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# United States Court of Appeals for the Federal Circuit

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2011-5069

CREWZERS FIRE CREW TRANSPORT, INCORPORATED,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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

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**PLAINTIFF-APPELLANT'S RESPONSE TO  
DEFENDANT-APPELLEE'S MOTION TO DISMISS**

Crewzers Fire Crew Transport, Incorporated, Apache Junction, Arizona, Plaintiff-Appellant herein, pursuant to FED. R. APP. P. 27(a)(3), FED. CIR. R. 27(b), hereby provides Plaintiff-Appellant Crewzers' Response to Defendant-Appellee's Motion to Dismiss this Appeal as moot. Defendant-Appellee's Motion to Dismiss was filed on Wednesday, November 2<sup>nd</sup>, 2011 and this Response is timely filed on Tuesday, November 8<sup>th</sup>, 2011, well within ten days after service, FED. R. APP. P. 27(a)(3)(A).

The gravamen of Defendant-Appellee's Motion to Dismiss is that this Appeal is mooted because Defendant-Appellee United States Department of Agriculture's United States Forest Service's Contracting Officer unilaterally terminated Plaintiff-Appellant Crewzers' Preseason Incident Blanket Purchase Agreement (BPA) on Tuesday, September 13<sup>th</sup>, 2011. Plaintiff-Appellant Crewzers is challenging this unilateral termination in *Crewzers Fire Crew Transport, Inc. v. United States*, Fed. Cl. No. 11-607C, Judge Lawrence M. Baskir, filed Wednesday, September 21<sup>st</sup>, 2011.

As Plaintiff-Appellant Crewzers observed in its Notice of Related Case, FED. CIR. R. 47.5(b), filed on Friday, October 7<sup>th</sup>, 2011, the Civil Action now pending before the United States Court of Federal Claims and this Appeal do not involve the same issues—this Appeal arises from a Pre-Award Procurement Protest under 28 U.S.C. § 1491(b)(1), and the pending Civil Action is a Complaint on a Government Claim under an express Contract, a Contract Disputes matter over which Plaintiff-Appellant Crewzers contends the United States Court of Federal Claims has jurisdiction under 28 U.S.C. § 1491(a)(1), under 28 U.S.C. § 1491(a)(2), and under 41 U.S.C. § 7104(b)(1).

The pending Civil Action and this Appeal do however involve the same Contract—this Appeal arises from a challenge to certain terms of a Solicitation for these BPAs, a challenge for which Plaintiff-Appellant Crewzers here seeks injunctive relief, and the pending Civil Action before the United States Court of Federal Claims is a Contract Disputes matter arising under a BPA which was awarded to Plaintiff-Appellant Crewzers, one of several such BPAs, for the hire of specific crew carrier buses.

In its Motion to Dismiss Defendant-Appellee presumes that it will prevail at the United States Court of Federal Claims for Defendant-Appellee argues that “Crewzers is no longer in a position to benefit” from a favorable decision here by reason “of Crewzers’ termination from its BPA with the Forest Service, . . . .” Defendant-Appellee’s Motion to Dismiss, at 4. As well, Defendant-Appellee presumes that Plaintiff-Appellant can develop no evidence in the Contract Disputes proceedings now before the United States Court of Federal Claims which would support relief other than the money judgment which might be issued in those proceedings by the United States Court of Federal Claims. Defendant-Appellee’s Motion to Dismiss, at 8.

**This Is A Present, Live Controversy—There Is A Reasonable Expectation That This Harm, The *Preference* Established In These BPAs For The Hire Of A Bus Or Buses Owned By Local Government Entities, Will Recur.**

Importantly, Defendant-Appellee does not argue that the harm here in issue will not continue over the remaining two-year term of these BPAs. Rather, Defendant-Appellee argues that Plaintiff-Appellant Crewzers lacks standing to continue with this Appeal as a result of the unilateral termination of Plaintiff-Appellant Crewzers' BPA by Defendant-Appellee United States Department of Agriculture's United States Forest Service's Contracting Officer on Tuesday, September 13<sup>th</sup>, 2011. Again, this argument necessarily presumes that Defendant-Appellee will prevail in the Civil Action challenging this unilateral termination which is presently before the United States Court of Federal Claims.

