

No. 2011-5069

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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.

CORRECTED BRIEF OF DEFENDANT-APPELLEE, UNITED STATES

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July 20, 2011

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, defendant-appellee's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Defendant-appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CREWZERS FIRE CREW TRANSPORT, INCORPORATED,
Plaintiff-Appellant,

v.

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

BRIEF OF DEFENDANT-APPELLEE, UNITED STATES

STATEMENT OF JURISDICTION

Although we agree with plaintiff-appellant, Crewzers Fire Crew Transport, Incorporated's ("Crewzers"), statement that this Court possesses jurisdiction to consider the appeal of a pre-award bid protest pursuant to 28 U.S.C. § 1295(a)(3), we disagree with Crewzers's assertion that the United States Court of Federal Claims refused to consider Crewzers's claim that the solicitation violated the Federal Grant and Cooperative Agreement Act ("FGCAA"), 31 U.S.C. §§ 6303-6308. Plaintiff-Appellant's Brief ("Applnt. Br.") at 6. The trial court specifically held that the solicitation, as written, did not violate the terms of the FGCAA. A18.¹

¹ "A_" refers to pages of the parties' joint appendix.

STATEMENT OF THE ISSUES

1. The United States Forest Service issued a solicitation requesting quotes for crew carrier buses to assist in fire-fighting, and reserved for itself the option of using agency cooperator-owned resources in response to fire emergencies. Crewzers contends that the FGCAA required the agency to use procurement contracts for the crew carrier buses needed in emergency responses to forest fires. Did the trial court err in holding that the Forest Service's solicitation did not violate the FGCAA?

2. The Reciprocal Fire Protection Act, 42 U.S.C. § 1856a(a), expressly authorizes Federal agencies to enter into cooperative agreements with any fire organization for mutual aid in fire protection. Crewzers contends that the authority granted in the statute applies only to fire engines and equipment, not to crew carrier buses, and permits the Forest Service to enter into cooperative agreements only with local fire departments. Does Crewzers's reading of the Act fail?

STATEMENT OF THE CASE

I. Nature Of The Case

Crewzers appeals the trial court's judgment granting the Government's motion for judgment on the administrative record in this pre-award bid protest action.

Crewzers v. United States, No. 10-819C, 2011 WL 1047337 (Fed. Cl. Mar. 18, 2011)

(A1-18).

First, Crewzers contends that the trial court failed to address its assertion that the Forest Service's use of Preseason Incident Blanket Purchase Agreements ("BPAs") to acquire the use of crew carrier buses in connection with fighting forest fires violates the FGCAA. The FGCAA provides in pertinent part:

An executive agency shall use a procurement contract as a 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; or
- (2) The agency decides in a specific instance that the use of a procurement contract is appropriate.

31 U.S.C. § 6303.

In fact, the trial court rejected Crewzers's first issue on appeal, correctly holding that the Forest Service's contemplated use of agency cooperators' resources comported with applicable law and the unequivocal terms of the solicitation allowing the Forest Service to rely on agency cooperators instead of BPA holders for crew carrier buses during responses to forest fires. A18. The trial court further held that Crewzers's objection to "the existence and parameters of any cooperative agreement" regarding crew carrier buses is "purely conjectural" because the agency had yet to issue any BPAs, and the administrative record contained no allegedly improper agreements with agency cooperators. *Id.*

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. Crewzers relies on the language authorizing Federal agencies providing fire protection for United States property “to enter into a reciprocal agreement, with any fire organization maintaining fire protection facilities in the vicinity of such property, for mutual aid” 42

U.S.C. § 1856a(a). The Act also provides in pertinent part:

Notwithstanding any other provision of law, in fiscal year 1992 and thereafter, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Energy, the Secretary of the Army, and the Secretary of the Smithsonian Institution are authorized to enter into contracts with State and local governmental entities, including local fire districts, for procurement of services in the presuppression, detection, and suppression of fires on any units within their jurisdiction.

42 U.S.C. § 1856a-1.

The trial court did not explicitly address this argument but held that the Forest Service’s use of “agency cooperative agreements . . . complies with applicable procurement law. A17.

