

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CREWZERS FIRE CREW)	
TRANSPORT, INC.,)	
)	
Appellant,)	
)	
v.)	No. 2011-5069
)	
UNITED STATES,)	
)	
Appellee.)	

APPELLEE’S MOTION TO DISMISS APPEAL

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, appellee, the United States, respectfully requests that this Court dismiss the appeal of appellant, Crewzers Fire Crew Transport, Inc. (“Crewzers”), because the case is moot. We understand that briefing in this appeal is completed and that the Court has scheduled oral argument for December 7, 2011. However, on October 6, 2011, after briefing was complete, Crewzers filed a Notice of Related Case (“Notice”) indicating that it had been terminated from the agency’s Preseason Incident Blanket Purchase Agreement (“BPA”) with the United States Forest Service (the “Forest Service”). As a result of Crewzers no longer being a party to the BPA at issue on appeal, the case is moot.

Undersigned appellee’s counsel notified Crewzers’s counsel that we would be filing with the Court this motion to dismiss. Crewzers disagrees with our

position and will file a response to our motion.

STATEMENT OF THE ISSUE

Whether Crewzers's appeal has been rendered moot because Crewzers is no longer a party to the BPA with the Forest Service.

STATEMENT OF THE CASE

Crewzers is appealing the United States Court of Federal Claims' decision granting the Government's motion for judgment upon the administrative record in this pre-award bid protest. *Crewzers v. United States*, No. 10-819C (Fed. Cl. Mar. 18, 2011), reported at 98 Fed. Cl. 71 (2011).

Crewzers raises only two issues in its appeal to this Court. First, Crewzers contends that the trial court erred in refusing to consider Crewzers's challenge of BPA terms that permit the Forest Service to use the agency cooperators—defined in the solicitation as local government entities available through agreement to assist Federal and state government agencies—during fire emergencies instead of placing orders with BPA-holders. Applnt. Br. at 8. Second, Crewzers contends that the authority provided to the Forest Service in the Reciprocal Fire Protection Act, 42 U.S.C § 1856a(a), does not apply to the solicitation because crew carrier buses allegedly are not “fire engines and equipment,” and the Act permits the Forest Service to enter into cooperative agreements only with local fire departments. Applnt. Br. at 25. These arguments are fully addressed in our brief.

As a result of Crewzers's termination from the Forest Service's BPA, however, the appeal has been rendered moot. *See* Am. Compl. at 9, 27.¹

FACTS

On December 9, 2009, the Forest Service issued a solicitation to obtain multiple BPAs under which the Forest Service would place orders for crew carrier buses for fighting fires. JA24.² The BPA terms explicitly provided that the placement of any orders was not guaranteed and permitted the Forest Service to use agency cooperator-owned resources to combat fires instead of BPA-holders. JA31, 42. Crewzers filed a pre-award bid protest with the Court of Federal Claims on November 30, 2010, challenging the BPAs as “illusory and unenforceable,” and seeking a permanent injunction requiring the Forest Service to change the terms of the BPAs, as well as a declaration that Crewzers is entitled to relief because the Forest Service breached the implied covenant of good faith and fair dealing. JA7. Crewzers also sought bid preparation costs. JA18.

On March 18, 2011, the Court of Federal Claims granted the United States'

¹ “Am. Compl. ___” refers to the amended complaint filed by Crewzers in the Court of Federal Claims on September 26, 2011, in which Crewzers alleges that the Government wrongfully terminated it from the BPA. A copy of this complaint is contained within Crewzers's Notice. In referring to the amended complaint, we will use the pagination contained in the document.

² “JA ___” refers to pages within the parties' joint appendix filed with the Court on August 23, 2011.

motion for judgment upon the administrative record. *Id.*

Crewzers appealed the trial court's judgment on June 3, 2011. In its appeal, the only relief Crewzers requests is that this Court remand Crewzers's protest to the trial court with directions to permanently enjoin the Forest Service from using buses owned by local Government entities before placing orders for buses with BPA-holders. Applnt. Br. at 30.

