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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS, PACIFIC
MARITIME REGION,

No. C 06-2107-CW

No. C 06-2152-CW
(RELATED CASE)

Plaintiff,

v.

NATIONAL PARK SERVICE, et al.,

Defendants.

ORDER ON
PLAINTIFFS'
MOTIONS FOR
PRELIMINARY
INJUNCTION

INLANDBOATMEN'S UNION OF THE PACIFIC,
MARINE DIVISION, ILWU,

Plaintiff,

v.

FRAN MAINELLA, et al.,

Defendants.

Plaintiffs International Organization of Masters, Mates and
Pilots, Pacific Maritime Region (MM&P) and Inlandboatmen's Union of
the Pacific, Marine Division, ILWU (IBU) separately move for

1 preliminary injunctions, seeking to stop Defendants National Park
2 Service (NPS) and NPS Director Fran Mainella from awarding a
3 concession contract to Intervener Hornblower Yachts. Plaintiffs
4 contend that this contract would violate the 1965 McNamara-O'Hara
5 Service Contract Act (SCA), 41 U.S.C. § 351.¹ Defendants and
6 Intervener oppose these motions. The matter was heard on April 28,
7 2006. On May 1, 2006, the Court, for the reasons expressed in this
8 order, granted Plaintiff MM&P's motion, granted in part Plaintiff
9 IBU's motion and stayed the case.

10 BACKGROUND

11 Over a million visitors flock to Alcatraz Island each year;
12 ferries shuttle those visitors to and from the island. Currently,
13 under a 1983 contract (the original concession contract), Blue &
14 Gold Fleet provides transportation services to and from Alcatraz
15 Island. Pursuant to the Concessions Policy Act of 1965, Public Law
16 89-249, 79 Stat. 969 (the 1965 Concessions Act), the original
17 concession contract was entered into by Defendant NPS and Harbor
18 Carrier, Inc., for the fifteen year period beginning January 1,
19 1984, and ending December 31, 1998. Approximately a year and a
20 half before the contract was due to expire, it was assigned to Blue
21 & Gold Fleet.

22 Before the original concession contract expired, Congress
23 enacted the National Park Service Concessions Management

24
25 ¹The SCA requires contractors to pay their service employees
26 "in accordance with prevailing rates for such employees in the
27 locality" as determined by the Department of Labor, or "where a
28 collective bargaining agreement covers such service employees, in
accordance with the rates . . . provided for in [that] agreement."
41 U.S.C. § 351(a)(1).

1 Improvement Act of 1998 (the 1998 Concessions Act), which repealed
2 the 1965 Concessions Act and established "a new, comprehensive
3 concession management program." S. Rep. No. 105-202, at 20 (1998).
4 Unlike the 1965 Concessions Act, the 1998 Concessions Act requires
5 that concession contracts be awarded on a competitive basis to the
6 entity submitting the best proposal. The 1998 Concessions Act
7 instructs that, in selecting the best proposal, the following
8 factors must be considered: (1) the responsiveness of the proposal
9 to the objectives of protecting and preserving park resources and
10 of providing services to the public at reasonable rates; (2) the
11 experience and related background of the entity submitting the
12 proposal; (3) the financial capability of the entity submitting the
13 proposal; and (4) the proposed franchise fee, although the
14 consideration of revenue is to be subordinate to the objectives of
15 protecting and preserving park resources and of providing services
16 to the public at reasonable rates. Id. at 30; 16 U.S.C.
17 § 5952(5)(A). In addition, the 1998 Concessions Act requires that
18 any proposed concession contract with anticipated annual gross
19 receipts in excess of five million dollars, or a duration of more
20 than ten years, must be submitted to Congress at least sixty days
21 before it is awarded. 16 U.S.C. § 5952(6).

22 The original concession contract was extended under the 1998
23 Concessions Act. The contract requires that, upon the request of
24 Defendant NPS, Blue & Gold Fleet continue to conduct operations for
25 a reasonable time to allow selection of a successor. Blue & Gold
26 Fleet has accepted Defendant NPS's requests for extensions and
27 continuations of service. The contract is now due to expire on May
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1 31, 2006. According to Blue & Gold Fleet's Executive Vice
2 President, the company is willing and able to continue providing
3 ferry service to Alcatraz Island as it has since 1997.

