No. 04-1552

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROTHE DEVELOPMENT CORPORATION,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF DEFENSE
UNITED STATES DEPARTMENT OF THE AIR FORCE,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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BRIEF OF THE DEPARTMENT OF DEFENSE IN SUPPORT OF DISMISSAL OF THIS CASE

STATEMENT OF RELATED CASES

This case was previously before this Court on appeal from *Rothe Development Corp.* v. *United States Department of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1999). The name and number of the case on appeal was *Rothe Development Corp.* v. *United States Department of Defense and United States Department of the Air Force*, No. 00-1171. This Court rendered a decision on August 20, 2001, and the panel issuing the decision consisted of Circuit Judges

Michel, Clevenger, and Gajarsa. The permanent citation for the decision is *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (Fed. Cir. 2001). On remand, the district court issued *Rothe Development Corp.* v. *United States Department of Defense*, 324 F. Supp. 2d 840 (W.D. Tex. 2004), the order presently under appeal.

Prior to this Court, this case was incorrectly docketed in the United States Court of Appeals for the Fifth Circuit, which transferred the case to this Court. In the Fifth Circuit Court of Appeals, the name and number of the case was *Rothe Development Corp.* v. *United States Department of Defense and United States Department of the Air Force*, No. 99-50436. The date that the Fifth Circuit transferred the case to this Court was October 27, 1999, and the panel issuing that decision consisted of Circuit Judges Jolly, Smith, and Wiener. The permanent citation for Fifth Circuit decision is *Rothe Development Corp.* v. *United States Department of Defense*, 194 F.3d 622 (5th Cir. 1999).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343. This Court has appellate jurisdiction pursuant to 28 U.S.C. 1291 to determine if the Court has jurisdiction because this is an appeal

from a final judgment disposing of all claims against all parties. The United States ultimately argues, however, that this Court lacks jurisdiction.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction over this appeal because it is moot, whether Appellant Rothe Development Corporation (Rothe) lacks standing to maintain this suit, or alternatively, if Rothe has any cognizable claims, they are not yet ripe for judicial determination.

2. If this appeal is not moot and the Court determines that Rothe has standing to present ripe claims, whether the case must be remanded to the district court to comply with this Court's prior mandate that a factual record be developed.

3. Whether Rothe has waived any claims for attorneys' fees and costs by failing to develop such claims in its opening brief, or alternatively, if such claims were sufficiently developed, whether the United States was substantially justified in defending this lawsuit.

STATEMENT OF THE CASE

1. The Statutory Scheme

At issue in this litigation is the constitutionality of Section 1207 of the National Defense Authorization Act, 10 U.S.C. 2323, which preferentially selects bids based on race for certain government contracts by awarding them to "socially

and economically disadvantaged individuals" (SDBs). In Section 1207, Congress established an annual goal that five percent of the total dollar amount obligated for defense contracts and subcontracts for each fiscal year be awarded to small businesses that are owned and controlled by SBDs. See 10 U.S.C. 2323(a)(1). "Socially disadvantaged individuals" are those "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. 637(a)(5). "Economically disadvantaged individuals" are defined as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). Section 1207, therefore, defines an SDB according to the racial or ethnic origin of the controlling owner, thereby creating racial classifications and granting favorable status based on these classifications. See 10 U.S.C. 2323(a)(1)(A). Relevant here, Congress established a rebuttable presumption that Asian Pacific Americans are socially and economically disadvantaged. See 15 U.S.C. 637(d)(3)(C).

The 1207 program authorizes DoD to use a number of mechanisms to try to

achieve the five percent goal, including some race-neutral devices. 10 U.S.C. 2323(a), (c) & (e). Pursuant to Section 1207, the Government increases the bid of businesses owned by non-SDBs up to ten percent by applying a "price-evaluation adjustment" (PEA). See 48 C.F.R. subpart 219.10 (1997).[1] Thus, non-SDBs bids have ten percent added to their total, thereby making them less competitive, and consequently, less likely to be awarded a government contract.

In 1998, Congress amended the Section 1207 program and introduced a triggering mechanism for suspending the use of the PEA program. The 1998 amendment requires DoD to suspend the PEA program for one year following any fiscal year that DoD achieves Section 1207's five percent goal. 10 U.S.C. 2323(e)(3)(B). As of 2003, DoD had met Section 1207's five-percent goal in every fiscal year since fiscal year 1992. See *Rothe Dev. Corp.* v. *Department of Defense*, 262 F.3d 1306, 1319 (Fed. Cir. 2001) (*Rothe III*). Consequently, in accordance with the statutory suspension mechanism enacted in 1998, the PEA program has been suspended every year since the enactment of that suspension amendment beginning in February 1999 and remains suspended to the present. *See* Memorandum for Directors of Defense Agencies re Suspension of the Price

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[1] The United States is citing the version of the regulations in place at the time of the contract award.

Evaluation Adjustment for Small Disadvantaged Businesses dated 23 January 2004 (most recent suspension notice), available at http://www.acq.osd.mil/dpap/dars/dars/deviations/2004-O0001.pdf ; Notice of Suspension of Price Evaluation Adjustment, 64 Fed. Reg. 4847 (1999) (initial suspension notice). Moreover, contrary to Rothe's unsupported contention, there is no evidence in the record that DoD has used the PEA to award contracts since the program was suspended.

In December 2002, Congress enacted the Bob Stump National Defense Authorization Act for Fiscal Year 2003, which extends the Section 1207 program through September 2006. Pub. L. No. 107-314, 116 Stat. 2458. Thus, Section 1207 will expire absent congressional reauthorization. The DoD has exceeded the five percent goal in every year since the 1992 reauthorization. See *Rothe III* at 1314. Therefore, the DoD has not used the PEA program for roughly six years.

2. The Section 1207 Program As Applied

Suzanne Patenaude, a Caucasian female, owns Rothe. Through the use of a PEA, Rothe was outbid on a 1998 contract to provide services to the Air Force. Asserting that Section 1207 violates the equal protection component of the Fifth Amendment, Rothe sued to have it declared unconstitutional, permanently enjoin its enforcement and sought damages, costs, and attorneys' fees. The United States

argued that Section 1207 was constitutional because it was aimed at remedying past discrimination and was narrowly tailored to achieve that result. Ultimately, the parties cross-moved for summary judgment, and analyzing Section 1207 under a deferential standard of review, the district court granted summary judgment in favor of DoD. See *Rothe Dev. Corp.* v. *United States Dep't of Defense*, 49 F. Supp. 2d 937 (W.D. Tex. 1998). On Rothe's appeal, this Court vacated and remanded, holding that the district court failed to apply the proper standard of strict scrutiny in analyzing the constitutionality of Section 1207. See *Rothe III*, 262 F.3d 1306 (Fed. Cir. 2001). On remand, this Court expressly ordered the district court to apply strict scrutiny, ensure there was a strong factual basis supporting the alleged need for the racial classification, and make explicit findings of fact.

The parties therefore returned to the district court, which granted partial summary judgment in favor of each party: As to Rothe, the district court concluded that as reauthorized in 1992, Section 1207 was unconstitutional. See *Rothe Dev. Corp.* v. *United States Dep't of Defense* (*Rothe IV*), 324 F. Supp. 2d 840 (W.D. Tex. 2004). As to the DoD, the district court ruled that Rothe's facial challenge failed because it could not prove that Section 1207 would be unconstitutional under all circumstances; accordingly, the district court held that Section 1207 did not violate equal protection when it reauthorized racial

preferences in 2002. The district court ruled further that because the position of the United States was substantially justified under the Equal Access to Justice Act (EAJA), Rothe was not entitled to attorneys' fees. The district court also dismissed as moot Rothe's claims for an injunction preventing any work on the 1998 contract, for an award of the 1998 contract, and for costs of bid preparation and presentation for the 1998 contract. Rothe appeals, but the United States does not cross-appeal.

STATEMENT OF THE FACTS

1. Columbus Air Force Base Contract

When this litigation began in 1998, Rothe was performing a DoD contract at Columbus Air Force Base (AFB) in Mississippi. (J.A. at 1033).[2] Under that contract, Rothe operated and maintained the Network Control Center (NCC) and Switchboard Operations (SO) functions at the base. (J.A. at 1033). Rothe's contract was scheduled to expire on April 30, 1999. (J.A. at 1157). TennMark Telecommunications, Inc. (TennMark), was the prime contractor responsible for Base Telecommunications Services (BTS) at Columbus AFB. (J.A. at 1157).