II. Course Of Proceedings And Disposition Below

A. Agency And Government Accountability Office Protests

In February 2010, Crewzers filed a pre-award protest with the Government Accountability Office (“GAO”) challenging the terms of the Forest Service national solicitation number AG-024B-S-10-7000 (“solicitation”) for national crew carrier buses. *See* A26-97. GAO denied the protest upon the merits in May 2010. *Crewzers Fire Crew Transport, Inc.*, B-402530, B-402530.2, 2010 CPD P 117, 2010 WL 1983006, (Comp. Gen. May 17, 2010). Crewzers raised challenges in that protest that were different from the ones Crewzers raised below and in this Court.

Crewzers filed a second GAO protest on August 27, 2010, the date on which the bus quotations were due to the agency, raising issues similar to the ones it had raised in the first protest. *Crewzers Fire Crew Transport, Inc.*, B-402530.4 (Comp. Gen. Nov. 9, 2010). The GAO dismissed the protest without addressing the merits, finding that Crewzers was delaying the protest process by raising allegations in a piecemeal fashion. *Id.* at 3. On November 18, 2010, Crewzers filed an agency-level protest challenging the solicitation’s terms as illusory and unenforceable. A114-15. On November 23, 2010, Crewzers submitted revised quotations for multiple crew carrier buses through the Forest Service’s online Virtual Incident Procurement system (“VIPR”). A116-17. The contracting officer formally denied Crewzers’s agency-level protest in December 2010 because Crewzers had already filed the action below.

A179.

B. The Protest In The Trial Court

While its agency level protest was still pending, Crewzers filed the bid protest action below on November 30, 2010. A19. Crewzers requested three forms of relief from the trial court. A175-76. Crewzers first requested a declaration that the BPAs “are illusory and unenforceable, lack a reasonable basis, are unreasonable or irrational, and thus are arbitrary and capricious[.]” A175. Second, Crewzers requested a permanent injunction ordering the Forest Service to conduct any further competition for crew carrier buses with BPAs “which impose enforceable obligations both upon the United States Forest Service and upon Awardees of the proffered [BPAs.]” A175. Finally, Crewzers requested a declaration that it was “entitled to equitable relief, and money damages,” for the Forest Service’s alleged “breaches of the implied-in-fact Contract of good faith, fair dealing, and honest consideration” that allegedly arose when Crewzers submitted its bid. A176.

Crewzers principally contended before the trial court that the BPAs were illusory contracts because they did not obligate the Forest Service to place any orders with the offerors who submitted quotations. A221-23; 246-48. Crewzers also contended that the BPAs formed option contracts, A235-42, and that the use of agency cooperators—defined in the solicitation as local government entities available through agreement to assist the Federal and state government agencies—violated the

Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5150(a)(1) (“Stafford Act”) and the FGCAA. A217-20, 252, 256-57.

In January 2011, the Government filed a motion for judgment upon the administrative record, A22, which the trial court granted on March 18, 2011, while denying Crewzers’s cross-motion. A3.

The trial court first rejected Crewzers’s illusory contract theory, holding that it is well understood that a BPA obligates neither party until such time as the Government issues a purchase order that is accepted by the contractor. A13. The trial court discerned no precedent holding that a BPA binds one party and not the other. *Id.*

Second, the trial court rejected Crewzers’s contention that the BPAs are akin to option contracts that can be accepted by Crewzers’s partial performance over time, holding that there was “no support in the administrative record that the parties intended to enter into an option contract.” A15.

After rejecting “vagu[e]” allegations that the solicitation violated various provisions of the Federal Acquisition Regulation (“FAR”), *id.*, the trial court denied Crewzers’s claim “that the Forest Service’s solicitation violated a statutory preference for the use of local private contractors in responding to all-hazard incidents, established” by the Stafford Act. A15-16. It further rejected Crewzers’s alternative contention that the solicitation violated the FGCAA by allowing the Forest Service to

rely upon cooperative agreements with state and local governments, rather than upon contracts entered into using competitive acquisition procedures, to obtain crew carrier buses. A17. The trial court held that the Stafford Act did not create a preference for local private vendors over local governmental entities or agency cooperators. *Id.* The trial court further held that the solicitation does not violate the FGCAA, but rather reflects a policy “that in certain situations it is not advisable to limit in advance the Forest Service’s response options.” A18.

