uranium enrichment services the Government was selling, the dispute here relates directly to the compensation claimed for the property interest in improvements the Government was acquiring after Libbey’s contract expired. Indeed, no separate pricing of or compensation for the uranium feed material was specified by the contract in *Florida Power*, as contrasted with the separate specification under contract section 12 for compensation due Libbey for the improvements at issue.

DOI, in its reply memorandum, places great reliance on the 2005 decision of the Court of Federal Claims in *Frazier*. Aside from that decision having no binding precedential value, we find its facts to be readily distinguishable from those presented here. Unlike the instant dispute, the dispute in *Frazier* did not involve a claim for the Government’s payment of fair value for facilities constructed in furtherance of the concession lease, but rather, a claim for lost profits in the operation of a marina under that lease by reason of an alleged Government breach (release of a study proposing closure of the concession area). Indeed, unlike Libbey’s contract, the concessions lease in *Frazier* did not mandate even a successor concessioner’s acquisition of facilities constructed under the lease, and it contained nothing whatsoever, let alone separate special provisions, regarding the Government’s acquisition of such facilities.

The decisions of our predecessor boards of contract appeals are binding precedent for this Board. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,989. In this regard, one of our predecessors, the Department of the Interior Board of Contract Appeals (IBCA), on more than one occasion, held disputes under certain DOI NPS concessions contracts to be justiciable under the CDA. More particularly, although the IBCA made clear that the CDA might not apply to all disputes involving concessions contracts, it held the CDA applicable where the contracts required the concessioner to provide construction, alteration, repair, or other services as a condition of the permitted access to a national park, services that would benefit the Government. *Watch Hill Concession, Inc.*, IBCA 4284/2000, 01-1 BCA ¶ 31,298, at 154,520-21; *National Park Concessions, Inc.*, IBCA 2995, 94-3 BCA ¶ 27,104, at 135,096-98; *R&R Enterprises*, IBCA 2417, 89-2 BCA ¶ 21,708, at 109,145-47; *see also Great South Bay Marina, Inc.*, B-296335 (July 13, 2005) (Comptroller General noted that some NPS concessions contracts are “hybrids, and require the delivery of goods and/or services to the government, in addition to authorizing the contractor to provide services to park visitors”); *Alpine Camping Services*, B-238625.2 (June 22, 1990) (Comptroller General acknowledged CDA applicability where the concessioner was required to recondition and maintain recreation facilities and perform tasks to protect land, maintain campsites, and preserve structures in accordance with Government specifications, all to the benefit of the Government).

DOI seeks to distinguish the IBCA precedent on the basis that the concessions contracts in those prior cases purportedly did not have the same Disputes clause as was present here. Even if the Disputes clause in the instant contract were read as DOI would have the Board read it, the clause would not supersede this Board’s jurisdiction under the CDA. Indeed, as the Court of Appeals for the Federal Circuit has observed, “the CDA trumps a contract provision inserted by the parties that purports to divest the Board of jurisdiction, unless the contract provision otherwise depriving jurisdiction is itself a matter of statute primacy.” *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997). DOI has not tried to link the Disputes clause here to any statute that would take precedence over the CDA.

DOI also argues that the CDA would not be applicable in this case, because there was no contracting officer’s decision, a necessary prerequisite for Board jurisdiction under the CDA. This argument is likewise unpersuasive. Although the Director in this case was not referred to specifically as a “contracting officer,” under Federal Acquisition Regulation (FAR) 2.101, Definitions, the term “contracting officer” is defined as follows:

“Contracting officer” means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.