The Air Force decided to consolidate the NCC, BTS, and Switchboard Operations functions – which had been performed under two different contracts –

[2] "(J.A. at)" refers to the Joint Appendix.

into a single, new contract. (J.A. at 1157-1158). The Air Force solicited bids for the new contract in March 1998 and announced that it would use the ten percent PEA in evaluating bids. (J.A. at 1143, 1034).

International Computers & Telecommunications (ICT), Rothe, and several other firms competed for that contract. Both Rothe and ICT proposed to use TennMark as its subcontractor to perform the BTS portion of the new contract. (J.A. at 1186-1187). Rothe has asserted in this litigation that it would have made little, if any, profit on the BTS portion of the contract because it did not mark up TennMark's subcontractor bid in preparing its bid as the prime contractor. (J.A. at 1189).

After application of the ten percent PEA, ICT was deemed the low bidder and received the contract. At the time, ICT was owned by David and Kim Sohn. (J.A. at 855-856). The Sohns sold ICT in May 2002, while this litigation was pending on remand to the district court. (J.A. at 856, 861). The contract was for the period January 1, 1999, to September 30, 1999, which was subsequently extended one month to October 31, 1999, with four one-year options that if exercised would extend the contract through October 31, 2003. (J.A. at 1034-1035).

Performance on the BTS portion of the contract began on January 1, 1999.

(J.A. at 1213). ICT was scheduled to begin performance on the NCC and SO portions of the contract on May1, 1999, when Rothe's contract expired. (J.A. at 1213).

ICT did not begin work on the contract, however, because of this suit. Performance was stayed by order of the Fifth Circuit and this Court pending the original appeal. The stay order enjoined DoD from performing any work under the contract. After the Fifth Circuit entered the stay, DoD extended Rothe's contract to allow Rothe to continue working on the NCC/SO at Columbus AFB until the Fifth Circuit stay was lifted or DoD could award a new consolidated contract after a resolicitation. (J.A. at 1213-1214).

Because of the stay, the government issued an interim contract to TennMark to continue providing telecommunications services at the base. (J.A. at 1213-1214; 1159). Because of the stay, Rothe continued performing the NCC and Switchboard operations services at Columbus AFB until March 2000, well past September 30, 1999, the date on which ICT's contract was supposed to expire if the government declined to exercise the options. (J.A. at 1117, 1114, 1145, 1150).

In August 1999, because of the stay, DoD issued a new solicitation for the work covered by the original Columbus AFB contract and awarded that new

contract without using the PEA or any other race-conscious mechanism. (J.A. at 1214). Rothe's bid on the race-neutral contract was second highest, and ICT's was second lowest. (J.A. at 1216). The low bidder was awarded the contract, which was later revoked when the low bidder failed to obtain necessary security clearances. (J.A. at 1216). Pursuant to the Air Force's usual procedures, the contract was then awarded to ICT as the second lowest bidder. (J.A. at 1216).

ICT started performing the new, race-neutral contract in March or April 2000 and so performed until the contract expired in September 2002. (J.A. at 1122, 1119). The Air Force then decided to split the Columbus AFB contract into two portions, similar to the way it was set up before the disputed contract that gave rise to this litigation. In October 2002, Rothe Enterprises, a firm wholly owned by Rothe Development's owners, won the contract for the Base Network Control Center (BNCC) at Columbus AFB. Rothe is currently performing on the contract. (J.A. at 1122, 1119, 1133-1134). According to Rothe, this BNCC contract "addresses essentially the same services" as the ICT contract that gave rise to this litigation and the race-neutral contract that replaced it. (J.A. at 1119).

2. Procedural Background

In August 2001, this Court reversed the district court's entry of summary

judgment and ordered that the case be remanded. See *Rothe III*, 262 F.3d at 1312. *Rothe III* concluded that a deferential standard of review had been applied rather than the proper strict scrutiny standard. *Rothe III* also criticized the district court for impermissibly relying on post-reauthorization evidence to support the program's constitutionality. *Ibid.* *Rothe III* directed the district court to specifically analyze several factors:

> On remand, the district court must reevaluate the constitutional sufficiency of the 1207 program as reauthorized by reliance only on the pre-reauthorization evidence. *** We remand for a determination of the constitutionality of the 1207 program under a strict scrutiny standard, *** The constitutionality of the 1207 program must be assessed as reauthorized in 1992, as applied to Rothe's bid in 1998, and at present, to the extent that declaratory or injunctive relief is still sought.

Id. at 1328-1329.

Following remand, the parties unsuccessfully attempted to settle the case. As part of those settlement efforts, the United States tendered to Rothe $10,000 in full satisfaction of its Tucker Act claims. In April 2002, the United States moved to dismiss, asserting that Rothe's claims were moot because it had been offered full remedial relief. (J.A. at 1041-1060). On July 5, 2002, the district court granted in part the United States' motion to dismiss but permitted the declaratory aspect of the case to proceed. (J.A. at 763-768). Specifically, the district court dismissed

Rothe's prayer for an injunction to prevent any work on the 1998 contract, for an award of the 1998 contract, and for costs of Appellant's bid preparation and presentation for the 1998 contract. (J.A. at 768). The district court noted, "[a]s Rothe could no longer argue for an injunction as to that contract or be awarded that contract, those two claims were moot. In addition, defendants tendered a payment of $10,000 to Rothe under the Tucker Act as payment for costs incurred in the original bid preparation and presentation which rendered that claim moot." *Rothe IV*, 324 F. Supp. 2d at 845.

Following dismissal of some of Rothe's claims on mootness grounds, the district court issued various rulings in which it advised the parties that the case on remand had been narrowed to a single issue: The constitutionality of the 1992 version of the Section 1207 program.

In ruling on the parties' cross-motions for summary judgment, however, the district court proceed to adjudicate the constitutionality of Section 1207 as reauthorized in 1992, as it applied to Rothe's 1998 bid, as well as the constitutionality of the program as reauthorized in 2002.[3]

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[3] The United States questioned whether the court still had jurisdiction over Rothe's constitutional claims. (J.A. at 1091 n.1). The district court however, reasoned that because Rothe sought "prospective injunctive and declaratory relief" the court had jurisdiction to adjudicate its claims. See *Rothe IV*, 324 F. Supp. 2d at 845.

On July 2, 2004, the district court adjudicated the cross motions for summary judgment and dismissed Rothe's case. *Rothe IV*, 324 F. Supp. 2d at 860. The district court denied Rothe declaratory relief and injunctive relief on its facial challenges to the current reauthorization of the Act and PEA and ordered both parties to bear their own costs. On August 6, 2004, Rothe filed a motion for attorney's fees pursuant to the EAJA, 28 U.S.C. 2412 and Federal Rules for Civil Procedure 54. This motion was denied, and Rothe appeals from both orders.

SUMMARY OF ARGUMENT

The United States contends that this case is moot because there is no live case or controversy to adjudicate, nor can this Court grant any meaningful relief to Rothe that it has not already obtained because the PEA has been suspended since 1999 by congressional mandate because the defendants have satisfied the five percent goal every year since 1999, obviating operation of the PEA. In fact, defendants have satisfied the five percent goal even *without* operation of the PEA. Because the PEA is no longer in effect, has been statutorily suspended by Congress, and is slated to expire in 2006, Rothe has already received the benefits of any judicial decree. Consequently, this case is moot and should be dismissed.

If this Court concludes that the case is not moot, the United States asserts that Rothe lacks standing to maintain this suit because it is not entitled to any

prospective relief, nor has it incurred injury for standing purposes with respect to any future contracts.

Alternatively, if this Court holds that the case is not moot and Rothe has standing, the United States contends that any claims for prospective relief Rothe possesses are not ripe for judicial review, thereby warranting dismissal. If any claims are ripe, the United States agrees that this case must be remanded to the district court to satisfy the mandate of *Rothe III* to make the requisite factual findings.

With respect to any claims for attorneys' fees and costs, Rothe has waived any such claims because it did not develop any such arguments in its opening brief, but merely made vague references in limited isolated instances to such claims. If the Court holds that such claims were sufficiently developed for appeal, the United States was substantially justified in defending this suit.