The test here for a present, live controversy is a liberal one, and asks only whether or not it is likely, as opposed to merely speculative, that this harm, the *preference* for the hire of a bus or buses owned by local Government entities, will be redressed by a favorable decision in this Appeal. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-81 (2000). In other words, U.S. CONST. ART. III standing may abate *only if* "it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur." *County of Los*

*Angeles v. Davis*, 440 U.S. 625, 631 (1979). Plaintiff-Appellant Crewzers need not show that this “reasonable expectation” of a recurrence is probable, and instead Plaintiff-Appellant Crewzers needs to show only that “such a possibility does in fact exist.” *Honig v. Doe*, 484 U.S. 305, 318 (1988).

Whether or not the proceedings now before the United States Court of Federal Claims may result in the reinstatement of Plaintiff-Appellant’s Crewzers’ BPA, the other BPAs are in effect only for another two years of their three-year term. Thereafter, it is likely that Defendant-Appellee United States Department of Agriculture’s United States Forest Service will again seek to hire private-sector crew carrier buses through a public Competition. Not once has Defendant-Appellee United States Department of Agriculture’s United States Forest Service abjured its *preference* for the hire of a bus or buses owned by local Government entities in such public Competitions for private-sector crew carrier buses.

In *The Veterans Law Group v. Secretary of Veterans Affairs*, 208 Fed. Appx 813, \*816, 2006 U.S. App. LEXIS 17885, \*8 (Fed. Cir. 2006), it was a letter issued by the Veterans Benefits Administration which was withdrawn six days after it had been issued that had come before this Court. This Court dismissed that matter as moot because those Petitioners could not point to a policy there *at issue*, only a hypothet-

ical *future* policy. That is not this Appeal—the *preference* here will remain in effect until the term of the other BPAs expires in two years, and it is indeed possible, and more likely probable, that this *preference* will be re-imposed by Defendant-Appellee United States Department of Agriculture’s United States Forest Service in any successor Contracts for the hire of private-sector crew carrier buses.

And a victory for Defendant-Appellee United States Department of Agriculture’s United States Forest Service in the proceedings now before the United States Court of Federal Claims is remote in time at best, whether or not such a victory would be limited to a money judgment only. Defendant-Appellee United States Department of Agriculture’s United States Forest Service’s response in the proceedings before the United States Court of Federal Claims was due for filing on Monday, November 21<sup>st</sup>, 2011. The Report required by 28 U.S.C. § 520 was earlier due in those proceedings, but on Tuesday, November 3<sup>rd</sup>, 2011 the United States Department of Justice reported on behalf of Defendant-Appellee United States Department of Agriculture’s United States Forest Service that neither the required Report, nor a suggested response to Plaintiff-Appellant Crewzers’ Complaint had been prepared, or was then even proposed. The United States Department of Justice requested a sixty-day time extension. Defendant’s Unopposed Motion for an En-

largement of Time, at 3. This Motion is Attachment 1 to this Response. On Tuesday, November 3<sup>rd</sup>, 2011 the United States Court of Federal Claims granted this Unopposed Motion, extending the period for such a response from Monday, November 21<sup>st</sup>, 2011 through Friday, January 20<sup>th</sup>, 2012. This Order is Attachment 2 to this Response.

**Contract Disputes Proceedings Before The United States Court Of Federal Claims Are Not Limited To Money Judgments.**

Although it has yet to prepare or even propose a suggested response to Plaintiff-Appellant Crewzers' Complaint, Defendant-Appellee asserts in its Motion to Dismiss this Appeal as moot that Plaintiff-Appellant Crewzers can obtain from the United States Court of Federal Claims nothing more than a money judgment, a recovery of its breach of contract damages, including expectation damages, and that "it is extremely unlikely that the Court of Federal Claims could grant such relief [reinstatement of Plaintiff-Appellant Crewzers' wrongly terminated BPA]." Defendant-Appellee's Motion to Dismiss, at 8. Defendant-Appellee argues that Plaintiff-Appellant 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." *Id.*

This argument ignores, of course, the point that the term of the remaining BPAs extends for only another two years, and that thereafter Defendant-Appellee United

States Department of Agriculture's United States Forest Service must return to the marketplace with a public Competition for successor Contracts for the hire of private-sector crew carrier buses.

More to the point, Defendant-Appellee's argument misstates the Contract Disputes jurisdiction of the United States Court of Federal Claims.

As this Court has recently explained, the Contract Disputes jurisdiction of the United States Court of Federal Claims is extended by 28 U.S.C. § 1491(a)(2) beyond monetary disputes to “*nonmonetary disputes on which a decision of a contracting officer has been issued.*” *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed Cir. 2011), 2011 U.S. App. LEXIS 17980, \*11. The *Todd Construction* Court says that so long as there a decision of the Contracting Officer, then “all claims which are based on a valid contractual theory provide the Claims Court with CDA [Contract Disputes Act] jurisdiction,” says that a “contractor's claim need not be based on the contract itself (or a regulation that can be read into the contract) as long as it relates to its performance under the contract.” *Id.*, 2011 U.S. App. LEXIS 17980, \*18-\*19.