48 CFR 2.101 (2008). Here, it was the Regional Director of the NPS Southwest Region who executed the instant concessions contract and who was designated therein to make the decision on any concessioner claim for compensation under section 12(c) of the contract. Accordingly, assuming that the matter at issue was appropriately one under the CDA, it would have been proper to have submitted the claim to the Regional Director for a contracting officer’s decision. In terms of other prerequisites for “claim” status under the CDA, the present claim would have satisfied the CDA requirement that it be for a “sum certain,” i.e., it sought a total of \$253,056.34. Further, the claim appears to have been certified by an authorized Libbey representative with language that would have complied adequately with the claim certification provisions of the CDA. Thus, were this matter properly under the CDA, the decision the Regional Director made would qualify as a contracting officer’s decision.³ As to appeal timeliness, given the unusual language of the contract’s Disputes clause,⁴ Libbey’s appeal to the Secretary within thirty days of the Regional Director’s decision in accordance with that clause cannot be said to have been untimely in terms of the ninety-day appeal limitation of the CDA. Indeed, because the Regional Director’s decision failed to apprise Libbey properly as to its rights under the CDA to appeal that decision to this Board, the ninety-day limitation for such an appeal would not even have commenced. *Lawrence Harris Construction, Inc.*, VABCA 7219, 05-1 BCA ¶ 32,830, at 162, 438 (citing *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996)).

Our analysis would not be complete, however, unless we address the provisions of the 1998 National Parks Omnibus Management Act (the 1998 Act), 16 U.S.C. §§ 5951-5966 and, in particular, 16 U.S.C. § 5954. Although the parties did not initially mention the 1998 Act, the Board requested that they do so by means of supplemental briefs.

³ DOI regulations expressly preclude the Secretary from taking jurisdiction over and rendering final decisions for the agency in matters properly before the Board under the CDA. 43 CFR 4.5(a) (2007).

⁴ Although not clear from the submissions, it may be that the provision for a thirty-day appeal period and some of the other language contained within the instant Disputes clause were borrowed from what had been the standard federal construction contract Disputes clause under Standard Form 23-A that had been in use by DOI and other federal agencies prior to enactment of the CDA. See *Harry Claterbos Co., JV*, IBCA 1153-5-77, 78-1 BCA ¶ 12,888 (1977).

Under the 1998 Act, Congress changed the nature of the interest acquired by a concessioner in improvements it has constructed in connection with a DOI national parks concessions contract. Instead of a possessory interest, concessioners acquire a so-called “leasehold surrender interest” in capital improvements they construct on or after that Act’s effective date, November 13, 1998, “pursuant to a concessions contract.” 16 U.S.C. § 5954(a). For this purpose, the Act does not distinguish between capital improvement construction performed under a pre-November 13, 1998, contract and construction under a contract awarded after the Act’s effective date. *Id.* In addition, the 1998 Act addresses the situation where a possessory interest has been created under a pre-November 13, 1998, concessions contract, by reason of capital improvements construction accomplished prior to November 13, 1998, and where that pre-Act contract has been replaced by a *new* post-November 12, 1998, contract. In that situation, the 1998 Act provides for the possessory interest to be converted to a leasehold surrender interest having an initial value equal to the value of the previously existing possessory interest as of the termination date of the previous contract. *Id.* § 5954(b)(2). In terms of disputes concerning the valuation of the possessory interest under the earlier contract upon its conversion to a leasehold surrender interest, the 1998 Act expressly mandates that “a dispute between the concessioner and the Secretary [of the Interior] as to the value of such possessory interest” be “resolved through binding arbitration.” *Id.*

In their supplemental briefs, both parties argue that the instant concessions contract, executed in 1987 for a ten-year term, was extended thereafter for successive one-year terms until 2005, and *was never replaced with a new contract*. Accordingly, they maintain, the provisions of 16 U.S.C. § 5954(b)(2) are inapposite. For pre-November 13, 1998, contracts, such as the present one, respondent points out, the statute provides that the concessioner is due compensation for its possessory interest “in the amount and manner as described” by the pre-November 13, 1998, contract, where that contract is not replaced by a new contract. 16 U.S.C. § 5954(b)(1). Thus, respondent asserts, the terms of the 1987 concessions contract, including the contract’s Disputes clause, would still govern the resolution of any disputes between the concessioner and the agency regarding any compensation due Libbey.