4 On July 27, 2004, Defendant NPS issued a solicitation seeking
5 proposals for a new ten-year concession contract for transportation
6 and other visitor services for Alcatraz Island. The solicitation
7 and the draft of the new concession contract attached to it did not
8 contain any information specifying minimum wages and fringe
9 benefits for service employees or any other information concerning
10 wages and benefits that would be required by the SCA. Instead, the
11 solicitation stated that it was being issued pursuant to the
12 authority of the 1998 Concessions Act and its implementing
13 regulations, 36 C.F.R. Part 51, and included a copy of the
14 regulations. Among the implementing regulations is 36 C.F.R.
15 § 51.3, which provides, "Concession contracts are not contracts
16 within the meaning of 41 U.S.C. 601 et seq. (the Contract Disputes
17 Act) and are not service or procurement contracts within the
18 meaning of statutes, regulations or policies that apply only to
19 federal service contracts or other types of federal procurement
20 actions."

21 The solicitation also included instructions directing offerors
22 to submit comments to Defendant NPS in writing no later than thirty
23 days prior to the due date for proposals if they believed any
24 statement in the solicitation to be inaccurate. No offerors did.
25 The instructions also directed that, if offerors did not understand
26 something in the solicitation, they should submit questions in
27 writing to Mr. Lee Shenk. Although Mr. Shenk received several
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1 written questions prior to the deadline set for submission of such
2 questions, none of those questions concerned the SCA or wages and
3 benefits required under the new concession contract.

4 Four proposals were submitted, including one from Blue & Gold
5 Fleet. In September, 2005, Defendant NPS announced that
6 Intervener's proposal had been selected as the best proposal
7 received.

8 On November 15, 2005, Blue & Gold Fleet filed in the United
9 States Court of Federal Claims a pre-award protest of the selection
10 of Intervener for the new concession contract. Among the issues
11 raised was whether the SCA applied to the contract. On November
12 17, 2005, the court allowed Intervener to intervene in that case.
13 Two months later, the court allowed Plaintiffs to file amicus
14 briefs in support of Blue & Gold Fleet.

15 On November 30, 2005, Plaintiffs sent a joint letter to the
16 Department of Labor (DOL), requesting a formal determination of
17 whether the SCA applies to the proposed contract with Intervener.
18 On January 6, 2006, DOL's Wage and Hour Division issued a letter to
19 Defendant Mainella, stating that "the SCA applies to all contracts
20 entered into by the United States or the District of Columbia that
21 are principally for the furnishing of services through the use of
22 service employees." Preliminarily finding that the SCA applies to
23 the contract in question, the DOL ordered Defendant NPS to provide
24 it "with the reasons for not including SCA" in the contract "within
25 21 days of the date of this letter." Defendant NPS did not do so;
26 instead, it requested an extension until March 31, 2006. On
27 April 7, 2006, Defendant NPS responded to the DOL's letter,

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1 asserting that "NPS concession contracts are governed exclusively
2 by the NPS Concessions Management Improvement Act of 1998, and that
3 the SCA does not apply" to the new concession contract.

4 On March 6, 2006, the Federal Claims Court issued its decision
5 in Blue & Gold Fleet v. United States; the court granted Defendant
6 NPS and Intervener's motions for judgment on the administrative
7 record and dismissed Blue & Gold Fleet's protest. The court did
8 not reach the merits of Blue & Gold Fleet's SCA claim, finding that
9 Blue & Gold Fleet had waived its SCA claim by failing to raise it
10 before submitting a proposal in response to the solicitation. That
11 same day, Blue & Gold Fleet appealed the court's order. It also
12 filed motions in the Court of Federal Claims and the Federal
13 Circuit for injunctions pending appeal to enjoin NPS from awarding
14 the new concession contract. The motion was denied by the Court of
15 Federal Claims; the motion in the Federal Circuit is still pending.

16 After the Federal Claims Court issued its judgment, Defendant
17 NPS submitted the proposed new concession contract to Congress
18 pursuant to 16 U.S.C. § 5952(6). The sixty-day notification period
19 expired on May 7, 2006, and, if Defendant NPS were not enjoined, it
20 would have been able to award the new concession contract to
21 Intervener.

22 Plaintiffs are Unions; their members include employees of Blue
23 & Gold Fleet. Intervener's employees, however, are not unionized,
24 and Intervener has no obligation under the new concession contract
25 to pay its employees the same wages, or provide the same benefits,
26 that were provided to Blue & Gold Fleet's employees under the
27 original concession contract. According to Plaintiffs, awarding
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1 the new concession contract, without requiring that the contractor
2 comply with the SCA, will result not only in the loss of jobs and
3 income for their members, but will also depress area wage and
4 benefit standards in the entire maritime industry in California.