This appeal followed.²

STATEMENT OF FACTS

I. The Solicitation

In December 2009, the Forest Service issued the solicitation as a request for quotes (“RFQ”) for crew carrier buses. A26. The solicitation stated that the Forest Service intended to issue multiple BPAs that may be used by state and Federal agencies. A31. The dollar amount for any individual order under a BPA was limited to \$150,000.00. *Id.* Regarding the placement of orders with BPA holders, the solicitation stated,

Since the needs of the Government and availability of Contractor’s resources during an emergency cannot be

² After the trial court issued its opinion, the agency awarded a BPA to Crewzers on March 30, 2011. On April 11, Crewzers filed a post-award protest with the GAO, raising other matters of contract administration. The GAO dismissed the protest. *Crewzers Fire Crew Transport, Inc.*, B-402530.6 (Comp. Gen. Apr. 29, 2011).

determined in advance, it is mutually agreed that, upon request of the Government, the Contractor shall furnish the resources listed herein to the extent the Contractor is willing and able at the time of order. Due to the sporadic occurrence of Incident activity, the placement of any orders IS NOT GUARANTEED.

Id. (emphasis in original).

The solicitation further stated that BPAs would be established for a three-year period, but once each year, the contracting officer may allow BPA holders to change their prices, equipment attributes, and their preferred host dispatch center. A36-37. The solicitation made clear that “nationally only one award will be made for a resource within each category and/or type.” A32.

II. Equipment Dispatch Procedures

The ranking and dispatch procedures for the crew carrier buses were detailed in subsection D.6 of the solicitation. A42-43. But subsection D.6 also provided expressly that the resulting BPA would “not preclude the Government from using any Agency or Agency Cooperator owned resources before resources are mobilized under this Agreement.” A42.

The solicitation stated that “[t]he Government intends to dispatch contractor resources” according to the BPA’s priority ranking “for other than initial attack.” *Id.* “For initial attack,” the solicitation provided, “dispatchers [would] follow the ‘closest forces’ concept and utilize locally available resources according to agency and incident needs.” *Id.* As a result, the priority dispatch ranking under the BPA “may

not be used during initial attack and Contractor resources may or may not be used.” *Id.* Even after the initial attack phase, however, the Forest Service retained the discretion to deviate from the protocol:

Government normally will dispatch resources in accordance with this protocol; however, the number of fire orders in process and actual fire conditions at the time of dispatch may require a deviation from normal procedures in order to respond effectively to such conditions. **Any such deviation will be within the discretion of Government, and will not be deemed a violation of any term or condition of this Agreement.**

Id. (emphasis added).

SUMMARY OF THE ARGUMENT

The solicitation’s explicit terms reserved to the Government the option to use other Government resources, including state and local agency cooperators, to obtain crew carrier buses to respond to fire emergencies. Crewzers contends incorrectly that the Government must use procurement contracts to obtain crew carrier buses for use in emergency responses to forest fires. Several authorities permit the Forest Service to enter into cooperative agreements with state and local governments for these buses under certain circumstances. The contemplated cooperative agreements would not violate the FGCAA because they would equally benefit the various affected governments by allowing them to coordinate emergency responses to fire emergencies occurring upon both Federal and state land.

Even if the FGCAA required the Government to enter into procurement contracts for crew carrier buses, those contracts would not be subject to typical competitive requirements. Crewzers contends that a preference for local government entities over private contractors, such as Crewzers, in the procurement context violates the Competition in Contracting Act (“CICA”), 41 U.S.C. § 3301(a)(1).³ If the Forest Service entered into any contracts with agency cooperators for the “presuppression, detection, and suppression of fires on any units within their jurisdiction” under the Reciprocal Fire Protection Act, 42 U.S.C. §§1856-1856d, then such contracts would not be subject to CICA.

Crewzers failed to establish below that any cooperative agreement with agency cooperators—let alone any alleged contract with an agency cooperator—violated the law and adversely affected its ability to compete for a BPA. To the extent that Crewzers takes issue with the *specifics* of any cooperative agreements with agency cooperators, the trial court correctly held that such arguments were conjectural.