ARGUMENT

I

THIS CASE IS NOT JUSTICIABLE, AND THIS COURT HAS NO JURISDICTION TO ENTERTAIN THIS APPEAL BECAUSE THIS CASE IS MOOT, ROTHE LACKS STANDING TO MAINTAIN THIS LAWSUIT, AND IF ROTHE HAS ANY CLAIMS, THEY ARE NOT RIPE

A. This Court Lacks Jurisdiction To Hear This Appeal Because It Is Moot

This appeal must be dismissed as moot because there is no case or controversy between the parties. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (per curiam). To avoid the mootness bar, "a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). This judicial decision must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1972) (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937)). Rothe, therefore, must maintain a genuine, substantial "personal stake" in the outcome of the litigation. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). If a court cannot "give the plaintiff meaningful relief," then the case is moot. *Jews for Jesus, Inc.* v. *Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998).

Mootness is a threshold jurisdictional inquiry that must be resolved before turning to the merits of a suit. See *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988); *Louisiana Envir. Action Network* v. *EPA*, 382 F.3d 575, 580 (5th Cir. 2004)[4]. If a controversy ceases to exist because it has become moot, a court must dismiss the suit for want of jurisdiction. See *Preiser*; 422 U.S. at 403-404; *Troiano* v. *Supervisor of Elections*, 382 F.3d 1276, 1281 (11th Cir. 2004). In this connection, mootness serves as a vehicle for the constitutional limitations Article III places on the federal judiciary only to resolve "cases" or "controversies." See *Preiser*, 422 U.S. at 401; *Troiano*, 382 F.3d at 1281; *Doe No. 1* v. *Veneman*, 380 F.3d 807, 814 (5th Cir. 2004). Mootness ensures that the federal judiciary is confined to its proper role of adjudicating particular cases between particular parties and does not encroach on the coordinate branches of government by issuing advisory opinions. See *Lewis*, 494 U.S. at 477; *Preiser*, 422 U.S. at 401. As the court in *Socialist Workers Party* v. *Leahy*, 145 F.3d 1240, 1244 (11th Cir. 1998), explained, "[b]ecause the judiciary is unelected and unrepresentative, the Article III case-or-controversy limitation, as embodied in justiciability doctrine, presents an important restriction on the power of the federal courts." An appellate court

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[4] This Court applies the law of the regional circuit because the constitutional issues in this appeal are not matter assigned exclusively to the Federal Circuit. See *Intergraph Corp*. v. *Intel Corp*., 195 F.3d 1346, 1351 (Fed. Cir. 1999).

exercises plenary review in determining if a case is moot. See *FDIC* v. *McFarland*, 243 F.3d 876, 883 n.9 (5th Cir. 2001).

Because mootness deprives a court of jurisdiction, courts have an independent obligation to ensure that a case is not moot. See *McCorvey* v. *Hill*, 385 F.3d 846, 848 (5th Cir. 2004). A suit can become moot at any time during the litigation; thus, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis*, 494 U.S. at 477. Accordingly, "Article III requires that a plaintiff's claim be live not just when he first brings suit, but throughout the litigation." *Tucker* v. *Phyfer*, 819 F.2d 1030, 1034 (11th Cir. 1987). In this regard, the relevant law is "the law as it is now, not as it stood below [in the earlier proceeding]." *Kremens* v. *Barltey*, 431 U.S. 119, 128 (1977). If the law has changed, therefore, the law to be considered for mootness purposes is the present state of the law.

Analogous here, repeal of challenged laws or termination of challenged conduct typically moots a case. See, *e.g.*, *Lewis*, 494 U.S. at 478 (holding that an amendment to the Bank Holding Company Act that resulted in a constitutionally unassailable denial of an application regardless of any Commerce Clause issues presented by the suit mooted the case); *Princeton Univ.* v. *Schmid*, 455 U.S. 100,

103 (1982) (per curiam) (ruling that a regulation that was amended during the pendency of the appeal such that the amendment apparently would not regulate the offensive conduct rendered the case moot); *Kremens*, 431 U.S. at 129-130 (holding that because a state amended the challenged statute to remove the challenged impediment, the case was moot); *Bayou Liberty Ass'n* v. *United States Army Corps of Eng'rs.*, 217 F.3d 393, 396 (5th Cir. 2000) (holding that the case became moot because the challenged conduct was substantially completed by the time of the appeal); *Jews for Jesus, Inc.*, 162 F.3d at 629 (ruling that because an airport lifted its policy of distribution of literature on airport grounds, there was no longer any dispute about which the appellant could complain). These precedents recognize the precept that "[i]f a dispute has been resolved, or if it has evanesced because of changed circumstances, it is considered moot." *Louisiana Envir. Action Network*, 382 F.3d at 581.

A case is not moot, however, simply because the defendant voluntarily ceased the challenged conduct because then the conduct is capable of repetition yet evading review. See *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). If, however, there is no *reasonable* expectation that the voluntarily ceased conduct will recur, then the case is moot. See *United States* v.

W.T. Grant Co., 345 U.S. 629, 632 (1953). These precepts are all the more salient if, as here, the defendant is a governmental entity and has ceased the challenged conduct. See *Coral Springs St. Sys., Inc.* v. *City of Sunrise*, 371 F.3d 1320, 1328-1329 (11th Cir. 2004); *Ragsdale* v. *Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988). As the *Troiano* court explained, "when a defendant is not a private citizen but a government actor, *there is a rebuttable presumption that the objectionable behavior will not recur.*" *Troiano*, 382 F.3d at 1283 (emphasis added). Thus,

> Courts are more likely to trust public defendants to honor a professed commitment to changed ways; individual public defendants may be replaced in office by new individuals, with effects that have little parallel as to private defendants; remedial calculations may be shaped by radiations of public interest; administrative orders may seem to die or evolve in ways that leave present or future impact unclear.

13A Charles Wright, Arthur Miller, and Mary Kay Cooper, *Federal Practice & Procedure* § 3533.7, at 351 (2d ed. 1984). The courts thus "place greater stock in [governmental] acts of self-correction, so long as they appear genuine." *Magnuson* v. *City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991). If the challenged regulation no longer exists, the case is moot and the court cannot grant relief. See *D.H.L. Assocs.* v. *O'Gorman*, 199 F.3d 50, 54 (1st Cir. 1999) (holding case moot because the ordinances "no longer exist"). In this respect, the mere prospect that

the PEA is only suspended and Section 1207 may be reauthorized does not bar mootness because "the mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged law *likely will be reenacted*." *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (emphasis added).

Rothe's suit is moot because the PEA program has been suspended since 1999 and has not been used in awarding contracts. While Rothe may assert that it is challenging other aspects of Section 1207, the PEA is the source of any alleged injury identified in the Amended Complaint. Critically, this suspension was not simply the result of agency action, but was mandated by Congress. See 10 U.S.C. 2323(e)(3)(B) (requiring that the PEA be suspended following any year in which the five percent goal is met).

Associated General Contractors of Connecticut, Inc. v. *City of New Haven*, 41 F.3d 62 (2d Cir. 1994), is relevant. The City of New Haven adopted an ordinance to set aside a certain percentile of public contracts to "people of color" and women in response to alleged past discrimination. *Associated Gen.*, 41 F.3d at 64. Subsequent to the adoption and various amendments of the ordinance, the

Supreme Court delivered *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), which invalidated many such set-aside programs; and in response to *Croson*, New Haven reevaluated the ordinance and ultimately determined to retain the ordinance, but provide that it expire in three years. See *ibid.* Associated General Contractors challenged the constitutionality of the ordinance and filed a complaint seeking declaratory and injunctive relief. See *id.* at 65. The district court declared the ordinance unconstitutional in light of *Croson*, declined to award injunctive relief, and the City of New Haven ceased enforcing the ordinance. See *ibid.* Because of various procedural machinations, however, an amended final judgment was not entered until "over a month after the set-aside program would have expired by its own terms had it not been declared unconstitutional." *Ibid.*

The Second Circuit concluded that the suit was moot because the City of New Haven did not repeal the ordinance to avoid an adverse judgment, nor did the city reenact a similar ordinance. See *id.* at 66. Moreover, even if the city did reenact a similar ordinance, such a reenactment would presumably be based on new statistical evidence proving the necessity of such a program, and if so, a challenge could be mounted at that time. See *ibid.* Failing those contingencies, the court must engage in rank speculation to determine the future of any such ordinance, and such speculation counseled dismissing the case as moot.