The Board finds the interpretation of the 1998 Act advanced by both parties here to be overly simplistic and incorrect. Under the Act, an extension of an existing concessions contract issued after the Act’s effective date is expressly treated as a “new concessions contract.”⁵ In this regard, 16 U.S.C. § 5952(2) reads: “Except as otherwise provided in this

⁵ The parties also fail to acknowledge that the 1998 Act expressly prohibited a pre-November 13, 1998, contract from being extended for more than three years beyond its expiration date without a new public solicitation. *See* 16 U.S.C. § 5952(11)(A). DOI

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 . . .” *Emphasis added; see also* 16 U.S.C. § 5952(11) (“the Secretary may award, without public solicitation, the following: (A) A temporary concessions contract or an extension of an existing concessions contract for a term not to exceed 3 years in order to avoid interruption of services to the public. . .”). Applicable DOI regulations also equate the extension of an existing contract with an award. 36 CFR 51.5 (1998); *id.* 51.23, .24 (2008).

The 1998 Act thus required that, under the first extension of the instant contract issued by DOI after November 12, 1998, i.e., the one that extended Libbey’s contract from January 1, 1999, through December 31, 1999, any possessory interest acquired for capital improvements constructed prior to November 13, 1998, be converted to a leasehold surrender interest having an initial value equal to the value of the previously existing possessory interest as of the termination date of the previous contract 16 U.S.C. §5954(b)(2). For this purpose, the “termination date” of the contract existing as of the effective date of the 1998 Act would have been December 31, 1998, i.e., the end of the initial extension period. Under the 1998 Act, were there a dispute between Libbey and the Secretary over the valuation of any such possessory interest as of that date, and the equivalent initial valuation of the leasehold surrender interest that arose as of the following date, January 1, 1999, that dispute would be subject to binding arbitration. *Id.*⁶

regulations implementing the 1998 Act make clear that, even though individual extensions might only be for one-year periods, such extensions may not “exceed three years in the aggregate.” 36 CFR 51.23 (2008).

⁶ The parties had also been asked to address in their supplemental briefs the Consolidated Appropriations Acts for Fiscal Year 2008, Pub. L. No. 110-161, § 6 (div. F, tit. I), 121 Stat. 1844, 2107 (2007), and a provision therein that is a note to 16 U.S.C. § 5954. The provision entrusts the Court of Federal Claims with *de novo* judicial review of value determination decisions arising in a proceeding “conducted under a National Parks Service concessions contract issued prior to November 13, 1998.” We find the provision inapplicable here because, as we explain above, the instant pre-November 13, 1998, contract was replaced with a series of new contracts (in the form of post-November 12, 1998, contract extensions). As such, all portions of Libbey’s claim under the current appeal relate to the existence and valuation of its interests in capital improvements under such new contracts – in particular, the contract that came into existence as of January 1, 1999, and the one that terminated as of December 31, 2005 – rather than under the original pre-November 13, 1998, concessions contract.

Nevertheless, this limited focus of Congressionally mandated arbitration on a potential related issue does not deprive this Board from resolving under the CDA the real matter at issue here, namely, the ultimate value of any leasehold surrender interests that may have existed as of the termination of the final contract on December 31, 2005. *See Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1580-81 (Fed. Cir. 1993) (noting that the Court of Claims had CDA jurisdiction when a dispute centered on the parties' mutual contract rights and obligations, even though matters decided exclusively by the Department of Labor were part of the factual predicate to the dispute).

Moreover, DOI has indicated, by way of a footnote to its supplemental brief, that Libbey engaged in construction at the park during three separate years, 1991, 2001, and 2005.⁷ In this regard, it appears that only the 1991 construction could have given rise to a possessory interest, since the construction during both 2001 and 2005 would have occurred after the effective date of the 1998 Act and, if anything, would have resulted in leasehold surrender interests. 16 U.S.C. § 5954(a)(1). Accordingly, any theoretical use of arbitration here would be limited to a dispute relating to the 1991 construction and then only to a dispute as to its initial valuation upon conversion from a possessory interest to a leasehold surrender interest. All disputes about the valuation of any⁸ leasehold surrender interests as of December 31, 2005 – i.e., disputes about the progression in value of the 1991 improvements beyond the January 1, 1999, conversion date, and disputes that concern compensation for Libbey's construction in 2001 and 2005 – remain disputes solely within this Board's subject matter jurisdiction under the CDA.⁹

⁷ As to the 2005 construction, the parties disagree as to whether such construction was of capital improvements or merely involved ongoing maintenance. DOI argues that the 2005 construction represented only maintenance, since the costs were not capitalized on Libbey's books, but rather expensed. In its claim, Libbey acknowledges that it charged the 2005 costs as expenses, rather than capitalizing them, but explains that it did so only because the contract was not being renewed beyond 2005.

