
United States Court of Appeals for the Federal Circuit

2011-5069

CREWZERS FIRE CREW TRANSPORT, INCORPORATED,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

**Appeal from the United States Court of Federal Claims in 10-CV-819,
Judge Lawrence M. Baskir.**

**REPLY BRIEF OF PLAINTIFF-APPELLANT
CREWZERS FIRE CREW TRANSPORT, INCORPORATED**

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August 18th, 2011

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**THIS IS NOT ABOUT MUTUAL AID OR AN ASSISTANCE RELATIONSHIP; RATHER,
THIS IS ABOUT PROCUREMENT CONTRACTS, AND THE QUESTION IS
WHETHER THE PREFERENCE FOR THE HIRE OF A BUS OR BUSES
OWNED BY LOCAL GOVERNMENT ENTITIES IS LAWFUL**

Defendant-Appellee's argument focuses on the use of Cooperative Agreements for mutual aid, these in fact a species of assistance relationship separate and distinct from procurement Contracts, arguing that the challenged publicly-competed Solicitation's *preference* for United States Forest Service (USFS) hire of public-sector Resources (here, a bus or buses to be used as crew carrier to transport fire crews to and from a fire line) from local Government entities even "before [private-sector] resources are mobilized under this Agreement," is a lawful exercise of USFS authority "to coordinate resources for a unified emergency response." Defendant-Appellee's Red Brief, at 15.

Contrariwise, Plaintiff-Appellant argued before the United States Court of Federal Claims, *Crewzers Fire Crew Transport, Inc. v. United States*, Fed. Cl. No. 10-819-C, March 18th, 2011, 2011 U.S. Claims LEXIS 370, *35-*36, and argues here that the principal purpose of the *preference* created by the challenged publicly-competed Solicitation, the hire of a public-sector bus or buses from local Government entities

even before Orders are placed by USFS with private-sector Awardees under the multiple Pre-Season Incident Blanket Purchase Agreements for the hire of specific crew carrier buses to be used regionally and nationwide in the suppression of wild-fires in wildland areas and for the resolution of “all-hazard” incidents (natural and man-made disasters), is unlawful because the *preference* in the challenged publicly-competed Solicitation is one for the “direct benefit” of the USFS and therefore must have been made through a competitive procurement Contract, and not under a Grant or Cooperative Agreement. Plaintiff-Appellant’s Blue Brief, at 27-28.

**THE HIRE OF A BUS OR BUSES OWNED BY LOCAL GOVERNMENT
ENTITIES REQUIRES A PROCUREMENT CONTRACT OBTAINED
USING COMPETITION “TO THE MAXIMUM EXTENT PRACTICABLE”**

The re-enactment of Title 41, United States Code on January 4th, 2011, Pub. L. No. 111-350, 124 Stat. 3677 (2011) sets out an unambiguous mandate for competition “to the maximum extent practicable” when procurement Contracts are obtained using Simplified Acquisition Procedures. Simplified Acquisition Procedures are reserved by the re-enactment of Title 41 for: (1) Contracts not greater than the Simplified Acquisition Threshold, else (2) for Contracts greater than the Simplified

Acquisition Threshold but not greater than \$5,000,000 when the property or services to be delivered “will include only commercial items.” Pub. L. No. 111-350, § 3305(a), 124 Stat. 3752 (2011). The Simplified Acquisition Threshold is \$100,000. Pub. L. No. 111-350, § 134, 124 Stat. 3682 (2011).

The mandate set by the re-enactment of Title 41, United States Code on January 4th, 2011 for procurement Contracts obtained using Simplified Acquisition Procedures is that Agencies “shall promote competition to the maximum extent practicable.” Pub. L. No. 111-350, § 3305(d), 124 Stat. 3752 (2011). The phrase “competition to the maximum extent practicable” is undefined in the re-enactment of Title 41, United States Code. Nonetheless, the re-enactment of Title 41, United States Code unambiguously provides that “the intent is to conform to the understood policy, intent, and purpose of Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections” Pub. L. No. 111-350, § 2(b), 124 Stat. 3677 (2011).

As it turns out, this Court construed the phrase “competition to the maximum extent practicable” in 1988, there holding that this requirement demands more than mere “effective” competition and limits Agency discretion “consistent with

CICA’s [the Competition in Contracting Act’s] purpose of *imposing stringent restrictions on the use of noncompetitive procedures in government contracting.*” *SMS Data Products Group, Inc. v. United States*, 853 F.2d 1547, 1554 (Fed. Cir. 1988) (Emphasis added).

A stated *preference* in a publicly-competed procurement Contract for the hire of a public-sector bus or buses owned by local Government entities even before Orders are placed with private-sector Awardees is a noncompetitive procedure and is most certainly not promoting “competition to the maximum extent practicable” in obtaining procurement Contracts for the hire of Resources to be used for the suppression of wildfires in wildland areas and for the resolution of all-hazard incidents.