Equally relevant is *Princeton University*. In that case, the defendant was arrested for improperly disseminating literature on the grounds of the university. See *Princeton Univ.*, 455 U.S. at 101. The lower state courts respectively convicted and sustained the defendant's conviction, but while the case was pending in the state supreme court, the university apparently suspended the regulation because when the suit arrived in the United States Supreme Court, "the regulation at issue [wa]s no longer in force." *Id.* at 103. Because the regulation was no longer in force, "the issue of the validity of the old regulation is moot," so "this case has 'lost its character as a present, live controversy of the kind that must exist if [the courts] are to avoid advisory opinions on abstract questions of law.'" *Ibid.* (quoting *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam)).

In a related vein is *Jews for Jesus, Inc.* Jews for Jesus unsuccessfully attempted to distribute religious literature at the Tampa, Florida, international airport. See *Jews for Jesus, Inc.*, 162 F.3d at 628. The attempt was unsuccessful because the airport authority flatly prohibited distribution of such literature. Jews for Jesus sued the airport authority, and one month after the lawsuit commenced, the airport authority lifted the ban on the distribution of literature. See *id.* at 629. Affirming dismissal on mootness grounds, the Eleventh Circuit explained, "the airport's change of policy has already given Jews for Jesus the relief [it]

seek[s]–the ability to distribute literature at the airport–and there is therefore no meaningful relief left for the court to give. The only remaining issue is whether the airport's policy *was* constitutional–which, at this stage, is a purely academic point." *Ibid.*

These cases compel the conclusion that this suit must be dismissed as moot. The PEA program has been suspended since 1999; thus, the program has not been used to adjust bids for approximately six years. Furthermore, DoD has satisfied the five percent goal every year since 1992 and has continued to meet this goal after 1999 even with the suspension of the PEA. These facts moot this suit because there is no "live" controversy between the parties. The defendant is also a government actor, and "[w]hen government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit." *Troiano*, 382 F.3d at 1283. Just so, Congress suspended the challenged conduct which has not transpired for approximately six years. See *Magnuson*, 933 F.2d at 565 (affirming dismissal as moot because there was no "reasonable expectation that the City will repeat its purportedly illegal actions").

Any assertion that the PEA program could be reauthorized is of no moment. Congress has mandated in 10 U.S.C. 2323(e)(3)(B) that the PEA not be used for fiscal years in which the five percent goal has been met. Accordingly, there is no

reason to believe that Congress will lift the suspension. See *Christian Coalition of Ala.* v. *Cole*, 355 F.3d 1288, 1292-1293 (11th Cir. 2004) (affirming as moot a case in which the defendant withdrew an opinion adverse to the plaintiff, even though the defendant had the power to reissue the opinion). As the Supreme Court in *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 223 (2000), explained, these facts make "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" See also *Friends of the Earth, Inc.* v. *Laidlaw Envir. Servs., Inc.*, 528 U.S. 167, 193-194 (2000) (stating that before a case is moot there must be no reasonable probability that the challenged conduct will not recur and as applied there, factual disputes precluded such a finding). Similarly, any pleas that vindication for alleged past wrongs are unavailing because "[p]rinciple alone unaccompanied by a live case or controversy does not present a justiciable claim." See *Saladin* v. *City of Milledgeville*, 812 F.2d 687, 693 (11th Cir. 1987).

1. Rothe has no damages claims under the 1998 contract

With respect to damages for the 1998 contract, any such damages claims are moot because defendants tendered to Rothe payment that equals or exceeds the monetary relief to which it has a potentially cognizable claim. To elucidate, Rothe's damages are statutorily capped by the Tucker Act, 28 U.S.C. 1346(a)(2), at $10,000 because Rothe elected to assert its bid-preparation claim in the Western

District of Texas, rather than in the Court of Federal Claims. See *Rothe II*, 194 F.3d at 624 & n.3. Additionally, the federal government and its agencies are immune from damages claims by disappointed bidders other than claims for the costs incurred in preparing their unsuccessful bid. See *id.* at 624-626; *New Am. Shipbuilders, Inc.* v. *United States*, 871 F.2d 1077, 1079 (Fed. Cir. 1989). The defendants tendered to Rothe $10,000 in satisfaction of her claim. Because this sum equals or exceeds the amount of damages to which Rothe is entitled, this tender moots Rothe's damages claim. See *United States* v. *San Pablo & T.R. Co.*, 149 U.S. 308, 313-314 (1893) (dismissing as moot a claim because the offer to pay the disputed sums extinguished the controversy). Rothe has previously conceded that its damages are limited to its bid preparation costs. (J.A. at 1030). Rothe further conceded that its Tucker Act claim "cannot and does not exceed $10,000," is "Rothe's only sources for recovering monetary relief," (J.A. at 1031-1032), and Rothe "has no remedy in law to recoup the losses of profits," (J.A. at 1029). Consequently, any damages claim for the 1998 contract is moot.

2. Rothe has no equitable claims under the 1998 contract

With respect to any equitable relief under the 1998 contract, that relief is also moot for at least two reasons: First, an injunction prohibiting the award of the 1998 contract is moot because the object of any such injunction has been achieved

because both this Court and the Fifth Circuit enjoined pending appeal the performance of the 1998 contract that had been awarded to ICT in a race-based competition; accordingly, defendants were required to solicit and award an entirely new contract in 1999-2000 that replaced the 1998 contract and the contracts the 1998 contract was intended to replace. In this respect, the Air Force extended Rothe's contract for services and Rothe continued performing the contract through spring of 2000–several months beyond the original expiration date of the disputed contract. Moreover, because of the stays, Rothe had the opportunity to compete in a race-neutral competition for a contract covering the same work as the one that was awarded to ICT in 1998; but Rothe was underbid by ICT. Subsequently, ICT was awarded a race-neutral contract, which it started performing in the spring of 2000 when Rothe's contract expired. Even if, therefore, Rothe could establish it would be entitled to an award of the contract, it has already received that benefit because it performed for an *extended* period of time under that contract, and the PEA was not in force by the stays this Court and the Fifth Circuit issued.[5] In this

[5] In 2002, Rothe Enterprises, an affiliate of Rothe, was awarded a contract at Columbus Air Force Base covering much of the the same work as the disputed contract. Indeed, Rothe has characterized this 2002 contract as essentially covering the same work as the 1998 dipusted contract. Even if Rothe were entitled to an award of the contract, it essentially received that award in 2002, further bolstering the conclusion that Rothe has already received all to which it would be entitled.

connection, Rothe had the opportunity to rebid on the replacement contract, but it was unsuccessful, and this opportunity to rebid remedies any complaint it may have had. See *CACI, Inc.-Fed.* v. *United States*, 719 F.2d 1567, 1575 (Fed. Cir. 1983) (recognizing that the opportunity to rebid remedies the injury inflicted by a tainted bidding process).

Second, Rothe seeks an injunction prohibiting the award of the 1998 contract, but that contract was already awarded; consequently, that claim is moot. See *Bayou Liberty Ass'n*, 217 F.3d at 396 (holding that if the event sought to be enjoined has already transpired, then the claim is moot and injunctive relief cannot be awarded). Injunctive relief is particularly suspect against the defendants because "[w]hen a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with 'the well-established rule that the Government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs."'" *Rizzo* v. *Goode*, 423 U.S. 362, 378-379 (1976) (quoting *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974) (quoting *Cafeteria & Restaurant Workers Union Local 473, AFL-CIO* v. *McElroy*, 376 U.S. 886, 896 (1961))). The district court properly concluded that any claim–legal or equitable–under the 1998 contract is moot, which conclusion should be affirmed.