⁸ The parties are at odds as to whether Libbey waived its rights regarding such interests in each instance and thus as to whether any interests ever came into being.

⁹ Notably, the 1998 Act is silent as to disputes between a concessioner and the Secretary regarding the valuation of leasehold surrender interests created after the Act's effective date, under either a post-Act or pre-Act concessions contract, and there is nothing in the Act that indicates a Congressional intent that dispute resolution under the CDA be supplanted generally in terms of DOI concessions contracts.

Decision

For the foregoing reasons, respondent's motion to dismiss the appeal for lack of subject matter jurisdiction is **DENIED**.

RICHARD C. WALTERS
Board Judge

I concur:

JEROME M. DRUMMOND
Board Judge

VERGILIO, Board Judge, concurring.

I concur in the decision to deny the Government's motion to dismiss for lack of jurisdiction. I write separately because I find that the discussion of unpersuasive or factually-inapplicable, non-precedential decisions obfuscates the actual, concise analysis that leads to the result. The Government's motion is readily resolved after considering the contract (stating what the Government procured) and the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (2006) (CDA) (dictating its applicability). Similarly, I find that the legislation dealing with concessions contracts may be directly analyzed and considered with the facts before the Board. Finally, although I agree with the majority that the claim is properly before the Board, our analysis differs. The majority concludes that the equivalent of a contracting officer's decision is issued at a Director level without the involvement of the Secretary of the Interior (or designee). I read the contract, regulations, and the decision of the Director (which permits further review by the Secretary) as establishing a procedure by which the Secretary (or designee) issues the equivalent of a contracting officer's decision that may be appealed to this Board or the Court of Federal Claims.

The Government moves to dismiss this matter for lack of jurisdiction, asserting that the underlying concessions contract is not subject to the CDA. The contract specified that the concessions contractor (concessioner) may construct and install buildings, structures, and other improvements in order to provide accommodations, facilities, and services for the

public within the Hot Springs National Park, Arkansas. The contract recognized that, to establish and maintain necessary facilities and services, the concessioner would have to make a substantial investment of capital. Consistent with statutes, 16 U.S.C. § 20e (1988) and 16 U.S.C. § 5954(d) (2006), legal title to all concessioner improvements vested in the United States. Contract at 1, 2 (§ 2), 5-7 (§§ 4(a), (b), (d), (e), 6). The contract required the concessioner to maintain and repair all facilities used in the operation. Contract at 6 (§ 5). At the same time that the concessioner paid to the Government fees for privileges granted under the contract, and could collect fees from users of the facilities, the concessioner obtained a possessory interest in its improvements. Contract at 8-14 (§§ 9, 12).

The Government procured property, construction, maintenance, alteration, and repair. From the plain language of the CDA, the concessions contract is subject to the CDA. 41 U.S.C. § 602(a). Neither the CDA nor statutes addressing concessions contracts and the Department of the Interior remove this type of concessions contract from the scope of the CDA, which gives a contractor the right to dispute resolution before a board or the Court of Federal Claims. This holding is consistent with decisions of a predecessor to this Board, e.g., *Watch Hill Concession, Inc.*, IBCA 4284, 01-1 BCA ¶ 31,298, and of the Comptroller General, e.g., *Great South Bay Marina, Inc.*, B-296335, 2005 CPD ¶ 135 (July 13, 2005) (recognizing that the Government may procure property or services under a concessions contract). Cases referenced by the Government in support of its position are not persuasive in their analysis in application to this case. Because the concessions contract underlying this dispute is subject to the CDA, I deny the Government's motion to dismiss.