On March 30, 2011, shortly after the trial court issued its judgment, the Forest Service awarded Crewzers a BPA under the solicitation. Am. Compl. at 6. On September 13, 2011, the Forest Service terminated Crewzers from the agency's BPA because Crewzers failed to abide by the terms of the agreement. *Id.* at 25, 27.

Crewzers filed a complaint in the Court of Federal Claims alleging wrongful termination of its BPA on September 26, 2011. *Id.* at 4. Crewzers's wrongful termination complaint requests that the court grant Crewzers declaratory and monetary relief. *Id.* at 38-39. Since being terminated from the BPA, Crewzers is no longer on the list of potential contractors to be dispatched during emergencies.

ARGUMENT

This Court should dismiss Crewzers's appeal because the case has become moot as a result of Crewzers's termination from its BPA with the Forest Service, and Crewzers is no longer in a position to benefit from a decision.

I. Standard of Review For Mootness

“[M]ootness . . . is a threshold jurisdictional issue.” *Myers Investigative & Sec. Svcs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002). A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980) (citation omitted). “The inability of the federal judiciary ‘to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.’” *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (citations omitted).³

The requirement that there be a case or controversy and that both parties have a legally cognizable interest in the outcome “must be satisfied throughout the action,” and not just when the action was filed. *See Geraghty*, 445 U.S. at 411; *DeFunis*, 416 U.S. at 316 (citations omitted); *see also Alvarez v. Smith*, – U.S. –, 130 S.Ct. 576, 580-81 (2009) (actual controversy must be extant at all stages of review, not merely at the time the complaint is filed) (quotation and citation omitted).

³ Though established under Article I of the Constitution, the Court of Federal Claims’ jurisdiction is also limited by this same Article III case or controversy requirement. *See Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

There are three elements of a case or controversy: (1) an “injury in fact”; (2) “a causal connection between the injury and the conduct complained of;” and (3) a likelihood that the injury will be “redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). “The party invoking federal jurisdiction bears the burden of establishing these elements.” *Id.* at 561.

When a claim becomes moot during the appeals process, it should be dismissed as moot. *See Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) (“When a claim is rendered moot while awaiting review . . . the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint.”); *see also Texas Instruments Inc. v. ITC*, 851 F.2d 342, 344 (Fed. Cir. 1988) (holding that, when a case becomes moot, the appellate court should “remand with a direction to dismiss.”) (citation omitted).

II. Because Crewzers’s BPA Has Been Terminated, Crewzers Has No Legally Cognizable Interest In The Outcome Of This Case And This Court Is Unable To Issue Any Relief That Would Redress Crewzers’s Alleged Injury

Crewzers’s complaint is no longer “live” because the outcome of this case will not redress Crewzers’s alleged injury. *See Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). An injury is not redressable unless there is “a likelihood that the requested relief will redress the alleged injury.” *Steel Co. v. Citizens for a Better Env’t*, 523

U.S. 83, 103-04 (1998) (citation omitted); *see also Lujan*, 504 U.S. at 561 (“it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”) (citation omitted).

Crewzers, filed its appeal with this court when it was still a party to the Forest Service BPA, asking the Court to enjoin the Forest Service from utilizing BPA provisions that allowed the Forest Service to use agency or agency cooperator resources instead of placing orders with BPA-holders. *Id.*⁴

Since the Forest Service terminated Crewzers’s BPA, enjoining the Forest Service from using agency or agency cooperator resources over placing orders with BPA-holders, will have no impact upon Crewzers because it is not now a party to the BPA. Applnt. Br. at 30; Am. Compl. at 3. This relief will only affect

⁴ Crewzers’s appeal requests the following relief:

[T]hat this Court hold that the United States Court of Federal Claims has committed legal error, and that this Court remand this Pre-Award Procurement Protest to the United States Court of Federal Claims with a direction to enter Judgment for Plaintiff-Appellant [Crewzers], and with a direction to permanently enjoin Defendant-Appellee [the Forest Service] before Orders for specific crew carrier buses are issued by [the Forest Service] personnel under BPAs resulting from this Solicitation, from using a bus or buses owned by local Government entities to transport fire crews.