3. Rothe has no equitable claims to prohibit future application of the PEA

Rothe's request that it be awarded any future contract is not cognizable because a disappointed bidder "has 'no right to have the contract awarded to it in the event the court finds illegality in the award of the contract,'" see *CACI, Inc.*, 719 F.2d at 1575 (quoting *Scanwell Labs., Inc.* v. *Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970)), because "courts do not determine who should have obtained the disputed contract," see *O'Donnell Constr.* v. *District of Columbia*, 963 F.2d 420, 428-429 (D.C. Cir. 1992). Rothe has conceded this point. (J.A. at 1027-1029). Moreover, there is no contract on which to issue any such relief; to issue a decree that an entity receive a government contract at some future date incarnates the type of advisory opinion that the case or controversy requirement prohibits the federal courts from issuing. See *D.H.L. Assocs.*, 199 F.3d at 54 (holding that the courts "are without power to grant injunctive and declaratory relief" if the challenged conduct no longer exists).

B. This Court Should Dismiss This Case Because Rothe Lacks Standing to Maintain This Lawsuit

Even if Rothe could overcome the insurmountable hurdle of mootness, it lacks standing to maintain this lawsuit with respect to prospective relief. Standing invokes the jurisdiction of the federal courts to entertain a case or controversy. See

Flast v. *Cohen*, 392 U.S. 83, 94-101 (1968). Standing is therefore a "threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983). To possess standing, Rothe "must demonstrate a 'personal stake in the outcome'" of the litigation. See *ibid.* (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), the Supreme Court articulated the "irreducible constitutional minimum" that standing requires:

> First, the plaintiff must have suffered an injury in fact–an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of–the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

(citations and internal quotation marks omitted) (alterations in original). The mandate that Rothe possess standing is based on the need "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." See *Baker*, 369 U.S. at 204. Because standing is jurisdictional in nature, it can be raised at any time, even for the first time on appeal. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 546-547 (1986). Reviewing courts exercise plenary review

over whether a litigant has standing. See *Arguello* v. *Conoco, Inc.*, 330 F.3d 355, 361 (5th Cir. 2003).

Regarding the injury element, there are no "specific, concrete facts" proving that the challenged conduct will result in a "demonstrable, particularized injury" so that Rothe "personally w[ill] benefit in a tangible way" from a judicial decree. See *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975). Thus, Rothe must prove that it "has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical.'" See *Lyons*, 461 U.S. at 102. The injury must be "distinct" and "palpable," *Allen* v. *Wright*, 468 U.S. 737, 751 (1984), and "[a]bstract injury is not enough," *Lyons*, 461 U.S. at 101.

To prove causation, Rothe must establish that its injury "fairly can be traced to the challenged action." See *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)). This element requires a direct causal connection between Rothe's purported injury and the defendants' action. See *Florida Audubon Soc'y* v. *Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996) (en banc). Causation requires that "[t]he injury must both be caused by the defendant and be remediable by the defendant." *Wehunt* v. *Ledbetter*, 875 F.2d 1558, 1567 (11th Cir. 1989).

The redressability element of standing examines if the relief sought would alleviate the alleged injury. See *Kelly* v. *Harris*, 331 F.3d 817, 820-821 (11th Cir. 2003); *Florida Audubon Soc'y*, 94 F.3d at 663-664. Redressability ensures that the presentation of issues are conducive to resolution by judicial action, see *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982), and implements the limitation on federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process," *Flast*, 392 U.S. at 97. Essentially, redressability "assume[s] that proper parties have brought their dispute to the proper branch of the federal government" for resolution. *Florida Audubon Soc'y*, 94 F.3d at 663.

1. Rothe Is Not Entitled To Prospective Relief

Rothe lacks standing to prosecute this suit as to any prospective relief. First, Rothe is not in any imminent danger of any concrete, immediate, palpable, distinct, particularized injury entitling it to damages. Indeed, Rothe has no such injury at all because there is no contract at issue on which Rothe can presently sue:[6] At the

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[6] The United States does not dispute that Rothe initially possessed standing at the commencement of the litigation to seek $10,000 in damages. Even if the suspension were lifted between February 2005 and September 2006, there is little chance that the program would affect Rothe. Virtually all the contracts on which Rothe has bid in the past have been small-business set-asides, which are exempt by

time Rothe filed its original complaint, Congress ordered the PEA suspended if the five percent goal was met *before* Rothe filed suit, and by the time Rothe filed its amended complaint, DoD had already operated with the suspension of the PEA. Because DoD met the five percent goal every year since 1992, that the PEA would be reinstituted was highly unlikely, and in fact, DoD announced the first one-year suspension before Rothe filed its Amended Complaint. Rothe, therefore, could not demonstrate that it would be subjected to the PEA in the foreseeable future. Accordingly, there was no threat of injury on the filing of the original and amended complaints, so Rothe cannot benefit from a judicial decree, see *Warth*, 422 U.S. at 508.

In *Lyons*, 461 U.S. at 109, the Supreme Court articulated the constitutional "preconditions for asserting an injunctive claim" in federal court: To "satisfy the threshold requirement imposed by Art. III of the Constitution," Rothe must demonstrate "that [it] 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged * * * conduct." *Id.* at 102 Significantly, "past wrongs do not in themselves amount to that real and immediate threat of

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regulation from the PEA even when the suspension is not in place. See 48 C.F.R. 219.7001(b) (1997); 48 C.F.R. 19.1102(b)(3) (2001). Indeed, the disputed contract in this case is the only one Rothe has ever lost to an SDB that had received a price-evaluation adjustment.

injury necessary to make out a case or controversy." *Id.* at 103. Thus, injunctive relief is not available "if unaccompanied by any continuing, present adverse effects." *Lujan*, 504 U.S. at 564 (quoting *O'Shea* v. *Littlejohn*, 414 U.S. 448, 495-496 (1974)). The Supreme Court has also admonished that "[e]specially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948).

In this appeal, there is not nor cannot be any immediate threat of injury because the PEA has been suspended by Congressional mandate for almost six years. These facts negate immediate, imminent injury entitling Rothe to any prospective injunctive relief. See *Armstrong* v. *Turner Indus.*, 141 F.3d 554, 563 (5th Cir. 1998) (concluding that plaintiffs were not entitled to prospective equitable relief because they did not establish they would suffer from or be subjected to the past challenged conduct in the future); *Henschen* v. *City of Houston*, 959 F.2d 584, 588 (5th Cir. 1992) (denying plaintiffs equitable relief because the object of their injury already occurred and terminated, thereby removing future injury). Just so in this appeal, the allegedly unlawful conduct is no longer an immediate, imminent threat, so Rothe is not entitled to any prospective injunctive relief. In addition, "for the same reasons [Rothe] lacks standing to procure injunctive relief, [it] likewise

has no standing to seek declaratory relief." *Armstrong*, 141 F.3d at 563 (denying declaratory relief because plaintiff lacked standing for prospective injunctive relief). As the Fourth Circuit cogently explained in holding that a plaintiff lacked standing for equitable relief for lack of threatened injury, "the injunctive and declaratory powers of the federal courts are broad and vital to justice, but Article III simply precludes their empty use to enjoin the conjectural or declare the fully repaired broken." *Bryant* v. *Cheney*, 924 F.2d 525, 529 (4th Cir. 1991).

2. Any Purported Injury Is Wholly Speculative

Here, any injury that Rothe may suffer in the future is wholly speculative. This deprives Rothe of standing and this Court of jurisdiction. See *Public Citizens, Inc.* v. *Bomer*, 274 F.3d 212, 219 (5th Cir. 2002) (holding that because the alleged injury was not imminent and speculative, the plaintiff lacked standing); *North Am. Natural Resources, Inc.* v. *Strand*, 252 F.3d 808, 813-814 (6th Cir. 2001) (dismissing a case for want of standing because if any injury could occur, it would occur in the future and the potential for no injury existed); *Lee* v. *Oregon*, 107 F.3d 1382, 1388-1389 (9th Cir. 1997) (ruling that the plaintiffs lacked standing because any threat of injury was too speculative and hinged on too many contingencies). In this connection, because the PEA is not in force, Rothe cannot be injured by it. See *Carrelli* v. *Ginsburg*, 956 F.2d 598, 693 n.8 (6th Cir. 1992) (recognizing the

plaintiff lacked standing because the rule he sought to challenge was not in effect).