However, the inquiry does not stop there because of the actual dispute and applicable law. *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997) ("the CDA trumps a contract provision inserted by the parties that purports to divest the Board of jurisdiction, unless the contract provision otherwise depriving jurisdiction is itself a matter of statute primacy"). An essential part of the analysis involves provisions of the National Park Service Concessions Management Improvement Act of 1998, 16 U.S.C. §§ 5951-5963 (2006) (Act).

Under the Act, as of November 13, 1998, and regulations, the extension of an existing contract constituted an award of a new contract. Thus, the parties entered into a new contract for 1999 and each year thereafter through 2005. 16 U.S.C. § 5952(2), (11); 36 CFR 51.5 (1998); 36 CFR 51.23, .24 (2007). The view of the parties that there was no new award with each extension is incorrect. (In resolving the motion, the Board need not determine if the parties violated the three-year limitation on extending contracts or any potential impact of such a violation.)

Effective on January 1, 1999, the Government awarded the concessioner a new contract; that is, a contract that replaced the existing contract. Under the Act, the concessioner obtained a leasehold surrender interest. The concessioner had a leasehold surrender interest under its contract that expired on December 31, 2005. The value of the existing possessory interest as of December 31, 1998, became the initial value of the leasehold surrender interest under the new contract. That initial value (with necessary interim adjustments under 16 U.S.C. § 5954(a)) carried over to the final contract. 16 U.S.C. § 5954(b)(2).

The dispute is over the value (if any) of the concessioner's leasehold surrender interest under the expired 2005 contract. One element, or a factual predicate, of the valuation seemingly requires a dollar figure for the value of the concessioner's initial interest. To the extent that the parties cannot agree on that initial valuation, statute dictates that that dispute shall be resolved through binding arbitration. 16 U.S.C. § 5954(b). Given the directive in the statute, the Board is not authorized to resolve that element of a dispute under the CDA. However, this limitation does not deprive the Board of jurisdiction under the CDA to determine the leasehold surrender interest under the expired contract, the actual dispute before the Board. *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1580-81 (Fed. Cir. 1993) (the Federal Circuit noted that the Court of Claims had jurisdiction when a dispute centered on the parties' mutual contract rights and obligations, even though matters decided exclusively by the Department of Labor were part of the factual predicate to the dispute).

The other elements of the valuation of the expired contract also are described in the Act. The concessioner obtained a leasehold surrender interest in capital improvements constructed on and after November 13, 1998; the present value of any such interests must be determined. Also, one must determine the present value of the initial interest. The Act directs how to calculate the value of the leasehold surrender interest. 16 U.S.C. § 5954(a)(1), (3), (5). The Act does not dictate a method for resolving a dispute regarding the valuation of a leasehold surrender interest under an expired lease. Accordingly, because the dispute arises under a contract subject to the CDA, and the Act does not divest the Board of jurisdiction, the concessioner may bring a case to this Board pursuant to the CDA.¹

¹ The Consolidated Appropriations Acts for Fiscal Year 2008, Pub. L. No. 110-161, § 6 (div. F, tit. I), 121 Stat. 1844, 2107 (2007), contains a provision that is a note to 16 U.S.C. § 5954. The provision entrusts the Court of Federal Claims with de novo review of value determination decisions arising in a proceeding conducted under a concessions contract issued prior to November 13, 1998. The dispute here relates to valuation under a new contract, arising in 1999 initially, but ultimately the value under the contract for 2005.

This concessioner properly brought this case to this Board. Consistent with the language of the Disputes clause, the concessioner submitted a written, certified claim to the Director, and then to the Secretary. Department regulations specify the power of the Secretary and Director. Prior to an appeal to this Board, the designee of the Secretary assumed the role of a contracting officer in issuing the decision denying the claim. 43 CFR 4.5 (2007). The concessioner filed a notice of appeal to this Board within ninety days of receipt of the decision of the designee of the Secretary.

JOSEPH A. VERGILIO
Board Judge

Accordingly, that provision does not impact the resolution of this dispute.