5 LEGAL STANDARD

6 To obtain a preliminary injunction, the moving party must
7 establish either: (1) a combination of probable success on the
8 merits and the possibility of irreparable harm, or (2) that serious
9 questions regarding the merits exist and the balance of hardships
10 tips sharply in the moving party's favor. Rodeo Collection, Ltd.
11 v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987).

12 The test is a "continuum in which the required showing of harm
13 varies inversely with the required showing of meritoriousness."
14 Id. (quoting San Diego Comm. Against Registration & the Draft v.
15 Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471,
16 1473 n.3 (9th Cir. 1986)). The moving party ordinarily must show
17 "a significant threat of irreparable injury," although there is "a
18 sliding scale in which the required degree of irreparable harm
19 increases as the probability of success decreases," United States
20 v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174, 175 (9th Cir.
21 1987), and vice versa. To overcome a weak showing of merit, a
22 plaintiff seeking a preliminary injunction must make a very strong
23 showing that the balance of hardships is in its favor. Rodeo
24 Collection, 812 F.2d at 1217.

25 DISCUSSION

26 Plaintiff MP&P seeks a preliminary injunction barring
27 Defendants NPS and Mainella from awarding a new concession contract
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1 to Intervener that violates the SCA by allowing Intervener to pay
2 less than the wages and benefits specified in MM&P's collective
3 bargaining agreement with the predecessor contractor, Blue & Gold
4 Fleet. Plaintiff IBU seeks a broader injunction. It seeks to
5 enjoin Defendants (1) from awarding any NPS concession contracts,
6 the principle purpose of which is to furnish transportation
7 services, in response to a solicitation that does not expressly set
8 forth the applicability of the SCA; and (2) from allowing any
9 contractor on any concession contract, the principle purpose of
10 which is to provide transportation services, to pay their employees
11 wages and fringe benefits lower than those required by the SCA.
12 Defendants and Intervener contend that Plaintiffs are not entitled
13 to relief.

14 I. Standing

15 Defendants argue that Plaintiffs lack standing to bring these
16 suits because they are not within the zone of interest to be
17 protected by the SCA. But, as Plaintiffs note, this argument
18 ignores the specific injuries Plaintiffs claim and controlling
19 Ninth Circuit case law. Unlike in other cases cited by Defendants,
20 Plaintiffs here are not merely claiming lost jobs. Instead, they
21 have alleged that by refusing to apply the SCA to the new
22 concession contract, Defendant NPS has proximately caused injury
23 and will continue to threaten to injure both Plaintiffs and their
24 members by: (1) depriving them of the SCA's protections against
25 wage-slashing competition that would, otherwise, substantially
26 reduce their current job security; (2) denying them the opportunity
27 to keep their jobs with Blue & Gold Fleet by having their current
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1 wage compensation package serve as the uniform standard for
2 prospective contractors as required by the SCA; (3) denying them
3 the opportunity to compete for and retain their job duties with
4 Intervener without suffering a decrease in wages and benefits; and
5 (4) depressing the area standards that Plaintiffs have struggled to
6 secure through collective bargaining and thereby undermining
7 Plaintiffs' bargaining power and ability to represent their members
8 effectively in future collective bargaining with other maritime
9 employers in the San Francisco Bay Area.

10 In International Longshoremen's and Warehousemen's Union v.
11 Meese, 891 F.2d 1374, 1377 (9th Cir. 1989), the Ninth Circuit held
12 that the government's failure to require a third-party employer to
13 comply with federal law proximately caused injury to the union and
14 its members by denying them "the opportunity to compete" for
15 similar work, and thus the union had standing to challenge the
16 government's failure to enforce the law. Plaintiffs claim the same
17 type of injury here. According to Plaintiffs, they were denied the
18 opportunity to compete with others on wage terms which all federal
19 contracts must observe under the SCA but which the government, as
20 in ILWU, refuses to enforce; thus, they too have standing.
21 Defendants attempt to distinguish ILWU, noting that, there, the
22 court found that the plaintiffs came within the zone of interest of
23 the Immigration and Naturalization Act, not the SCA. Their
24 attempt, however, fails. Although different statutes are involved,
25 the holding in ILWU is applicable to this case.

26 The Ninth Circuit has instructed that the zone of interest
27 test "is to be construed generously," and "a court should deny
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1 standing under the 'zone of interest' test only 'if the plaintiff's
2 interests are so marginally related to or inconsistent with the
3 purposes implicit in the statute that it cannot reasonably be
4 assumed that Congress intended to permit the suit.'" City of
5 Sausalito v. O'Neill, 386 F.3d 1186, 1200 (9th Cir. 2004) (quoting
6 Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 399 (1987)).

