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August 27, 2014

Ms. Jennifer Parker  
Chief of Concessions  
National Park Service  
Intermountain Region  
12795 West Alameda Parkway  
Lakewood, CO 80228

via e-mail to Jennifer\_Parker@nps.gov

*Re: Questions Regarding Prospectus for Dinosaur National Monument,  
Solicitation Nos. CC-DINO001-15, CC-DINO002-15, CC-DINO003-15,  
CC-DINO005-15, CC-DINO006-15, CC-DINO008-15, CC-DINO009-15,  
CC-DINO011-15, CC-DINO012-15, CC-DINO014-15, CC-DINO016-15*

Dear Ms. Parker,

In accordance with the Proposal Instructions of the National Park Service's ("NPS") Prospectus for "Guided Interpretive Whitewater River Trips," Solicitation Nos. CC-DINO001-15, CC-DINO002-15, CC-DINO003-15, CC-DINO005-15, CC-DINO006-15, CC-DINO008-15, CC-DINO009-15, CC-DINO011-15, CC-DINO012-15, CC-DINO014-15, CC-DINO016-15, America Outdoors Association ("AOA"), on behalf of itself and its members, some of whom may submit bids in response to the Prospectus, submits the following questions regarding the Prospectus:

#### **ALLOCATIONS**

**Question 1:** Section III(3) of Exhibit B of the Draft Contract, the Operating Plan, states that NPS "may take consistently underutilized river allocations from the Concessioner based on multi-seasonal average use. These allocations would revert back to the Service and may be allocated to other concessioners." This language is very vague. Moreover, there are many legitimate reasons that a particular concessioner might not utilize its entire

allocation in any given year, or even over a several year period. What specific methodology and criteria would NPS employ to determine underutilization for purposes of reversion and potential reallocation?

### **INSURANCE REQUIREMENTS**

**Question 2:** Pursuant to sections 407 and 409 of the National Park Service Concessions Management Improvement Act of 1998 (CMIA) and NPS regulations at 36 C.F.R. Part 51, Congress and NPS have recognized as a fundamental tenet of NPS's commercial services program that concessioners must be afforded a reasonable opportunity to make a profit. Exhibit D of Draft Contract CC-DINOXXX-15 outlines the "minimum types, amounts, and scope of insurance that [NPS] considers necessary to allow the operation of the concession at the Area" and that must be obtained and maintained during the term of the Contract. Section 2(a) of Exhibit D requires the Concessioner to obtain Commercial General Aggregate Liability insurance at the minimum limit of \$4 million. This represents an increase of \$3 million over the \$1 million minimum limit specified in the 2004 solicitation and required in the existing contracts. Section 2(a) also specifies a Per Occurrence minimum limit of \$3 million, reflecting an increase of \$2 million from the \$1 million minimum limit specified in the 2004 solicitation and required in the existing contracts. Moreover, Exhibit D requires that, "[i]f the policy insures more than one location, the general aggregate limit must be amended to apply separately to each location." As addressed in the additional questions below, Exhibit D also imposes or may impose additional insurance obligations.

- (a) On what basis did NPS determine it necessary to include in the Draft Contract minimum Commercial General Liability coverage limits that are three to four times that required under the prior 2004 solicitation and existing contracts?
- (b) Please clarify the following statement: "If the policy insures more than one location, the general aggregate limit must be amended to apply separately to each location."

**Question 3:** Exhibit D of Draft Contract CC-DINOXXX-15, section (b), contains requirements for automobile liability insurance that exceed the federal requirements. On what basis did NPS determine it necessary to include in the Draft Contract automobile insurance requirements that are more stringent than required by the Federal Motor Carrier Safety Administration for 9 to 15 passenger vans?

**Question 4:** Exhibit D of Draft Contract CC-DINOXXX-15, section 2(j), states that "[i]f Concessioner operations are conducted in proximity to navigable waters and employ persons in applicable positions, United States Longshore and Harbor Workers' Compensation Act coverage must be endorsed onto the Workers' Compensation Policy."

In November 2013, NPS explained that, "[t]o address Dinosaur-specific and ongoing insurance concerns," several actions were being taken. According to the update, among other actions, NPS had "tasked its insurance consultant with reviewing the requirements

contained in the Dinosaur National Monument prospectus. Several requirements, such as the longshoreman's and harborworker's endorsements, have been determined to be unnecessary for this contract and will be removed." Letter from L. McDowall to D. Brown, R. Lindsey, J. Sattler, and M. Fetchero (Nov. 7, 2013) ("November 7 Letter"), p. 2. Under 33 U.S.C. § 902(3) and 20 C.F.R. § 701.302, individuals employed by "recreational operations" are excluded from the definition of "employee" for purposes of such coverage, provided they are covered by a state workers' compensation law.

Does NPS maintain that the Concessioner operations to be required or authorized under the contracts to be issued pursuant to the Prospectus will be conducted in proximity to navigable waters and employ persons in applicable positions, such that an endorsement for United States Longshore and Harbor Workers' Compensation Act coverage would be required for the operation of the visitor services to be required or authorized under the contracts to be issued pursuant to the Prospectus? Alternatively, does NPS agree that United States Longshore and Harbor Workers' Compensation Act coverage is inapplicable to these contracts and should not be included in the contracts?