3. No Injury Will Recur

A fatal stumbling block for Rothe regarding prospective relief is the improbability of the challenged conduct recurring in light of the suspension of the PEA. See *Lyons*, 461 U.S. at 105-106 (holding plaintiff lacked standing because there was no showing that he would suffer future injury given that the alleged misconduct had been suspended); *O'Shea*, 414 U.S. at 493-496 (opining that a plaintiffs lacked standing because they could not prove that they would again be subjected to the discriminatory conduct); *Rizzo*, 423 U.S. at 372 (ruling that even the plaintiffs' evidence of violations failed to evince a policy of widespread misconduct, so plaintiffs did not have standing to use an entire police force). If the threat is sufficiently unlikely to transpire again, a plaintiff does not have standing. See *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969) (dismissing a suit for want of standing because "it was most unlikely" that the factual circumstances would expose the plaintiff to any threat). Because the PEA has been suspended and is most unlikely to be reactivated, any threat of injury has been removed.[7]

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[7] Rothe failed to prove injury, which terminates the standing inquiry. Likewise, the other elements of standing are missing. The fact that Rothe has no injury precludes a finding of causation. That fact aside, defendants have not caused any injury because Rothe can participate in the bidding process with any other bidder, and the PEA is no longer in effect. Redressability eludes Rothe. The

C. If Rothe Had Cognizable Claims, They Would Not Be Ripe For Review

Even disregarding the insurmountable hurdles of mootness and standing, if Rothe has any cognizable claims for prospective relief, they are not ripe for review. Like mootness and standing, ripeness implicates the subject matter jurisdiction of federal courts. See *Tari* v. *Collier County*, 56 F.3d 1533, 1535-1536 (11th Cir. 1995); *Southern Pac. Transp. Co.* v. *Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990). Ripeness concerns the timing of a suit: "[R]ipeness is peculiarly a question of timing [and] it is the situation now rather than the situation at the time of the [decision under review] that must govern." *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974). Accordingly, if too many contingencies must transpire to shape the case, the suit is not ripe. The gravamen of ripeness is to determine if a suit is sufficiently concrete such that a genuine dispute exists between the parties. In this respect, ripeness prevents the courts from becoming embroiled in an abstract or theoretical disagreement. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967) abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977). In *Abbott Laboratories*, 387 U.S. at 149, the Supreme Court explained that

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PEA has been suspended for approximately six years, contractors are bidding on contracts without the race-based price adjustments, and Rothe has bid on contracts. There is simply no wrong to redress here because the PEA is suspended. Congress is better suited that the courts to determine the need for any race-conscious remedies in the government contracting arena.

ripeness involves two principle considerations: fitness for judicial review and the hardship that results by withholding a judicial decision. If contingencies may not occur as anticipated or occur at all, the more likely the claim is not ripe. See *Marusic Liquors, Inc.* v. *Daley*, 55 F.3d 258, 260-261 (7th Cir. 1995); *Massachusetts Ass'n of Afro-Am. Police, Inc.* v. *Boston Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992) (per curiam). This Court's review of whether any claims are ripe is de novo. See *Monk* v. *Huston*, 340 F.3d 279, 281 (5th Cir. 2003).

If and when Rothe ever bids on another contract in which the PEA is enforced, Rothe can assert any claims at that time. Until such time, any putative claims are premature and simply not ripe for review. The PEA program is suspended, has been for many years, shows no sign of reactivation, and Section 1207 is slated to terminate in 2006. These circumstances present far too many contingencies for any claim to be ripe. See *New Mexicans for Bill Richardson* v. *Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (stating that a case is not fit for review if it hinges on future or uncertain events). While the PEA is the source of Rothe's alleged grievance, to any extent it challenges other aspects of the Section 1207 program, it can assert an as-applied challenge at that time. Until such time, there are no ripe claims.

II

IF ANY OF ROTHE'S CLAIMS ARE JUSTICIABLE, THIS COURT SHOULD REMAND THE CASE FOR FURTHER FINDINGS AND ADDITIONAL DEVELOPMENT OF THE EVIDENTIARY RECORD

If this Court concludes that mootness, standing, and ripeness do not require dismissal of this appeal, the United States concedes that the district court did not comply with this Court's mandate in *Rothe III*, so this case must be remanded for compliance with that mandate and development of the record. Because the only remaining constitutional claim on remand would be a facial challenge to the Section 1207 program as reauthorized in 2002, Rothe would bear the heavy burden of proving that the program could not be constitutionally applied under any circumstances. Although the United States believes that Rothe cannot satisfy this burden, that is a determination that the district court should make in the first instance after allowing DoD to present evidence pertaining to the 2002 version of the Section 1207 program.

A. Deciding The Constitutionality Of The 2002 Version Of The 1207 Program Without A Remand Would Be Unfair To Both DOD And Rothe

Fairness dictates that this Court not decide the constitutionality of the 2002 version of the Section 1207 program without remanding the case to the district court for further findings and additional development of the record. Failure to remand would be unfair to all parties because the district court's disposition of the

case violated the reasonable expectations of both DoD and Rothe about the scope of the issues to be decided and the evidence that the court was going to consider.

1. DOD Did Not Present Evidence Or Analysis Regarding The 2002 Version Of The Program Because The District Court Advised The Parties That It Had Narrowed The Case On Remand To One Issue: Whether The 1992 Version Of The 1207 Program Was Constitutional

On remand, after dismissing some of Rothe's claims as moot (J.A. at 763-768), the district court advised the parties in several rulings that the case had been narrowed to one issue: Whether the Section 1207 program, as reauthorized by Congress *in 1992*, was constitutional. The court made this point in rejecting Rothe's request for discovery on matters post-dating 1992. (J.A. at 863-864, 866-868). In its order setting deadlines for filing dispositive motions, the district court reiterated that the case had been narrowed to a single issue:

> Plaintiff must understand by now that the issue before this Court is whether Congress had a compelling interest in 1992 when it reauthorized the § 1207 program and whether or not that program was narrowly tailored to meet that interest.

(J.A. at 1074-1076). In addition, both parties filed numerous pleadings over a ten-month period in which they noted their understanding that the district court had limited the issue in the case to the constitutionality of the 1992 version of the

program.[8] Although emphasizing its disagreement with the court, Rothe conceded that it interpreted the district court's rulings as restricting the constitutional inquiry to the 1992 reauthorization. (J.A. at 1072, 1220, 918, 1140). Prior to its summary judgment ruling, the district court had never contradicted the parties' repeated expressions of their understanding of the court's rulings limiting the scope of the case. Because of the court's rulings, DoD focused its summary judgment papers on the 1992 version of the program and did not attempt to present evidence or analysis respecting the information available to Congress at the time of the 2002 reauthorization. (J.A. at 1092-1112; 1078-1082).[9]

In its summary judgment ruling, however, the district court proceeded to address not just the 1992 version of the program, but also the constitutionality of the program as reauthorized in 2002. See *Rothe IV*, 324 F. Supp. 2d at 841-842, 849. In ultimately holding that the 2002 version of the program was at issue, the court noted that it had ordered DoD "to consider the Federal Circuit's entire remand." *Id.* at 842. The district court apparently was referring to a portion of its

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[8] (J.A. at 1143, 1069, 1072, 1220, 918, 1082-1083, 1087, 1090-1091, 1124, 1126-1132, 1135-1139, 1140-1141).

[9] Although DoD presented some reports to the district court that were published after 1992, DoD made clear that such materials were relevant because they were largely based on data from the period preceding 1992. (J.A. at 1108-1110).

September 26, 2003 order directing the parties to "address all matters considered by the Federal Circuit in their [sic] opinion." (J.A. at 1076). As noted, however, that same order had stated that the constitutional issue in the case was the validity of the program as reauthorized in 1992. (J.A. at 1074-1076). DoD thus reasonably interpreted the court's order of September 26, 2003, as directing the parties to address all the factors that this Court found relevant to the compelling interest and narrow tailoring inquiries, see *Rothe III*, 262 F.3d at 1329-1332, but to do so only with regard to the 1992 version of the program. Indeed, after the September 26, 2003 order, DoD reiterated its understanding in various pleadings that the only matter at issue in the cross-motions for summary judgment was the constitutionality of the program as reauthorized in 1992. (J.A. at 1090-1092, 1115, 1126, 1128, 1130-1132, 1140 n.2). Until the district court issued its summary judgment ruling in July 2002, DoD had no reason to believe that the district court changed its mind regarding the scope of the case.