7 As explained in American Federation of Government Employees,
8 Local 1668 v. Dunn, 561 F.2d 1310 (9th Cir. 1977),

9 The legislative history reveals that the Service Contract
10 Act was passed in reaction to Congress' finding that a
11 depressed wage level prevailed in private service
12 employment. These service employees were not covered, in
13 many instances, by the Fair Labor Standards Act or by
14 state minimum wage rates, resulting in a situation where
15 contractors paying the lowest wage would secure most
16 government jobs. Congress, feeling that in this way "the
17 Government is in effect subsidizing subminimum wages,"
18 passed the Service Contract Act to insure "that the
19 Federal Government shall not be a party to the depressing
20 of labor standards in any area of the nation." The
21 purpose statement of the Service Contract Act states: "The
22 purpose of this bill is to provide labor standards for the
23 protection of employees of contractors and subcontractors
24 furnishing services to or performing maintenance service
25 for Federal agencies."

26 561 F.2d at 1312 (citations omitted). In AFGE, the court found
27 that the plaintiff did not have standing under the SCA because the
28 service employees it represented were government employees, not
"employees of contractors and subcontractors." Id. There, the
plaintiff's interests were different from the purpose of the SCA,
which was enacted explicitly for the benefit of employees of
contractors and subcontractors. In arguing that Plaintiffs do not
have standing under AFGE, Defendants fail to note that, unlike the
plaintiff in AFGE, Plaintiffs here represent employees of
contractors. Instead, Defendants argue that to have standing a

1 plaintiff must be an employee of the successor contractor whose
2 wages or other benefits are below what is required under the SCA.
3 AFGE, however, does not support that argument.

4 Defendants cite no case from this circuit holding that a union
5 representing employees of a current federal contractor lacks
6 standing to sue for application of the SCA to a contract for
7 services, being performed by its members for the government, that
8 is now subject to re-bidding. The out-of-circuit cases that
9 Defendants cite are distinguishable. For example, in National
10 Maritime Union of America v. Commander, Military Sealift Command,
11 824 F.2d 1228, 1235 (D.C. Cir. 1987), the court specifically noted
12 that the unions, which represented government employees and not
13 employees of private-sector federal contractors, did not allege as
14 injury any threat that the winning contractor would pay less than
15 the prevailing wages and benefits under the SCA: "Indeed, the
16 Unions could not allege any such injury in this case, since the
17 contract specifically requires [the contractor] to pay, retroactive
18 to the date of the award, whatever wages and benefits the Secretary
19 ultimately determines to be 'prevailing.'"

20 Plaintiffs have standing to seek injunctive relief requiring
21 Defendants to apply the SCA to the new concession contract.
22 Defendants' actions have allegedly caused Plaintiffs and their
23 members injury which is likely to be redressed by a favorable
24 decision from the Court. See Valley Forge Christian College v.
25 Americans United for Separation of Church and State, 454 U.S. 464,
26 472 (1982); Steel Co. v. Citizens for a Better Environment, 523
27 U.S. 83 (1998). And, when the zone of interest test is construed

1 generously as the Ninth Circuit requires, Plaintiffs, whose members
2 include service employees the SCA was enacted to protect, are
3 within the zone of interest protected by the SCA.

4 II. Time-Barred

5 Defendants argue that Plaintiffs' challenge to 36 C.F.R.
6 § 51.3, which provides that laws such as the SCA do not apply to
7 NPS concession contracts, is time-barred under either 28 U.S.C.
8 § 1658 (four-year statute of limitations) or 28 U.S.C. § 2401(a)
9 (six-year statute of limitations). As Defendants note, this
10 regulation was promulgated in the Federal Register on April 17,
11 2000, and a similar regulation, which existed until it was replaced
12 by 36 C.F.R. § 51.3, was promulgated in 1982.

13 Claims challenging specific application of an unlawful
14 regulation accrue at the time the regulation is actually applied,
15 not when the regulation was first promulgated. See Wind River
16 Mining Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991);
17 Natural Res. Def. Council, Inc. v. Evans, 279 F. Supp. 2d 1129,
18 1148 (N.D. Cal. 2003). The solicitation for the new concession
19 contract was issued on July 27, 2004. Thus, Plaintiffs' challenge
20 is not time-barred.

21 III. Res Judicata

22 Intervener argues that, as a result of the judgment entered by
23 the Court of Federal Claims in Blue & Gold Fleet v. United States,
24 Plaintiffs' claims are barred by res judicata. The claims in this
25 case and in Blue & Gold Fleet v. United States arise from "the same
26 transactional nucleus of facts," namely, the solicitation, bidding
27 and award of the new concession contract. Tahoe-Sierra Pres.

