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Ms. Mary Ziegler
Director of the Division of Regulations, Legislation, and
Interpretation, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-3510
Washington, DC 20210

Dear Ms. Ziegler:

Thank you for this opportunity to comment on the proposed regulation to establish a minimum wage for Federal contractors, RIN 1235-AA10. The Forest Service's (FS) suggested revisions to the proposed rule follow.

Consolidation of Terms and Definitions for a Contract

The definitions for "concessions contract or contract for concessions" and "contract or contract-like instrument" in §10.2 should be consolidated. The Department of Labor's (DOL) proposed rule has two separate terms for a contract, "concessions contract or contract for concessions" and "contract or contract-like instrument," and separate definitions for those terms. Two separate terms and definitions are unnecessary, as the definition for "concessions contract or contract for concessions" ("a contract under which the Federal Government grants the right to use Federal property") is subsumed in the definition for "contract or contract-like instrument" ("an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"). In addition, the definition for "concessions contract or contract for concessions" would be confusing for the FS and perhaps other federal land management agencies to implement, as the FS construes the term "concession" much more narrowly than the definition for "concessions contract or contract for concessions" in the proposed rule. The FS interprets concessions to include only commercial recreation public services such as ski areas, marinas, and outfitting and guiding. The FS does not interpret concessions to include the provision of noncommercial interpretive or educational services or the provision of energy, communications, transportation, or water services to the public. For clarity and simplicity, the FS recommends incorporating the definition for "concessions contract or contract for concessions" into the definition for "contract or contract-like instrument."

De Minimis Threshold for Concessions Subject to the Fair Labor Standards Act (FLSA)

The proposed rule includes a de minimis threshold ranging from \$2,000 to \$3,000 for procurement contracts. However, the proposed rule does not include a de minimis threshold for nonprocurement concession contracts subject to the FLSA. Given that most concessions on National Forest System lands are operated under a nonprocurement instrument and that many involve land use fees to the FS at, or below, the micro-purchase threshold for the FLSA, the FS recommends modifying §10.3(b) to add a de minimis threshold for nonprocurement contracts that are subject to the FLSA when the land use fee to the Federal Government does not exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). This revision could be accomplished by adding the following sentence to §10.3(b):

For nonprocurement concessions contracts or contracts for concessions where workers' wages are governed by the Fair Labor Standards Act, this part applies where



the land use fee to the Federal Government exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a).

This revision would provide for consistent treatment of procurement and nonprocurement concession contracts that involve only negligible amounts of money. In addition, this revision would avoid excessive paperwork and administrative costs associated with application of the minimum wage requirement when only minor business transactions are involved. As shown in the discussion below of the Regulatory Flexibility Act analysis, many FS nonprocurement concessions involve very small business entities that earn less than \$100,000 in annual revenue and pay de minimus land use fees to the Federal government.

Scope and Meaning of Bilateral Contract Modifications

The FS would like clarification on the scope of bilateral contract modifications that would require adding the minimum wage clause to a concession instrument. On page 34575, the proposed rule states:

The Department notes that only truly automatic renewals of contracts or exercises of options devoid of any bilateral negotiations fall outside the scope of the Executive Order. As discussed above and consistent with the FAR, the Department's proposed definition of the term contract specifically includes bilateral contract modifications. Any renewals or extensions of contracts resulting from bilateral negotiations involving contractual modifications other than administrative changes would therefore qualify as "new contracts" subject to the Executive Order.

The FS seeks clarification of whether, based on the foregoing, the proposed rule is intended to apply to bilateral contract modifications exclusively in the context of renewal or extension of contracts, or rather to bilateral contract modifications in any context, e.g., to revisions during the term of the contract that do not change the scope of the authorized use.

The FS also seeks clarification of whether the proposed rule is intended to apply exclusively to bilateral contract modifications that change the scope of offered services or facilities, or rather to any type of bilateral contract modifications, such as updating an annual operating plan or a land use fee offset agreement, which do not change the scope of authorized services or facilities. FS concession instruments often have operating plans that typically are reviewed and updated annually by the holder and approved by the FS. Furthermore, the FS utilizes Section 7 of the Granger-Thye (GT) Act to authorize the use of Federally owned improvements. The GT Act allows the holder to offset the land use fee due the United States by the cost of renovation, reconditioning, improvement, and maintenance of the authorized improvements performed at the holder's expense. A GT fee offset agreement is utilized to identify the work that will be performed in the upcoming year. Fee offset is contemplated in the initial solicitation. However, identification of fee offset projects takes place each year.

Enforcement Responsibility

The FS seeks confirmation of DOL's responsibility for enforcement of the minimum wage clause. In particular, the FS seeks confirmation that if it receives a complaint regarding proper payment of wages under the clause, the FS should refer that complaint to DOL; that DOL will determine whether there is a violation; and that DOL will notify the holder of the instrument and the FS as to the corrective action that needs to be taken and the timeframe for completing it. The FS has authority to suspend or revoke the instrument based on noncompliance with its terms, including noncompliance with the minimum wage clause, after giving the holder notice and an opportunity to comply. The FS has authority to refer a holder whose instrument has been revoked for debarment and suspension in accordance with applicable law and FS directives.

Regulatory Flexibility Act Analysis

In the Regulatory Flexibility Act analysis, the threshold utilized to analyze the impacts on small business is too high for the Other Services sector. The FS recommends that DOL include additional thresholds below \$2,500,000 in Table D-8 for the Other Services sector on page 34608. In Table D-8, the lowest category is firms earning less than \$2,500,000 in annual revenue, whereas for some other sectors, the threshold is less than \$100,000 in annual revenue (see Tables D-1 through D-3 for the Construction, Transportation and Warehousing, and Information Industries). FS concessions would fall into the Other Services sector. To illustrate how the threshold would apply to outfitting and guiding services for example, we estimate that 90 percent of permits for outfitting and guiding services involve annual revenue of less than \$100,000; 9.5 percent of permits involve annual revenue between \$100,000 and \$2,500,000 (the floor in Table D-8); and only 0.5 percent of outfitting and guiding permits have annual revenue of over \$2,500,000.

Recordkeeping Requirements Subject to the Paperwork Reduction Act

The Paperwork Reduction Act analysis on page 34593 states that §10.21 of the proposed rule, which would require contractors and subcontractors to comply with the minimum wage clause in the proposed rule, would impose no new recordkeeping requirements. The rationale given for this conclusion is that the recordkeeping requirements in the minimum wage clause of the proposed rule are no different from the recordkeeping requirements contractors and subcontractors must already meet under existing federal law and which have already been approved by the Office of Management and Budget. However, it could be argued that inclusion of the minimum wage clause itself in instruments such as FS concession instruments that do not already contain a minimum wage provision constitutes a new information collection requirement. To address this concern, the FS recommends that the preamble to the final rule expressly state that inclusion of the minimum wage clause in contracts or contract-like instruments that do not already contain a minimum wage provision does not constitute a new information collection requirement, since all the information collected under the clause is already being collected under existing federal law.

Sincerely,

/s/ Gregory C. Smith, for
LESLIE A. C. WELDON
Deputy Chief, National Forest System

Ms. Mary Ziegler

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