Finally, Crewzers argues that crew carrier buses are exempt from the Reciprocal Fire Protection Act because buses are not fire equipment, and that pursuant to the statute the Forest Service can only enter into cooperative agreements

³ On January 4, 2011, Title 41 of the United States Code was recodified. As a result, 41 U.S.C. § 253 was recodified as 41 U.S.C. § 3301. *See* Pub. L. No. 111-350, 124 Stat. 3677 (2011). Crewzers cites to the former provision, § 253(a)(1)(A), in its brief. The recodified language is not materially different from the version cited by Crewzers.

with local fire departments. Contrary to Crewzers's conclusory argument, the statute broadly defines fire protection to include services and equipment that are required for fire fighting and emergency services. Crew carrier buses are required for fire fighting. Moreover, the statute authorizes the Forest Service to enter into cooperative agreements with any government entity—which includes all Federal, state, and local government entities—not just local fire departments. Thus, Crewzers's interpretation fails on its face.

ARGUMENT

I. Standard Of Review

The Court reviews the trial court's judgment upon the administrative record without deference. *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed. Cir. 2005). This means that the Court applies the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA") anew to the agency's procurement decision. *Id.*; *Ala. Aircraft Indus., Inc.-Birmingham v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009). An agency's action is to be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Bannum*, 404 F.3d at 1351; *see also* 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(A). Any underlying issue of statutory interpretation is a question of law, which the Court reviews *de novo*. *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1108 (Fed. Cir. 2004).

Accordingly, a procurement action may be set aside if “(1) the procurement official’s decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.” *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001). Where, as here, “a challenge is brought on the second ground, the disappointed bidder must show a clear and *prejudicial* violation of applicable statutes or regulations.” *Id.* at 1333 (emphasis added). Even assuming the agency had committed a technical violation of a procurement statute, Crewzers still would have to prove that the violation prejudiced it. *CACI Field Svcs. v. United States*, 854 F.2d 464, 466 (Fed. Cir. 1988) (citations omitted). Prejudice is a question of fact. *Bannum*, 404 F.3d at 1353 (citing *Adv. Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057 (Fed. Cir. 2000)). The Court reviews the trial court’s non-merits findings of fact under the “clear error” standard. *Id.* at 1354.

II. The Forest Service’s Use Of Cooperative Agreements For Mutual Aid Did Not Violate The FGCAA

Crewzers first contends that the solicitation’s provision that “[t]his agreement does not preclude the Government from using any Agency or Agency Cooperator owned resources before resources are mobilized under this Agreement” creates an unlawful “preference” for agency cooperators. Applnt. Br. at 28.

As a matter of public policy, Congress has authorized Executive Agency heads to enter into reciprocal fire protection agreements. The Forest Service has express

authority to cooperate with other government agencies pursuant to the Reciprocal Fire Protection Act of May 27, 1955, 42 U.S.C. § 1856a. A17. Congress authorized the Secretary of Agriculture to enter into cooperative agreements with public or private agencies for the purpose of fire protection. 16 U.S.C. § 565a-1 (“[T]he Secretary [of Agriculture] is authorized to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons to . . . perform forestry protection, including fire protection . . .”). Moreover, the Secretary of Agriculture has general authority to “make provisions for the protection of national forests against destruction by fire” pursuant to section 1 of the Act of June 4, 1897, 16 U.S.C. § 551, as well as a general authority to obtain resources from other Federal agencies pursuant to the Economy Act of 1932, 31 U.S.C. § 1535.

Crewzers relies exclusively on the FGCAA to contend that the Secretary of Agriculture is precluded from entering into cooperative agreements for fire protection on behalf of the Forest Service. Crewzers interprets the FGCAA as requiring that the Federal Government enter into procurement contracts with agency cooperators, presumably requiring full and open competition, rather than cooperative agreements. Applnt. Br. 27-28. Although Crewzers contends that its view is supported by the plain language of the FGCAA, it ignores the plain language of the FGCAA that allows the agency to enter into cooperative agreements with state and local governments. *See id.*

Pursuant to the FGCAA, an agency must use a procurement contract only when one of the following conditions is present:

(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; or

(2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

31 U.S.C. § 6303 (emphasis added). Crewzers overlooks the central purpose of cooperative agreements. Cooperative agreements are intended to be used for situations, such as fire protection, which by their very nature necessitate the Government to coordinate resources for a unified emergency response.