1 Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1078
2 (9th Cir. 2003). Intervener notes that the Ninth Circuit has found
3 that, for purposes of applying collateral estoppel or res judicata,
4 courts are "no longer bound by rigid definitions of parties or
5 their privies." United States v. ITT Rayonier, Inc., 627 F.2d 996,
6 1003 (9th Cir. 1980). Plaintiffs may be bound by the court's
7 judgment if they "had a sufficient interest and participated in the
8 prior action." Id.

9 Intervener points out that Plaintiffs had a sufficient
10 interest and that they participated as amici in Blue & Gold Fleet's
11 protest in the Court of Federal Claims. Thus, Intervener argues
12 that Plaintiffs should be bound by that judgment.

13 Certainly, Plaintiffs had an interest in the prior action.
14 However, it cannot be said that they participated in the action
15 merely by submitting amicus briefs. As the Ninth Circuit explains,
16 "We deny preclusive effect, in general, when the adjudicator lacks
17 jurisdiction to determine an issue, when the parties lacked an
18 adequate opportunity to litigate an issue, or when some other
19 aspect of due process, the 'full and fair opportunity' to litigate,
20 is missing." Miller v. County of Santa Cruz, 39 F.3d 1030, 1038
21 (9th Cir. 1994). Plaintiffs could not have joined as a party to
22 Blue & Gold Fleet's pre-award protest because jurisdiction to
23 challenge a bidding process is limited to "an actual or prospective
24 bidder or offeror whose direct economic interest would be affected
25 by the award of the contract or by the failure to award the
26 contract." Am. Fed'n of Gov't Employees v. United States, 258 F.3d
27 1294, 1302 (Fed. Cir. 2001) (holding that, because they were not
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1 actual or prospective bidders, unions lacked standing to bring bid
2 protest actions in the Court of Federal Claims). Plaintiffs did
3 not have a full and fair opportunity to litigate whether the SCA
4 applied to the new concession contract. The court rejected Blue &
5 Gold Fleet's SCA claim without reaching the merits; the court found
6 that Blue & Gold Fleet waived its SCA claim by not raising the
7 issue before submitting its proposal.

8 There is no indication that Blue & Gold Fleet was acting on
9 behalf of Plaintiffs in the Federal Claims Court action. See FTC
10 v. Garvey, 383 F.3d 891, 898 (9th Cir. 2004). Blue & Gold Fleet
11 sought to prevent the new concession contract from being awarded to
12 Intervener because it wanted the contract. Plaintiffs seek to
13 ensure that area wage and benefits standards are maintained
14 regardless of who is awarded the contract. Res judicata does not
15 bar Plaintiffs from bring their claim before this Court.

16 IV. Other Proceedings

17 Defendants and Intervener contend that this case is currently
18 being reviewed by the Federal Circuit, Congress and the DOL. They
19 urge the Court to defer ruling on the motions for preliminary
20 injunction and to stay these proceedings.

21 As discussed above, however, this case is not before the
22 Federal Circuit. Plaintiffs are not parties in the case before the
23 Federal Circuit and Blue & Gold Fleet does not represent their
24 interests. The Federal Circuit, like the Court of Federal Claims,
25 may not even address the merits of whether the SCA applies to the
26 new concession contract; instead, it too could focus only on Blue &
27 Gold Fleet's timeliness in raising that argument. Staying this

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1 action pending the Federal Circuit's ruling, without a preliminary
2 injunction, would allow Defendants to award the new concession
3 contract to Intervener.

4 Nor is this case before Congress. Although 16 U.S.C.
5 § 5952(6) requires that proposed concession contracts be submitted
6 to two Congressional committees sixty days before the contracts can
7 be awarded, that statute does not provide that those committees
8 will review the contracts to ensure that they comply with other
9 statutes, such as the SCA. The sixty day period has passed.

10 This case, however, is before the DOL. As noted above, the
11 DOL issued a preliminary determination that the SCA applies to the
12 concession contract. But Defendants and Intervener provide no
13 reason to defer ruling on the motions for preliminary injunction
14 until the DOL issues its final determination. A stay pending the
15 DOL's decision, without ruling on the motions, would be
16 inconsistent with the DOL's preliminary ruling. Furthermore, by
17 submitting their response over two months after the DOL requested
18 it, Defendants have delayed the DOL's final ruling. Plaintiffs
19 should not have to suffer irreparable and imminent harm while
20 waiting for completion of the DOL's review, which might have been
21 completed had Defendants timely filed their response. See
22 Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1980)
23 (judicial intervention is appropriate where administrative remedies
24 are inadequate, futile or where irreparable injury will result
25 unless immediate judicial review is permitted).