In light of DoD's reasonable understanding of the district court's rulings, it would be unfair to assess the constitutionality of the 2002 version of the program without giving the government an opportunity to present evidence and analysis on that issue. The presentation of such evidence should occur in the first instance in the district court, because as this Court recognized in the earlier appeal, detailed

findings by the trial court are necessary for meaningful appellate review of the constitutional issues. See *Rothe III*, 262 F.3d at 1323.

A remand on this issue would obviate the need to decide most of the issues raised in Rothe's appellate brief. For example, Rothe asserts (Br. 9-11) that the evidence on which the district court relied was too stale to support reauthorization of the program in 2002. But because DoD focused in the first remand on the 1992 version of the program, it has not yet had an adequate opportunity to bring to the district court's attention more current evidence that might bear on the constitutionality of the 2002 reauthorization. Moreover, Rothe's objections to the admissibility of various studies and other documents (Br. 12-13, 16 n.48, 56) are premature because DoD has not yet decided what evidence it might present to the district court on remand to defend the 2002 version of the program.

2. The Parties Reasonably Understood That the District Court Would Not Consider The Benchmark Study In Analyzing The Program's Constitutionality

A remand is also warranted because the district court upset the parties' reasonable expectations by relying on the Benchmark Study in its analysis of the program's constitutionality. As Rothe notes (Br. 33), DoD advised the district court that it would not rely on the Benchmark Study on remand. (J.A. at 868). The court then ruled that the study was "not relevant" to the narrow issue remaining in

the case. The court nonetheless used the Benchmark Study in upholding the 2002 version of the program. See *Rothe IV*, 324 F. Supp. 2d at 857-858.

DoD has made no decision whether it would rely on the Benchmark Study for any purpose if this Court were to remand the case for further analysis of the 2002 version of the program.[10] Consequently, this Court need not address at this time Rothe's arguments regarding the methodology, validity, or admissibility of the Benchmark Study. (Br. 33-36).

B. The District Court Failed To Make All Of Detailed Findings Mandated By This Court's Decision In Rothe III

In *Rothe III*, this Court laid out a roadmap to follow on remand and directed the district court to make "detailed findings" on a number of specific factors relevant to strict scrutiny analysis. See *Rothe III*, 262 F.3d at 1323, 1329-1332. This Court explained that such detailed findings were necessary in order for it "to undertake meaningful appellate review." *Id.* at 1323.

The United States agrees with Rothe that the district court failed to make

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[10] In the first appeal, DoD relied on the 1998 Benchmark Study as one of several pieces of evidence supporting the constitutionality of the 1998 contract award that gave rise to this litigation. See *Rothe III*, 262 F.3d at 1325, 1328, 1330-1332. On remand, however, the district court dismissed as moot Rothe's challenge to the 1998 contract award and further limited the scope of the case to the constitutionality of the program as authorized in 1992. In light of these developments, DoD did not rely on the Benchmark Study on remand.

findings on some of these factors with the degree of specificity mandated by this Court. For example, this Court directed the district judge to "conduct a probing analysis of the efficacy of race-neutral alternatives * * * by inquiring into any attempts at the application or success of race-neutral alternatives prior to the reauthorization of the 1207 program." 262 F.3d at 1331. Although the district court briefly alluded to race-neutral alternatives, it made no specific findings on this issue. See *Rothe IV*, 324 F. Supp. 2d at 857. Because such findings should be made in the first instance by the district court, *Rothe III*, 262 F.3d at 1323, 1330, a remand would be warranted if (contrary to DoD's arguments) Rothe still has any justiciable claims.

C. Rothe Would Face A Heavy Burden On Remand To Show That The 2002 Version Of The Program Is Unconstitutional On Its Face

If this case is remanded, the only remaining constitutional issue would be whether the 2002 version of the Section 1207 program is valid on its face.[11] Rothe cannot yet bring an as-applied challenge because it has not alleged that the 2002 version of the program has adversely affected it in any concrete way. The PEA, which has been the focus of this litigation from the beginning and is the source of

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[11] DoD has not appealed the district court's rulings that the 1992 version of the program, both as enacted and later applied in 1998, was unconstitutional. See *Rothe IV*, 324 F. Supp. 2d at 854.

Rothe's alleged injury, has been suspended pursuant to congressional mandate since 1999 and remains inoperable today.

"A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno,* 481 U.S. 739, 745 (1987). This is "a very heavy burden," *National Treasury Employees Union* v. *Bush*, 891 F.2d 99, 101 (5th Cir. 1989), appropriately so because "[f]acial invalidation 'is, manifestly, strong medicine'" that should be used "'sparingly and only as a last resort.'" *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 580 (1998). The district court correctly recognized that the *Salerno* standard would govern Rothe's facial challenge to the Section 1207 program. See *Rothe IV*, 324 F. Supp. 2d at 854.

Rothe incorrectly asserts, however, that it need not meet the heavy burden articulated by the Supreme Court in *Salerno*. (Br. 36-38). Rothe relies on this Court's discussion of *Salerno* in *Berkley v. United States*, 287 F.3d 1076 (Fed. Cir. 2002), but Rothe fails to acknowledge that this Circuit has articulated a standard equivalent to the *Salerno* test in a post-*Berkley* decision, see *Brubaker Amusement Co.* v. *United States*, 304 F.3d 1349, 1356 (Fed. Cir. 2002), or that the *Berkley* panel ultimately declined to decide whether *Salerno* prescribed the applicable

standard in that case, see 287 F.3d at 1090 & n.14; see also *Eastern Paralyzed Veterans Ass'n,* v. *Secretary of Veterans Affairs*, 257 F.3d 1352, 1364 (Fed. Cir. 2001) (Gajarsa, J., concurring) (applying *Salerno*). Rothe also neglects to mention that the Supreme Court has repeatedly reaffirmed *Salerno*, see, *e.g.*, *Anderson* v. *Edwards*, 514 U.S. 143, 155 n.6 (1995); *Reno* v. *Flores*, 507 U.S. 292, 300-301 (1993); *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991), and that the Fifth Circuit has repeatedly endorsed the *Salerno* test for facial challenges, see *United States* v. *Robinson*, 367 F.3d 278, 290 (5th Cir. 2004); *United States v. Robinson*, 119 F.3d 1205, 1213 (5th Cir. 1997); *Barnes* v. *Mississippi*, 992 F.2d 1335, 1342-1343 (5th Cir. 1993); *National Treasury Employees Union* v. *Bush*, 891 F.2d 99, 101 (5th Cir. 1989); *United States* v. *Parker*, 848 F.2d 61, 62, 63 (5th Cir. 1988). Although a three-justice plurality of the Supreme Court has questioned the *Salerno* standard, see *City of Chicago* v. *Morales*, 527 U.S. 41, 55-56 n.22 (1999) (opinion of Stevens, Souter, Ginsburg, JJ.), the Court in that case ultimately declined to resolve the viability of *Salerno*. *Ibid.* Because the Supreme Court has neither repudiated its earlier endorsements of the *Salerno* test nor overturned the binding Fifth Circuit precedent adopting that standard, Rothe must meet the demanding burden set forth in *Salerno* in order to prevail in its facial challenge to the Section 1207 program.

Therefore, Rothe could prevail in its facial challenge only if it established

that there are no set of circumstances under which the 2002 version of the Section 1207 program could be constitutionally applied. It is not clear that Rothe could meet this heavy burden on remand. Even though the PEA has been suspended since 1999, DoD has continued to exceed its statutory goal. It is conceivable that DoD could meet its goal in future years through race-neutral enforcement of anti-discrimination laws or race-neutral outreach efforts and technical assistance to expand the pool of potentially eligible contractors (regardless of ethnicity), who would all then be subject to the same selection criteria in awarding contracts. Indeed, Rothe has asserted in this litigation that "DoD could have met the goal *without* using the race-based preference," (J.A. at 1039) – a virtual concession that there are factual circumstances under which the program could be constitutionally applied.