This, of course, is precisely the circumstance now before the United States Court of Federal Claims. There has been a decision by Defendant-Appellee United

States Department of Agriculture's United States Forest Service's Contracting Officer relating to Plaintiff-Appellant Crewzers' performance under its BPA, and Plaintiff-Appellant Crewzers is proceeding before the United States Court of Federal Claims under 28 U.S.C. § 1491(a)(1), under 28 U.S.C. § 1491(a)(2), and under 41 U.S.C. § 7104(b)(1).

*Todd Construction* makes it clear that the broad reach and scope of this Contract Disputes jurisdiction of the United States Court of Federal Claims is defined by the definition of the term "claim" in the Federal Acquisition Regulation. *Todd Construction*, 2011 U.S. App. LEXIS 17980, \*9-\*12. The Federal Acquisition Regulation defines "claim" as "a written demand or written assertion by one of the contracting parties [here it was Defendant-Appellee United States Department of Agriculture's United States Forest Service's Contracting Officer] seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or *other relief arising under or relating to the contract.*" 48 C.F.R. § 2.101 (2010) (Emphasis added).

The only limitations on exercise of this broad Contract Disputes Act jurisdiction of the United States Court of Federal Claims are that the party seeking relief must show prejudice and must in its papers make out a claim for relief which is

plausible on its face. *Todd Construction, 2011 U.S. App. LEXIS 17980, \*23-\*26.* Suffice it to say, Plaintiff-Appellant Crewzers has been clearly prejudiced by the unlawful termination of its BPA, and Contract Disputes relief for this unlawful termination may, and indeed needs, to extend beyond recovery of breach of contract damages, including expectancy damages, just as is amply demonstrated by the impact of Defendant-Appellee's Motion to Dismiss this Appeal as moot.

On Tuesday, September 13<sup>th</sup>, 2011 Defendant-Appellee United States Department of Agriculture's United States Forest Service's Contracting Officer could have elected to continue Plaintiff-Appellant Crewzers' BPA. She did not. When Plaintiff-Appellant Crewzers timely challenged this unilateral termination on Wednesday, September 21<sup>st</sup>, 2011 in its filing with the United States Court of Federal Claims, this authority passed to the United States Court of Federal Claims.

Upon a timely invocation of the broad Contract Disputes jurisdiction of the United States Court of Federal Claims, the United States Court of Federal Claims proceeds de novo. 41 U.S.C. § 7104(b)(4). The Contract Disputes proceeding here in the United States Court of Federal Claims encompass the entire scope of the "claims" over which Defendant-Appellee United States Department of Agricul-

ture's United States Forest Service's Contracting Officer was given authority under 48 C.F.R. § 2.101 (2010):

the CFC [United States Court of Federal Claims] suit is not a "review," but an original action, and the CFC does not "affirm" or "reverse" the CO [Contracting Officer], but simply decides entitlement *vel non* to the adjustment. It is acting as a trial court of first instance, not an appellate court. *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987) (Under the CDA [Contract Disputes Act of 1979], "where an appeal is taken to a board or court, the contracting officer's award is not to be treated as if it were the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal.").

*Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1580 (Fed. Cir. 1994).

Defendant-Appellee United States Department of Agriculture's United States Forest Service's Contracting Officer could have decided to continue Plaintiff-Appellant Crewzers' BPA and when she did not, Plaintiff-Appellant Crewzers elected to bring an action on the Claim, a Government Claim, directly in the United States Court of Federal Claims. 41 U.S.C. § 7104(b)(1). The authority to act on this non-monetary dispute on which a decision of the Contracting Officer has been issued is now given to the United States Court of Federal Claims. The Contract Disputes proceedings before the United States Court of Federal Claims are not limited to a money judgment.

Respectfully submitted,

/s/ Cyrus E. Phillips IV

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Cyrus E. Phillips IV  
Virginia State Bar Number 03135

November 8<sup>th</sup>, 2011

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Attorney of record for Plaintiff-Appellant,  
Crewzers Fire Crew Transport, Incorporated.

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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CREWZERS FIRE TRANSPORT v. US.