26 For these reasons, the Court, in its May 1, 2006 order, stayed
27 this case pending the DOL's determination of whether the SCA

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1 applies to the concession contract at issue. During the stay,
2 however, the preliminary injunction will be in effect.

3 V. Merits

4 Plaintiffs contend that they are likely to succeed on the
5 merits. According to Plaintiffs, the new concession contract, like
6 all concession contracts involving transportation, is subject to
7 the SCA; thus, 36 C.F.R. § 51.3, as interpreted and applied, is
8 arbitrary, capricious and unlawful.

9 Enacted in 1965, the SCA states that it applies to "[e]very
10 contract (and any bid specification therefor) entered into by the
11 United States or the District of Columbia in excess of \$2,500,
12 except as provided in section 356 of this title, whether negotiated
13 or advertised, the principal purpose of which is to furnish
14 services in the United States through the use of service
15 employees." 41 U.S.C. § 351. The SCA provides that the Secretary
16 of Labor may make regulations allowing reasonable exemptions to and
17 from any and all provisions of the Act, but only when the Secretary
18 determines that such exemptions are necessary and proper in the
19 public interest. 41 U.S.C. § 351.

20 Three years after the statute's enactment, the DOL issued the
21 following regulation:

22 It is not considered that the Act was intended to cover
23 every contract, however, which is entered into with the
24 Government by a contract to furnish services, no matter
25 how indirect or remote a benefit the Government may
26 derive therefrom. If, for example, a contract with the
27 Government grants the Contractor the privilege of
operating as a concessionaire in a Government park for
the purpose of furnishing services to the public
generally rather than to the Government or to personnel
engaged in its business, the contract is not considered
subject to the Act.

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1 33 Fed. Reg. 9880, 9891 (July 10, 1968).

2 In 1983, however, the DOL revised that regulation. It now
3 provides:

4 The Department of Labor, pursuant to section 4(b) of the
5 Act, exempts from the provisions of the Act certain kinds
6 of concession contracts providing services to the general
7 public, as provided herein. Specifically, concession
8 contracts (such as those entered into by the National
9 Park Service) principally for the furnishing of food,
10 lodging, automobile fuel, souvenirs, newspaper stands,
11 and recreational equipment to the general public, as
12 distinguished from the United States Government or its
13 personnel, are exempt. This exemption is necessary and
14 proper in the public interest and is in accord with the
15 remedial purpose of the Act. Where concession contracts,
16 however, include substantial requirements for services
17 other than those stated, those services are not exempt.

18 29 C.F.R. § 4.133(b).

19 Here, there is no dispute that the new concession contract is
20 in excess of \$2,500. Nor is there a dispute that its principal
21 purpose is to furnish services in the United States. The
22 solicitation provides that it seeks a contractor to provide
23 "transportation service," "computerized reservation and ticketing
24 service," and maintenance of dock and other facilities. This is
25 not a contract for "the furnishing of food, lodging, automobile
26 fuel, souvenirs, newspaper stands, and recreational equipment to
27 the general public." Id.

28 Nonetheless, Defendants and Intervener argue that, pursuant to
Defendant NPS's regulation, the SCA does not apply to the new
concession contract or any concession contract. To justify
Defendant NPS's regulation, Defendants point to language in the
SCA's non-codified preamble, which states that the purpose of the
SCA is "to provide labor standards for the protection of employees

1 of contractors and subcontractors furnishing services to or
2 performing maintenance service for Federal agencies." 1965
3 U.S.C.C.A.N. 3737. They emphasize "furnishing services to . . .
4 Federal agencies," noting that concessionaires furnish services to
5 the public. This language, however, was not incorporated into the
6 statute. Instead, as noted above, the SCA provides that it applies
7 to contracts "the principal purpose of which is to furnish services
8 in the United States through the use of service employees." 41
9 U.S.C. § 351.

10 The Supreme Court instructs that "when the statute's language
11 is plain, the sole function of the courts -- at least where the
12 disposition required by the text is not absurd -- is to enforce it
13 according to its terms." Lamie v. United States Trustee, 540 U.S.
14 526, 534 (2004) (citations omitted). Here, the language of the SCA
15 is plain. Thus, the Court need not, and cannot, rely on the
16 preamble to interpret the SCA. Price v. Forrest, 173 U.S. 410, 427
17 (1899); see also Norman J. Singer, Sutherland Stat. Constr. § 47.04
18 (5th ed. 1992) ("while the preamble of the act can be used for the
19 purpose of explaining otherwise unclear legislative intent, it does
20 not control when the statutory language has plain and obvious
21 meaning").