Even if DoD still used the race-conscious price-evaluation adjustment, Rothe could not prevail in its facial challenge unless it could show that every possible application of the adjustment would be unconstitutional – regardless of the type of procurement involved, the industry subgroup affected, the ethnicity of the individuals submitting bids, or the extent of discrimination that such individuals may have previously suffered in competing for contracts. See *National Treasury Employees Union*, 891 F.2d at 101 (holding that to prevail on its facial challenge,

union "would have to establish that every possible plan implemented under the Order would be invalid"). Because Rothe's claim on remand would be limited to a facial challenge, this Court need not address several of the arguments raised in Rothe's appellate brief, such as the extent of discrimination against Korean-Americans (Br. 27), past or present discrimination in the "computer maintenance and repair" subindustry (Br. 8-10), or the particular economic circumstances of ICT's owners (Br. 29 & n.96). Even if any of these issues were arguably relevant to an as-applied challenge, they need not be resolved in order to reject Rothe's facial attack because not all future applications of the Section 1207 program will involve Korean-Americans, computer maintenance and repair services, or contractors whose financial situation is similar to that of ICT's owners.

Although it is doubtful that Rothe could meet its heavy burden on remand, that is an issue to be addressed in the first instance by the district court, which should make detailed findings after giving the parties ample opportunity to present evidence pertaining to the 2002 version of the program. Without a full airing of the evidence and detailed findings by the trial judge, this Court cannot conduct meaningful appellate review of the constitutionality of the Section 1207 program.

III

ROTHE HAS NOT PROPERLY PRESERVED ITS CHALLENGE TO THE DISTRICT COURT'S DENIAL OF ATTORNEY'S FEES

Without explanation, Rothe contends that the district court abused its discretion in denying plaintiff an award of attorney's fees and costs (Br. 56). By failing to explain the basis for its argument in the manner required by Federal Rule of Appellate Procedure 28(a)(9)(A), Rothe has waived its claim on appeal; mere mention of a contention is insufficient to preserve an issue for appeal–the issue must be sufficiently developed. See *Kramer* v. *Banc of Am. Secs.*, 355 F.3d 961, 964 n.1 (7th Cir.), cert. denied, 124 S. Ct. 2876 (2004); *Beal Bank, SSB* v. *Pittorino*, 177 F.3d 65, 71 (1st Cir. 1999). Here, there is no such development, but mere allusions interspersed throughout Rothe's opening brief.

A. Rothe's Fees And Costs Are Limited To $10,000

At any rate, Rothe's argument is meritless for the reasons set forth in the district court's order denying attorney's fees. (J.A. at 1005-1012). In the district court, Rothe did not state the vehicle for an award of costs and fees, but its fees are limited to $10,000 under the Tucker Act, 28 U.S.C. 1346, 1491. To the extent Rothe seeks damages under the EAJA, it is not likely to prevail because the Government's position was substantially justified, thereby precluding an award of costs and fees.

In relevant part, the Tucker Act provides

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims of:
>
> * * *
>
> Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to [provisions not relevant here].

28 U.S.C. 1346(a).

In 1996, the Tucker Act was amended to provide:

> (1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. * * *
>
> (2) To afford relief in such an action, the courts may award any relief that the court considers proper,

> including declaratory and injunctive relief, except that monetary relief *shall be limited to bid preparation and proposal costs.*

28 U.S.C. 1491(b)(1-2) (emphasis added).

This issue is more properly understood in terms of jurisdiction rather than remedy. "[T]he Tucker Act first vests exclusive jurisdiction over all contract actions exceeding $10,000 against the United States in the Court of Federal Claims, and then limits the remedies available in that court." See *VS Ltd. P'ship* v. *Department of Housing & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000). As for the concurrent jurisdictional grant to the regional district courts, a party is certainly free to litigate in such a court, but again, sovereign immunity has only been waived to $10,000, so a party with claims exceeding such an amount necessarily waives them. See *Roedler* v. *Department of Energy*, 255 F.3d 1347, 1351 (Fed. Cir. 2001); *Thiess* v. *Witt*, 100 F.3d 915, 916 (Fed. Cir. 1997); *Armstrong & Armstrong, Inc.* v. *United States*, 356 F. Supp. 514, 521 (E.D. Wash. 1973), aff'd, 514 F.2d 402 (9th Cir. 1975) (per curiam).

As for the 1996 amendments limiting a plaintiff to the bid preparation and proposal costs, there is nothing in that section vitiating the fact that the Tucker Act only waives sovereign immunity to the extent of $10,000. In addition, the Tucker Act represents a waiver of sovereign immunity, and any such waivers must be

explicitly expressed, are narrowly construed, and all ambiguities are resolved in favor of immunity. See *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992). At best, therefore, whether regional district courts are permitted to award proposal costs in excess of $10,000 is not clearly expressed and is ambiguous, so the ambiguity must be resolved in favor of the United States. Rothe has conceded that its damages are so limited.

B. The United States's Position Was Substantially Justified, Thereby Precluding Fees

As for attorneys' fees under the EAJA, attorneys' fees are not proper under that Act if the position of the Government was substantially justified. See *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988). "Substantially justified" means "'justified in substance or in the main'–that is, justified to a degree that could satisfy a reasonable person.'" See *id.* at 565 (quoting *Webster's New Int'l Dict.* 2514 (2d ed. 1945)). To be substantially justified, the United States's position must be reasonable in both law and fact. See *Gutierrez* v. *Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001); *United States* v. *Douglas*, 55 F.3d 584, 588 (11th Cir. 1995); *Foley Constr. Co.* v. *United States Army Corps of Eng'rs.*, 716 F.2d 1202, 1204 (8th Cir. 1982). Courts examine the totality of the circumstances and a

variety of factors to determine if the United States's position is substantially justified. See, *e.g.*, *Smith* v. *Principi*, 343 F.3d 1358, 1362 (Fed. Cir. 2003) (totality of circumstances); *Jean* v. *Nelson*, 863 F.2d 759, 767 (11th Cir. 1988) (a list of non-exhaustive factors), aff'd, 496 U.S. 194 (1990); *League of Women Voters of Cal.* v. *FCC*, 798 F.2d 1255, 1258 (9th Cir. 1986) (totality of circumstances). The Court reviews the denial of attorneys' fees for an abuse of discretion. See *Libas, Ltd.* v. *United States*, 314 F.3d 1362, 1364 (Fed. Cir. 2003).

Rothe cannot recover attorneys' fees simply because the district court declared the 1992 reauthorization unconstitutional because only a prevailing party is entitled to attorneys' fees under the EAJA. Under the EAJA, "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." See *Farrar* v. *Hobby*, 506 U.S. 103, 111-12 (1992). Rothe's obtaining the "moral satisfaction of knowing that a federal court concluded that [its] rights had been violated" is insufficient to recover attorneys' fees. See *Hewitt* v. *Helms*, 482 U.S. 755, 762 (1987). As *Farrar* explained, "[o]f itself, 'the moral satisfaction [that] results from any favorable statement of the law' cannot bestow prevailing party status." See *Farrar*, 506 U.S. at 112. Material for present purposes, acts of Congress enjoy a presumption of constitutionality, so

"situations in which the government's defense of the constitutionality of a federal statute fails the 'substantially justified' test should be exceptional." See *Grace* v. *Burger*, 763 F.2d 457, 459 n.5 (D.C. Cir. 1985).

Congressional acts are presumptively constitutional, and the United States was defending an act of Congress. See *Kiareldeen* v. *Ashcroft*, 273 F.3d 542, 550 (3d Cir. 2001) (reversing an award of attorneys' fees under the EAJA and noting that the United States was defending the constitutionality of a federal statute). Not only was this an Act of Congress, but other race-based contracting programs in the construction arena have been upheld. See *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003), cert. denied, 124 S. Ct. 2158 (2004); *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000). The United States certainly possessed a basis in law and fact to prosecute and defend this litigation. Indeed, throughout the history of this lawsuit, the United States has prevailed at every stage except for the remand in *Rothe III*.

CONCLUSION

The United States respectfully requests that this Court dismiss this appeal as moot, hold that Rothe lacks standing to assert any claims, or alternatively, hold that if Rothe has any cognizable claims, they are not now ripe. If the Court concludes that there is no procedural bar, the United States agrees with Rothe that the case

must be remanded for development of the record to comply with this Court's prior mandate.

Respectfully submitted,

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B).

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December 8th, 2004

CERTIFICATE OF SERVICE

I certify that on December 8th, 2004, I sent by overnight delivery a copy of the foregoing brief to counsel:

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