THE PLAIN LANGUAGE OF THE
FEDERAL GRANT AND COOPERATIVE AGREEMENT OF 1977,
31 U.S.C. §§ 6301-6308, NOT *CHEVRON* DEFERENCE, CONTROLS

Defendant-Appellee argues, variously, that Federal statutes other than the re-enacted provisions of Title 41, United States Code allow USFS to “cooperate” with local Government entities, thereby avoiding the “maximum practicable compe-

tion” mandate of 41 U.S.C. § 3305(d), Pub. L. No. 111-350, 124 Stat. 3752 (2011).
Defendant-Appellee’s Red Brief, at 13-14, 17-18, and 19-20.

Three sections of a procurement Statute in addition to the “maximum practicable competition” mandate of 41 U.S.C. § 3305(d), Pub. L. No. 111-350, 124 Stat. 3752 (2011) are implicated by these arguments, and these three sections come from the Federal Grant and Cooperative Agreement of 1977, 31 U.S.C. §§ 6301-6308. Here are these three sections:

§ 6303. Using Procurement Contracts

An executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government

(Emphasis added).

§ 6304. Using Grant Agreements

An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a

public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

(Emphasis added).

§ 6305. Using Cooperative Agreements

An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

(Emphasis added).

These three sections, § 6303, “Using Procurement Contracts;” § 6304, “Using Grant Agreements;” and § 6305, “Using Cooperative Agreements,” address a con-

cern of the Commission on Government Procurement (the Commission), Agency misuse of assistance relationships, *viz.*, use of Grant Agreements (§ 6304) or Cooperative Agreements (§ 6305), instead of procurement Contracts (§ 6303) so as to avoid the requirements of the competitive Procurement system. The Commission recommended adoption of these three sections to rectify these practices. Here is that discussion from a Senate Report adopting these recommendations:

No uniform statutory guideline exists to express the sense of Congress on when executive agencies should use either grants, cooperative agreements or procurement contracts. Failure to distinguish between procurement and assistance relationships has led to both the inappropriate use of grants to avoid the requirements of the procurement system, and to unnecessary red tape and administrative requirements in grants.

. . . .

As stated in the [Commission's] report, . . . Federal grant-type activities are a vast and complex collection of assistance programs, functioning with little central guidance in a variety of ways that are often inconsistent even for similar programs or projects. This situation gives rise to inappropriate practices by Federal agencies, including the use of grants to avoid competition and certain requirements that apply to procurement contracts.

S. REP. NO. 449, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 11, 16.

Defendant-Appellee seeks *Chevron* deference, arguing that it is free to ignore the unambiguous mandates of 41 U.S.C. § 3305(d), Pub. L. No. 111-350, 124 Stat.

3752 (2011); of 31 U.S.C. § 6301(1); and of 31 U.S.C. § 6305(1). Defendant-Appellee's Red Brief, at 20-21. But Defendant-Appellee ignores the limits of *Chevron* gap-filling.

Chevron gap-filling is available only where the statutes do not speak "directly" to the precise question and the law leaves "a gap for an agency to fill." *Gallegos v. Principi*, 283 F.3d 1309, 1312 (Fed. Cir. 2002), *cert. denied*, 2002 U.S. LEXIS 9078 (U.S. December 9th, 2002). Where there is no gap left to be filled, and the statutes are unambiguous, out of deference to the Legislative Branch, this Court and others assume that "Congress says in a statute what it means and means in a statute what it says there." *Terry v. Principi*, 367 F.3d 1291, 1296 (Fed. Cir. 2004), *citing Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

Here there are no gaps to be filled, and the statutes provide clear answers to the question at hand: a stated *preference* for the hire of Resources from local Government entities before Orders are placed with private-sector Awardees under publicly-competed procurement Contracts does not meet the "competition to the maximum extent practicable" mandate of 41 U.S.C. § 3305(d), Pub. L. No. 111-350, 124 Stat. 3752 (2011); and this stated *preference* for Cooperative Agreements with local

Government entities in lieu of publicly-competed procurement Contracts contradicts the plain and unambiguous language of the Federal Grant and Cooperative Agreement Act of 1977, plain and unambiguous language at 31 U.S.C. § 6303(1) which compels the use of procurement Contracts, not Cooperative Agreements, 31 U.S.C. § 6305(1), when services are hired from local Government entities and these services are *for the direct benefit or use of the United States Government*. It could not be clearer.

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Wednesday, August 17th, 2011 he caused to be sent, by Overnight Delivery, expenses prepaid, two copies of the foregoing Reply Brief of Plaintiff-Appellant Crewzers Fire Crew Transport, Incorporated to counsel for the United States at the following address:

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/s/ Cyrus E. Phillips IV

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B)(ii), the undersigned hereby certifies, under the penalty of perjury, that this Reply Brief is set in Adobe's Minion® Pro Opticals, a proportionally-spaced Garalde Oldstyle face; that this Reply Brief is set in face 14-point or larger; and that this Reply Brief contains no more than 7,000 words, *viz.*, that exclusive of the Table of Contents and the Table of Authorities, FED. R. APP. P. 32(a)(7)(B)(iii) and FED. CIR. R. 32(b), it contains 3,953 words out of 376 lines and 18,843 characters. I make this representation based on the "Word Count" Dialog Box as presented on the Review tab in the Proofing Group on the workspace ribbon in Microsoft® Word 2010 (14.0.6024.1000) SP1 MSO (14.0.6023.1000).

/s/ Cyrus E. Phillips IV

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