

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 REPLY TO APPELLANT'S
RESPONSE TO APPELLEE'S MOTION TO DISMISS**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, appellee, the United States, respectfully submits this reply to the response brief filed by appellant, Crewzers Fire Crew Transport, Inc. ("Crewzers"), opposing our motion to dismiss this appeal as moot.

In our opening brief, we established that because the United States Forest Service (the "Forest Service") terminated Crewzers's Preseason Incident Blanket Purchase Agreement (the "BPA"), Crewzers no longer stands to benefit from the relief it asks of this Court, namely reversal of the United States Court of Federal Claims' decision concerning Crewzers's challenge to the terms of the BPA. Mot. 4, 6-9. Because Crewzers is no longer a party to the BPA, Crewzers's challenge to the terms of that BPA does not involve a "live" dispute and should be dismissed as moot. Mot. 6-9.

Crewzers argues that its appeal of the Court of Federal Claims' decision is not moot because the Court of Federal Claims could potentially find in favor of Crewzers in its pending wrongful termination suit (filed with the court on September 26, 2011). Resp. 3-4. Crewzers argues that should the trial court find that the Forest Service wrongfully terminated Crewzers from the BPA, the court can direct that the Forest Service reinstate Crewzers to the BPA because the Court of Federal Claims is not limited to monetary judgments. Resp. 7-11. As we demonstrate below, these arguments lack merit.

ARGUMENT

I. Crewzers's Appeal Is Moot Whether Or Not it Prevails In Its Pending Court Of Federal Claims Action Complaint Against The Forest

Although Crewzers's response alleges that our motion assumes that Crewzers will lose its case against the Forest Service in the Court of Federal Claims, Resp. at 3-4, the mootness of Crewzers's appeal does not depend upon whether Crewzers wins or loses at the trial court. Rather, the fact that Crewzers is no longer subject to the terms of the BPA that it challenges in this appeal is what renders this appeal moot.

When Crewzers filed this appeal, it had been awarded a BPA and, therefore, could presumably benefit from this Court finding that the Forest Service's use of agency and state cooperators during a fire emergency violated the terms of the Federal Grant and Cooperative Agreement Act ("FGCAA"), 31 U.S.C. §§ 6303-

6308. Such a finding by this Court now that Crewzers is no longer a party to the BPA, is hollow because reversing the trial court's interpretation of the BPA will no longer have any impact whatsoever upon Crewzers.

II. Because Crewzers Is No Longer A Party To The BPA And Can No Longer Benefit From Striking Allegedly Harmful Provisions Of The BPA, Its Appeal Cannot Survive Upon The Grounds That Other Parties To The BPA Might Be Harmed By The BPA's Provisions

Crewzers contends that its appeal is not moot because there is a "reasonable expectation" that the alleged harm will "recur." Resp. at 4. To the extent that Crewzers contends that its appeal should survive because other parties to the BPA will benefit from a favorable outcome, its contention fails because, as we demonstrated in our motion to dismiss, "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." See *Totolo/King Joint Venture v. United States*, 431 Fed. App'x 895, 2011 WL 2181484, at *2 (Fed. Cir. 2011); Mot. at 8. Crewzers's suggestion that a favorable outcome in this appeal will change the terms of future solicitations by the Forest Service does not save this appeal from mootness because the terms of any future solicitations by the Forest Service can only be speculated upon by Crewzers.