Indeed, the FGCAA **mandates** the use of cooperative agreements, 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.**

31 U.S.C. § 6305 (emphasis added). The FGCAA, therefore, establishes standards for Government agencies to assist them in selecting what instrument best reflects the relationship to be established. *See Electronic Space Systems Corporation*, 61 Comp.

Gen. 428, 429 (1982)⁴ (concluding that the FGCAA gives agencies considerable discretion in determining whether to use a contract, grant, or cooperative agreement, and that the Comptroller General will not question such determinations unless it appears that the agency disregarded statutory and regulatory guidance or lacked authority to enter into a particular relationship).

Any cooperative agreements between Federal and agency cooperators for mutual assistance during forest fires have the dual purposes of protecting the life and property of both the Government and agency cooperators during fire emergencies. The Federal Government transfers a thing of value to the State and local governments (support during fire emergencies) and receives the same. Although Crewzers relies on *Trauma Services Group v. United States*, 33 Fed. Cl. 426, 429 (1995), *aff'd on other grounds*, 104 F.3d 1321, 1326 (Fed. Cir. 1997), Applnt Br. at 27, the case does not support its position. In *Trauma Services*, the court held that the FGCAA permitted the use of a memorandum of agreement (akin to a cooperative agreement) as opposed to procurement contract for mutual assistance in carrying out a Government program—in that case the Civilian Health and Medical Program of the Uniformed Services (“CHAMPUS”). *Id.*

⁴ Although not binding, the decisions of the Comptroller General are instructive in the area of bid protests. See *CHE Consulting, Inc. v. United States*, 552 F.3d 1351, 1355-56 (Fed. Cir. 2008); *Planning Research Corp. v. United States*, 971 F.2d 736, 740 (Fed. Cir. 1992).

Finally, as noted above, the FGCAA authorizes a cooperative agreement when “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.” 31 U.S.C. § 6305(2). The solicitation at issue here contemplates precisely that type of “substantial involvement.” Accordingly, the FGCAA permits the Federal Government to enter into cooperative agreements with agency cooperators.⁵

III. Even Assuming The FGCAA Required The Forest Service To Use Procurement Contracts With Agency Cooperators For Mutual Aid, The Contracts Would Not Be Subject To CICA

Crewzers further contends that the Forest Service’s preference for agency cooperators violates CICA’s competitive requirements. Applnt. Br. at 25-29. Crewzers reads CICA in a vacuum and disregards the plenary authority of the agency in contracting for emergency fire assistance.

Since 1991, Federal agencies, including the Forest Service, have been able to contract with local and state governments for fire suppression pursuant to a provision

⁵ As noted above, even assuming the agency had committed a technical violation of a procurement statute, Crewzers would still have to prove the violation prejudiced it. *See supra* Part I Standard of Review. The trial court did not reach the question of prejudice because it found no violation of Federal law. Even assuming there were a violation of law, the question of whether the alleged violation prejudiced Crewzers is not now properly before the Court. Prejudice is a question of fact that would be decided by the trial court in the first instance, and then reviewed by this Court for clear error. *Bannum*, 404 F.3d at 1353-54.

that was added to the Reciprocal Fire Management Act. As noted above, the Act, in pertinent part, provides as follows:

Notwithstanding any other provision of law, in fiscal year 1992 and thereafter, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Energy, the Secretary of the Army, and the Secretary of the Smithsonian Institution are authorized to enter into contracts with **State and local governmental entities, including local fire districts**, for procurement of services in the presuppression, detection, and suppression of fires on any units within their jurisdiction.

42 U.S.C. § 1856a-1 (emphasis added).

Further, even assuming, for argument's sake, that CICA applied to any procurement contract between the Forest Service and state and local cooperators, then CICA likely would carve out an exception to competition requirements "to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a **national emergency**" 41 U.S.C. § 3304(a)(3)(A) (emphasis added). A major forest fire certainly could qualify as a national emergency under certain circumstances.