22 Furthermore, Plaintiffs note that the new concession contract,
23 like the original concession contract, is a "hybrid" contract,
24 requiring services to be provided to the public and to Defendants.
25 For example, Defendant NPS's employees can get to Alcatraz Island
26 only through the concessionaire's services. Under the current
27 contract, Blue & Gold Fleet transports Defendant NPS personnel,
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1 equipment, material, supplies and potable water to the island, and
2 hauls all sewage and trash from the island. At the hearing,
3 Defendants stated that the new concession contract requires fewer
4 such services and that the services provided to Defendant NPS will
5 be minimal. Regardless, even if Defendants and Intervener are
6 correct that the SCA applies only to contracts that furnish
7 services to federal agencies, serious questions exist regarding
8 whether the SCA applies to the new concession contract.

9 As noted above, it has been the view of the DOL for over two
10 decades that the SCA applies to NPS contracts, with limited
11 exceptions not relevant here. Congress delegated the
12 responsibility to interpret the SCA to the DOL, not to Defendant
13 NPS. See Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.,
14 467 U.S. 837, 843-44 (1984) (deference must be given to the agency
15 to which Congress has delegated the responsibility to interpret the
16 law and draft regulations pursuant to that law). Thus, it is the
17 DOL's interpretation of the SCA that is entitled to deference, not
18 Defendant NPS's. Smith v. City of Jackson, 544 U.S. 228, 125 S.
19 Ct. 1536, 1558-59 (2005)(O'Connor, J., concurring) (noting that
20 "Congress has explicitly or implicitly delegated to the agency
21 responsible for administering a statute the authority to choose
22 among permissible constructions of ambiguous statutory text" and
23 applying contradictory interpretations from other agencies would be
24 contrary to such delegation). Defendants cannot render the SCA
25 inapplicable to concession contracts by implementing their own
26 contrary regulation, a "regulation" that the Supreme Court found to
27 be "nothing more than a 'general statement of policy' designed to
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1 inform the public of NPS's views." National Park Hospitality Ass'n
2 v. Dep't of Interior, 538 U.S. 803, 809 (2003)(holding that a
3 challenge to 36 C.F.R. § 51.3, purporting to render the Contract
4 Disputes Act of 1978 inapplicable to concession contracts, was not
5 ripe for judicial resolution).

6 Considering the plain language of the SCA and deference to
7 DOL's regulation on the scope of the SCA, the Court finds that it
8 is likely that Plaintiffs will succeed on the merits in showing
9 that the SCA applies to the new concession contract.

10 VI. Imminent and Irreparable Harm

11 Plaintiffs list numerous injuries that they and their members
12 will suffer if an injunction is denied and Defendants award the new
13 concession contract to Intervener, as planned, on or about May 7,
14 2006. Plaintiff MP&P states that more than 150 of its members will
15 lose their jobs without an opportunity to compete for those jobs on
16 equal footing with non-union employers and their employees. The
17 new contract will depress wages for union members in the entire
18 maritime industry in Northern California, undermining the current
19 level of wages and benefits provided to union members. In
20 addition, Plaintiff MP&P provides declarations of its members
21 attesting to the irreparable harm that they and their families will
22 suffer unless the award of the new concession contract is
23 preliminary enjoined.

24 Defendants contend that the only harm to Plaintiffs is
25 monetary. Without providing any authority, Defendants argue that
26 such monetary damages will not support injunctive relief.
27 Plaintiffs' harm, however, is not measurable entirely in monetary
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1 terms. As shown in the declarations, Plaintiffs' members face
2 substantial hardships, including the break-up of families and the
3 inability to preserve necessary health care; if unable to find
4 employment with similar wages and benefits, many members may be
5 forced to leave their homes in the Bay Area. Furthermore, courts
6 have found the injuries Plaintiffs claim sufficient to warrant a
7 preliminary injunction. In American Maritime Officers v. Hart,
8 1999 WL 33839612, *5 (D. D.C. 1999), the court granted the
9 plaintiff union's motion for preliminary injunction and enjoined a
10 federal agency from awarding a contract pursuant to a solicitation
11 that failed to comply with the SCA. In Whelan v. Colgan, 602 F.2d
12 1060, 1062 (2d Cir. 1979), the court found that "the threatened
13 termination of benefits such as medical coverage for workers and
14 their families obviously raised the spectre of irreparable injury."
15 See also Roe v. Anderson, 966 F. Supp. 977, 985 (E.D. Cal. 1997)
16 (finding irreparable harm where enforcement of law made it
17 impossible to find affordable housing in California).