NO. 2011-5069

**CERTIFICATE OF INTEREST**

Counsel for the (~~petitioner~~) (appellant) (~~cross-appellant~~) (~~respondent~~) (appellee) (amicus), (name of party) Crewzers Fire Crew Transport, Incorporated, certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Crewzers Fire Crew Transport, Incorporated  
10662 East University Drive  
Apache Junction, Arizona 85220-4271

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Crewzers Fire Crew Transport, Incorporated  
10662 East University Drive  
Apache Junction, Arizona 85220-4271

3. All parent corporations and any publicly held companies that hold 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4.  There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Cyrus E. Phillips IV, Albo & Oblon, L.L.P.

November 8<sup>th</sup>, 2011  
Date

/s/ Cyrus E. Phillips IV  
Signature of counsel

Cyrus E. Phillips IV  
Printed name of counsel

**PROOF OF SERVICE**

Pursuant to FED. R. APP. P. 25(d)(1)(B), the undersigned hereby certifies, under the penalty of perjury, that on Monday, November 7<sup>th</sup>, 2011, he caused two copies of the foregoing Plaintiff-Appellant's Response to Motion to Dismiss to be sent by pre-paid overnight delivery, addressed as follows:

Armando A. Rodriguez-Feo, Esq.  
Trial Attorney  
U.S. Department of Justice  
Commercial Litigation Branch  
1100 L Street, N.W., Room 12004  
Washington, D.C. 20530

/s/ Cyrus E. Phillips IV

\_\_\_\_\_  
Cyrus E. Phillips IV

## ATTACHMENT 1

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CREWZERS FIRE CREW	)	
TRANSPORT, INC.,	)	
	)	
Plaintiff,	)	No. 11-607C
	)	(Judge Baskir)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

**DEFENDANT’S UNOPPOSED  
MOTION FOR AN ENLARGEMENT OF TIME**

Pursuant to Rules 6(b)(1) and 6.1 of the Rules of the United States Court of Federal Claims (“RCFC”), defendant, the United States, respectfully requests an enlargement of time of 60 days, to and including January 20, 2012, within which to file its response to plaintiff’s complaint. Currently, the Government’s responsive pleading is due no later than November 21, 2011. This is our first request for an enlargement of time. Counsel for Crewzers Fire Crew Transport (“Crewzers”) has indicated that Crewzers will not oppose our request.

An enlargement of time is necessary to permit Government counsel adequate time to prepare a response to plaintiff’s complaint. In this case, agency counsel has not yet prepared a litigation report, as required by 28 U.S.C. § 520. Counsel of record has sent to the United States Forest

Service (“Forest Service”), a copy of the complaint, along with a request for a litigation report and suggested response to the complaint. Agency counsel has been working to gather the relevant information, but has requested additional time to review the information and prepare the agency’s litigation report and proposed response. Once the litigation report is received, counsel of record will need sufficient time to review the litigation report, relevant documents, and the agency’s suggested response to the complaint. Moreover, this enlargement will allow counsel time to prepare an appropriate response, to confer with her agency counterparts, and to obtain supervisory review so that the Government’s initial response to plaintiff’s complaint may be finalized and filed with the Court no later than the proposed date of January 20, 2012.

An enlargement of time is also necessary because Government counsel is currently preparing for, and will be engaged in trial from November 15 through 18, 2011, in the matter of *The United States v. C.H. Robinson*, No. (C.I.T. No. 06-434). Counsel for the Government will also be devoting significant time and resources to discovery matters in the *United States v. Washington International Insurance Company*, which has a discovery deadline of January 20, 2012.

For these reasons, defendant respectfully requests that the Court grant its first motion for a 60-day enlargement of time within which to file its response to plaintiff's complaint.

Respectfully submitted,

TONY WEST  
Assistant Attorney General

JEANNE E. DAVIDSON  
Director

/s/Bryant G. Snee  
BRYANT G. SNEE  
Deputy Director

/s/ Shelley D. Weger  
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Dated: November 3, 2011

Attorneys for Defendant

## ATTACHMENT 2

# In the United States Court of Federal Claims

Case No. 11-607C  
(Filed: November 3, 2011)

*****	*
<b>CREWZERS FIRE CREW</b>	*
<b>TRANSPORT, INC.,</b>	*
<i>Plaintiff,</i>	*
	*
v.	*
	*
<b>THE UNITED STATES OF AMERICA,</b>	*
<i>Defendant.</i>	*
*****	*

## ORDER

Defendant's unopposed **Motion for an Enlargement of Time** (60 days) to answer Complaint is hereby **GRANTED**. Defendant shall **respond to Complaint no later than January 20, 2012.**

**IT IS SO ORDERED.**

s/ Lawrence M. Baskir  
LAWRENCE M. BASKIR  
Judge