Applnt. Br. at 30.

BPA-holders, and Crewzers is no longer a BPA-holder. *Id.* Furthermore, Crewzers's pending wrongful termination complaint does not seek reinstatement of the BPA. *Id.* at 38-39. Indeed, even if Crewzers were requesting that the Forest Service reinstate its BPA, it is extremely unlikely that the Court of Federal Claims could grant such relief. *See Kanemoto v. Reno*, 41 F.3d 641, 645 (Fed. Cir. 1994) (holding that the Court of Federal Claims "cannot entertain claims for injunctive relief or specific performance, except in narrowly defined, statutorily provided circumstances"). As a result, Crewzers will not be in a position at some point in the future to benefit from the relief that it requests from the Court in this appeal.

Nor can Crewzers maintain this appeal on the grounds that, if Crewzers succeeds, other BPA-holders will benefit. *See Totolo/King Joint Venture v. United States*, 431 Fed. App'x 895, 2011 WL 2181484, at *2 (Fed. Cir. 2011) ("a party's desire to press a particular legal position in order to benefit others is not enough to prevent a case from being moot when there is no continuing case or controversy between the parties before the court.") (citation omitted). As there is no present controversy between Crewzers and the Forest Service concerning *its* interests upon the issue of the agency-preference provisions of the BPA, Crewzers may not base its appeal upon the alleged interests of other parties. *Id.*

To the extent that Crewzers requests declaratory relief, or a finding by this

Court that the trial court “committed legal error,” the claim is no less moot because such a holding would have no practical effect. *See PGBA, LLC v. United States*, 389 F.3d 1219, 1228 (Fed. Cir. 2004) (“A declaratory judgment is not available as an academic exercise”). A holding by this Court that the trial court committed legal error in refusing to consider Crewzers’s challenges to the agency or agency cooperator preference provisions of the BPA (a proposition that the United States has contested in its brief) would not have any effect upon Crewzers because Crewzers is no longer a BPA-holder and will not become a BPA-holder in the future. Therefore, this claim is moot as well. *See Labat-Anderson, Inc. v. United States*, 65 Fed. Cl. 570, 576 (2005) (holding that the Court of Federal Claims “cannot issue a declaratory judgment” where “a declaratory judgment on these facts would have no practical effect on the parties.”) (citing *PGBA*, 389 F.3d at 1228).

Because neither the resolution of the legal issues Crewzers has raised on appeal, nor the granting of the relief Crewzers has requested will affect any legally cognizable interest or redress any injury Crewzers alleges, the appeal is moot and should be dismissed.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court dismiss

Crewzers's appeal.

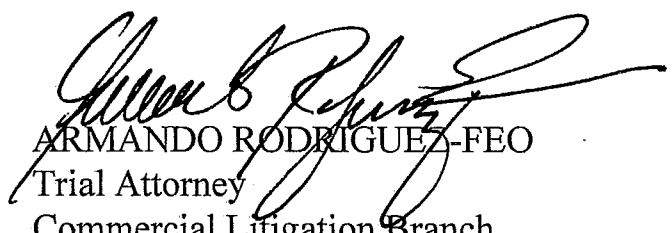
Respectfully submitted,

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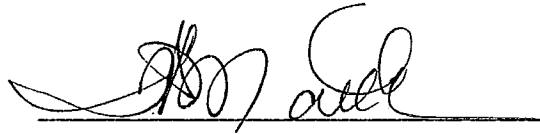
November 2, 2011

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 2nd day of November, 2011, I caused to be placed in the United States mail (first-class mail, postage paid) a copy of "APPELLEE'S MOTION TO DISMISS APPEAL" addressed as follows:

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A handwritten signature in black ink, appearing to read "C. Phillips IV", is written over a horizontal line.