In support of its argument that this appeal is not moot because of the continued existence of the provisions it alleges to be harmful, Crewzers relies upon two Supreme Court cases, *Friends of the Earth, Inc. v. Laidlaw Environmental*

Services, Inc., and *County of Los Angeles v. Davis*. Resp. 4-5. Crewzers contends that these cases stand for the proposition that a case is saved from mootness so long as a party can demonstrate the mere possibility that harm may result unless the party is granted the relief it seeks. *Id.* What Crewzers ignores about these cases is that they require that there be a possibility of harm *to the party bringing the case*, as opposed to an abstract possibility of harm to some non-party. See *Friends of the Earth, Inc. v. Laidlaw Environmental Svcs., Inc.*, 528 U.S. 167, 181-84 (2000) (holding that a citizens' group's claim for injunctive relief against a wastewater facility was not rendered moot by the facility's compliance with environmental standards because the citizens' group demonstrated that *its members* might suffer harm nevertheless in the absence of an injunction); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979) (holding that a class action suit against the Los Angeles Fire Department alleging discriminatory hiring practices was rendered moot by the department's voluntary adoption of non-discriminatory practices, which eliminated the possibility that *the class members* would be discriminated against).

In its response, Crewzers fails to demonstrate how it will be harmed by the continued inclusion in the BPA of the provisions it seeks to strike. Therefore, under the tests applied in *Friends of the Earth* and *County of Los Angeles*, Crewzers has failed to demonstrate that its case is not rendered moot by the

termination of its BPA.

Additionally, Crewzers may not base its appeal upon its contention that a favorable outcome will benefit bidders on future Forest Service solicitations.

Resp. 5. The reason for this is twofold.

First, because Crewzers cannot know what the terms of future Forest Service solicitations will be, its contention that a favorable outcome in this appeal will benefit bidders on those solicitations is purely speculative. A party does not have standing to sue where it is “merely ‘speculative’” that an “injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Similarly, Crewzers cannot also use this appeal to advance an argument affecting future solicitations by the Forest Service because it is far from certain that Crewzers would even have standing to protest to any such solicitations.

Second, just as it is impossible to know what the terms of a future Forest Service solicitation would be, it is impossible to know whether Crewzers would be an actual or prospective bidder with a direct economic interest in the solicitation. It makes little sense to allow Crewzers to continue this appeal upon the theory that it might remedy the imagined flaws of a non-existent solicitation that Crewzers may not be eligible to protest.¹

¹ To protest a solicitation, a party must establish that they (1) are an actual or prospective bidder, and (2) have a direct economic interest in the solicitation. *Weeks Marine, Inc. v. United States*, 275 F.3d 1352, 1359 (Fed. Cir. 2009).

Because the possibility that Crewzers itself will not be harmed by the continued existence of the BPA provisions it wants this Court to strike, and there is no way that Crewzers can demonstrate that it will directly benefit from the relief it requests in this appeal, the appeal should be dismissed as moot.


CONCLUSION

For the foregoing reasons, as well as those discussed in our motion to dismiss, the United States respectfully requests that this Court dismiss Crewzers's appeal as moot.

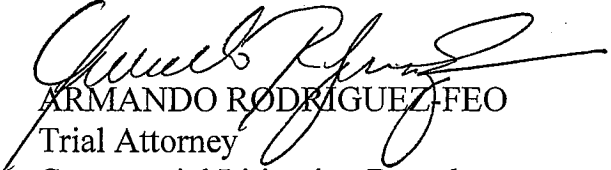
Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director


DEBORAH A. BYNUM
Assistant Director

Of Counsel:
AZINE FARZAMI
Attorney-Advisor
U.S. Department of Agriculture


ARMANDO RODRIGUEZ-FEO
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
PO Box 480, Ben Franklin Station
Washington, D.C. 20530
Tel: (202) 307-3390
Fax: (202) 305-7643

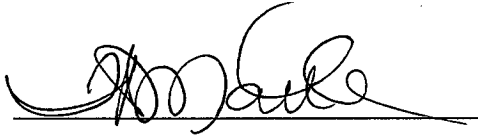
November 17, 2011

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 17th day of Noember, 2011, I caused to be placed in the United States mail (first-class mail, postage paid) a copy of "APPELLEE'S REPLY TO APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS," addressed as follows:

Cyrus E. Phillips IV
Albo & Oblon, LLP
Courthouse Plaza
2200 Clarendon Boulevard, Suite 1201
Arlington, VA 22201-3331

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