**Question 5:** Exhibit D of Draft Contract CC-DINOXXX-15, section 2(j), states that "[i]f the Concessioner operations include use of watercraft on navigable waters and employ persons in applicable positions, a Maritime Coverage Endorsement must be added to the Workers' Compensation policy, unless coverage for captain and crew is provided in a Protection and Indemnity policy." Does NPS maintain that the Concessioner operations to be required or authorized under the contracts to be issued pursuant to the Prospectus will include use of watercraft on navigable waters and employ persons in applicable positions, such that a Maritime Coverage Endorsement would be required for the operation of the visitor services to be required or authorized under the contracts to be issued pursuant to the prospectus, unless coverage is otherwise provided in a Protection and Indemnity policy? Alternatively, does NPS agree that the Maritime Coverage Endorsement requirement is inapplicable to these contracts and should not be included in the contracts?

**Question 6:** Exhibit D of Draft Contract CC-DINOXXX-15, section 2(i), limits self-insured retentions to \$5,000 unless this requirement is waived by the Director. Why is this requirement subject to a waiver and the other insurance-related requirements, such as the separate aggregate limit for each location, not also subject to a waiver?

**Question 7:** In the November 7 Letter, NPS explained that "NPS conducts a detailed analysis of risks and associated insurance requirements during the development phase of each new concession prospectus. An independent, professional insurance consultant completes this analysis." November 7 Letter, p. 2.

- (a) Did the consultant use historical data on claims and awards in completing the "detailed analysis"?
- (b) What data or factors were used to determine the aggregate and per occurrence minimum coverage limits for general liability?

- (c) Is this analysis of risks specific to the risks in Dinosaur National Monument as suggested, since it is for “each new concession prospectus?”
- (d) Will NPS please provide the consultant’s analysis?

**FRANCHISE FEE AND FINANCIAL ANALYSIS OF CONTRACTING OPPORTUNITY**

**Question 8:** Section 407 of the CMIA requires that NPS establish franchise fees “upon consideration of the probable value to the concessioner of the privileges granted by the particular contract involved . . . based upon a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract.” Section 407 further specifies that “[c]onsideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving park areas and of providing necessary and appropriate services for visitors at reasonable rates.”

The Prospectus specifies a minimum franchise fee that is three times that required by the prior 2004 solicitation for these visitor services. At the same time, the “obligations of the contract” as specified in the Draft Contract will substantially increase the costs of providing the visitor services required or authorized under the contracts to be issued pursuant to the Prospectus.

NPS has represented that “[t]he concession contracting process considers the costs associated with insurance requirements,” that NPS considers the “projected cost of coverage when it conducts a financial analysis to determine a contract’s financial viability as part of the process of developing a prospectus,” and that “[a]ny increased insurance cost is accounted for by the NPS and reflected as a reduction in the contract-specified franchise fee.” NPS has stated that it only releases a prospectus “if there exists a reasonable opportunity for the concessioner to earn a profit based on the terms of the contract.” November 7 Letter, p. 2.

The required increases in commercial general liability insurance and automobile insurance coverage alone could add thousands and even tens of thousands of dollars in additional premium costs for an operator, since a company purchases one policy for general liability to cover operations in the Monument and their other operations outside the Monument, including those on other federal lands and on private lands. Most, if not all, of the existing whitewater river trip operations at Dinosaur National Monument operate under very tight profit margins—margins that have little room to bear additional operating cost requirements. At the same time, the current market for these services is unlikely to bear rate increases that would allow operators to pass on these cost increases.

- (a) Did the NPS consider the extent of the substantially expanded insurance obligations in calculating the minimum franchise fee?
- (b) If so, please explain what the NPS determined to be the impact of this responsibility on the concessioner’s ability to make a reasonable profit (including any estimate of cost), and on rates to be charged to visitors, as well as any assumptions used by the NPS in making that determination. Please provide

- documentation of the “financial analysis” used to determine the “contract’s financial viability as part of the process” of developing the prospectus.
- (c) Does NPS intend or assume that these cost increases will be passed on to visitors in the form of increased rates? If so, did NPS assess how increased rates would affect the market for these visitor services? If so, would NPS provide documentation of that assessment?
  - (d) What were the results of the “additional market analysis” that NPS conducted “to verify availability and costs of the specified insurance,” and the other NPS actions related to review of the insurance requirements, mentioned in the working group update for the October 2013 CMAB meeting?
  - (e) If not answered in response to question 6(d) above, what is NPS’s estimate of potential costs for the required minimum insurance coverage? Please itemize by type of coverage and specify any assumptions regarding the size of the operator and the number and nature of the operator’s other locations. What is the source of this estimate?
  - (f) If actual expenditures exceed the NPS’s estimate and/or if NPS’s assumptions prove to be incorrect, will the NPS reduce the franchise fee?

**GENERAL**

**Question 9:** In July 2013, the NPS released a prospectus for the solicitation for the award of up to eleven Category III concession contracts for the operation of guided interpretive whitewater tours within Dinosaur National Monument. In August 2013, after receiving a significant number of questions and concerns relating to the prospectus, NPS concluded that additional time was needed to determine whether the prospectus should be modified, and canceled the solicitation. Although the re-issued Prospectus reflects some modification of certain insurance requirements, we have significant concerns that the insurance and minimum franchise fee obligations required by the Prospectus are inconsistent with provisions of the CMIA that require NPS to provide “a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract” and to “permit the concessioner to set reasonable and appropriate rates and charges for facilities, goods, and services provided to the public.” Will NPS withdraw the Prospectus and consider additional modification to the solicitation to address these continuing and significant concerns?

Thank you in advance for your response to these questions. As reflected in these questions, AOA submits that NPS has not adequately or appropriately addressed the concerns that led to the withdrawal of the prospectus that NPS issued for these visitor services in 2013.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan D. Simon', with a large, stylized initial 'S'.

Jonathan D. Simon

Counsel to America Outdoors Association