18 Intervener does not attest to any harm it will suffer.
19 Defendants assert that delay and uncertainty may cause difficulties
20 for Intervener. But, as Plaintiffs note, the absence of any claim
21 of harm by Intervener itself undermines that assertion. Plaintiffs
22 further note that there is no compelling urgency to award the new
23 concession contract. The solicitation for the contract has been
24 pending since June 27, 2004, and Defendants twice extended the
25 deadline for submission of proposals. Furthermore, Blue & Gold
26 Fleet is willing to continue under the original concession contract
27 as long as necessary; service to Alcatraz would not be interrupted

1 if the Court were to grant a preliminary injunction.

2 Absent the injunction Plaintiff MP&P seeks, Plaintiffs'
3 members likely will be imminently and irreparably harmed. Absent
4 the broader injunction sought by Plaintiff IBU, harm is not
5 imminent. Plaintiff IBU cites no other concession contract for
6 transportation services that is on the verge of being awarded. Its
7 only members in imminent danger of losing their jobs, health care
8 and homes are those members currently working for Blue & Gold
9 Fleet; any immediate and irreparable harm to those members would be
10 addressed by enjoining only the new concession contract.

11 VII. Public Interest

12 The parties note that, in ruling on a preliminary injunction,
13 courts consider "whether the public interest will be advanced by
14 granting the preliminary relief." Overstreet v. United Bhd. of
15 Carpenters and Joiners of Am., Local Union No. 1506, 409 F.3d 1199,
16 1207 (9th Cir. 2005). Plaintiffs contend that, here, the public
17 interest would be advanced by the preliminary injunctions. They
18 note that the SCA furthers a compelling public interest in
19 protecting wages and benefits of service contract employees and
20 ensuring "that the Federal Government shall not be a party to the
21 depressing of labor standards in any area of the nation." AFGE,
22 561 F.2d at 1312 (quoting 11 Cong. Rec. 24387, 1965, Cong. O'Hara,
23 co-author of the SCA). They further note that there is a strong
24 public interest in ensuring that federal agencies comply with
25 federal law.

26 Intervener and Defendants do not address the public interests
27 Plaintiffs cite. Instead, Intervener responds that the public's
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1 interest is in uninterrupted service to Alcatraz Island,
2 particularly during the peak summer tourist season, and that an
3 injunction would impede this interest. According to Intervener, if
4 the Court grants this injunction, Defendants will be forced to
5 scramble to find alternative services. But, as noted above, the
6 incumbent contractor, Blue & Gold Fleet, has expressed its
7 willingness to continue providing ferry services to Alcatraz.
8 Defendants respond that, if they are enjoined, the public and the
9 park will be denied the benefits described in Intervener's
10 proposal. Neither Defendants nor Intervener, however, offer any
11 evidence of potential harm to the park or public. Nor do they
12 state what benefits to the public will be denied.

13 Although it is not clear that the public interest will be
14 advanced by granting Plaintiffs' preliminary injunctions, neither
15 does it appear that the public interest will be harmed.

16 CONCLUSION

17 For the foregoing reasons, during the pendency of this
18 litigation, Defendants are enjoined from awarding a contract, for
19 the continuation of water transportation services between the City
20 of San Francisco, California and Alcatraz Island and related
21 services, that permits any contractor or subcontractor under it to
22 pay its employees providing services under such contract less than
23 the wages and fringe benefits specified in Plaintiffs' collective
24 bargaining agreements with Blue & Gold Fleet, LLP, including any
25 prospective increases in wages and fringe benefits specified in
26 such collective bargaining agreements. As explained in the Court's
27 May 1, 2006 order, this injunction does not prevent a contractor or
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1 subcontractor from seeking a variance from the Department of Labor.
2 If a variance is granted, Defendants may move to vacate the
3 preliminary injunction.

4 This case is stayed pending the Department of Labor's
5 determination of whether the SCA applies to the concession contract
6 at issue. The parties shall notify the Court immediately of such a
7 determination, and of any Federal Circuit ruling. A case
8 management conference is scheduled for September 8, 2006 at 1:30
9 p.m., but this date may be continued by stipulation.

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11 IT IS SO ORDERED.

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13 Dated: 5/26/06



CLAUDIA WILKEN
United States District Judge

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