IV. The Plain Language Of The Reciprocal Fire Protection Act Authorizes The Forest Service's Use Of Cooperative Agreements To Obtain Crew Carrier Buses

Crewzers contends that the preference given to local government entities in the solicitation exceeds the "limited authority" that the Reciprocal Fire Protection Act provides to enter into cooperative agreements. Applnt. Br. at 25-26. Crewzers first argues that the statutory authority provided by Congress under the Reciprocal Fire

Protection Act does not apply to crew carrier buses because buses allegedly are not “fire engines and equipment” as Crewzers contends are required to fall within the statute.⁶ Applnt. Br. at 25. Somewhat self-contradictorily, Crewzers simultaneously contends that the buses solicited by the Forest Service are ordinary buses and should not be considered firefighting equipment, *id*, and that it has specially retrofitted its own buses to be used in forest fires. *See generally* A118-47.

Crewzers’s narrow interpretation of the statutory language concerning firefighting equipment fails on its face. Applnt. Br. at 25-26. In relevant part, the Reciprocal Fire Protection Act provides:

Each agency head charged with the duty of providing fire protection for any property of the United States is authorized to enter into a reciprocal agreement, with any fire organization maintaining fire protection facilities in the vicinity of such property . . . for mutual aid in furnishing fire protection for such property

42 U.S.C. § 1856a(a). As used in section 1856a(a), the term “fire protection” is broadly defined as “equipment required for fire prevention, the protection of life and property from fire, fire fighting, and emergency services.” 42 U.S.C. § 1856(b).

Crewzers fails to support its crabbed view that the statute does not encompass crew carrier buses used for transporting personnel to and from forest fire incidents, or that

⁶ Crewzers also raised this argument in another bid protest concerning a similar Forest Service solicitation, and the trial court rejected this argument. *See ICP Northwest, LLC v. United States*, 98 Fed. Cl. 29, 43 (2011) (plaintiff provided no support for its contention that definition of “equipment” in 42 U.S.C. § 1856(b) is limited to fire engines).

the authority of the Government to enter into reciprocal fire agreements is somehow limited to the provision of “fire engines.” *See* Applnt. Br. at 25.

When evaluating an agency’s construction of a statute, the Court first asks “whether Congress has directly spoken to the issue.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Where, as here, Congress is silent with respect to the specific issue—the meaning of “equipment”—the Court should defer to the agency’s construction if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress’ express intent. *See Skidmore v. Swift & Craft*, 323 U.S. 134, 140 (1944) (agencies’ views are entitled to respect to the extent they have the power to persuade); *United States v. Mead*, 533 U.S. 218, 227 (2001) (whether Congress expressly delegates an agency “authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts . . .”). “The plain meaning of a statute is to be ascertained using standard dictionaries in effect at the time of the statute’s enactment.” *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1353 (Fed. Cir. 2005) (citing *Lamar v. United States*, 241 U.S. 103, 113 (1916)). In 1955, when the Reciprocal Fire Protection Act was enacted, equipment was defined as “material or articles used in equipping, as for an expedition . . . [or i]n industry, the physical facilities available for production, including buildings, machines, tools, etc.”

WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 865 (2d. ed. 1947). The Crew carrier buses at issue here, which are essential to the Forest Service's fire fighting efforts, plainly fall within this definition, and Crewzers has pointed to nothing that indicates Congressional intent to the contrary.

Finally, Crewzers contends that pursuant to the Reciprocal Fire Protection Act the Forest Service may only enter into cooperative agreements with local fire departments. Applnt. Br. at 26. The Forest Service's actions are not so restricted. The statute explicitly defines "fire organization" as any governmental entity or public or private corporation or association maintaining fire protection facilities within the United States." 42 U.S.C. § 1856(c). Thus, Crewzers's narrow reading of the statute directly contradicts the plain language, and thus fails on its face.

CONCLUSION

For these reasons, we respectfully request this Court to affirm the trial court's judgment below.

Respectfully submitted,

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July 20, 2011

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 20th day of July, 2011,
I caused to be placed in the United States mail (first class mail, postage pre-paid)
copies of "CORRECTED BRIEF OF DEFENDANT-APPELLEE" addressed as
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