23-1190

United States Court of Appeals for the Federal Circuit

ACLR, LLC,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States District Court of Federal Claims
in Case No. 1:15-cv-00767-PEC
(Hon. Patricia E. Campbell-Smith, Judge)

BRIEF FOR PLAINTIFF-APPELLANT

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JANUARY 30, 2023

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2023-1190

Short Case Caption ACLR, LLC v. US

Filing Party/Entity ACLR, LLC

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 12/07/2022

Signature: Thomas David

Name: Thomas K. David

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
ACLR, LLC		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, counsel for Appellant ACLR, LLC ("ACLR") is not aware of any appeals from this civil action that have been made before this, or any other, appellate court. The following case *ACLR, LLC v. United States*, No. 1:17-cv-00627 is pending in the United States Court of Federal Claims, and while that case will not directly affect or be directly affected, that case may be indirectly affected by this appeal.

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the United States Court of Federal Claims ("CFC") entered on November 2, 2022 granting summary judgment on behalf of the United States ("Government"). The CFC had jurisdiction over this case under the Tucker Act, 28 U.S.C. §1491 and under the Contract Disputes Act, 41 U.S.C. §7101-7109. ACLR filed a timely Notice of Appeal on November 18, 2022. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1295(a)(3).

STATEMENT OF THE ISSUES

1. The CFC improperly denied ACLR's Motion for Summary Judgment on its breach of contract claim as to ACLR's plan year 2007 duplicate payment audit.

2. The CFC's application of a constructive termination for convenience on ACLR's plan year 2007 and 2010 duplicate payment audit was reversible error.

3. The CFC's grant of summary judgment to the Government on ACLR's assertion that the Government breached its of duty of good faith and fair dealing was reversible error.

4. The CFC's finding that ACLR was not entitled to compensation for a percentage of the contract price was reversible error.

5. The CFC's denial of ACLR's Motion for Summary Judgment as to the preparation, presentation, and pursuit of settlement claim costs related to the settlement claim was reversible error.

6. The CFC's grant of summary judgment to the Government on ACLR's standard record keeping system was reversible error.

STATEMENT OF THE CASE

Factual Background:

The Centers for Medicare & Medicaid Services ("CMS") was legally obligated to recoup Part D overpayments to insurance companies. ACLR was awarded a contingency fee contract to ensure that CMS complied with its legal obligations. CMS interfered with and thwarted ACLR's ability to recoup plan year 2007 and 2010 duplicate payments. In connection with ACLR's extensive efforts to collect duplicate payments on behalf of CMS and the American taxpayer, ACLR is now on the brink of receiving no compensation for its duplicate payment audit efforts.

The Improper Payment Elimination & Recovery Act ("IPERA") requires that the Government identify and recover improper payments made to third parties and report its findings to Congress. The Affordable Care Act required the use of a recovery audit contractor ("RAC") by the Government to recover improper payments. Appx1041. Title I of the Medicare Prescription Drug Improvement and Modernization Act of 2003 ("Part D"), effective December 31, 2010. Appx1023, Appx1046.

In its 2010 Fiscal Report, the Department of Health and Human Services identified $5.4 billion in Part D improper payments for payments made during the 2007 calendar year. Appx1725. In its 2015 report to Congress on the efficacy of the Part D RAC program, the Government Accountability Office ("GAO") found that, in the four years since inception of the Part D RAC, the Government "had collected less than $10 million in improper payments and had not approved the RAC to perform new audit work since March 2014." Appx1313.

On December 2, 2010, the Government issued a Request for Quote ("RFQ") to "Selected FABS Schedule Holders" with the intention of awarding a "Firm-Fixed Price Contingency Fee Task Order for the subject work in accordance with the terms and conditions of your GSA FINANCIAL AND BUSINESS SOLUTIONS (FABS) Federal Supply Schedule and the terms and conditions in the attached Sample Task Order Terms and Conditions." Appx1044. The RFQ anticipated that the "period

of performance for the resulting task order shall a 12-month base period commencing at the date of award. The task order will also include four (4) 12-month option periods" (Appx1044) and contained a Statement of Objectives ("SOO") (Appx1046-1056) outlining an overall objective to identify underpayments, detect and collect overpayments, and prevent future improper payments and to obtain contractor support in accomplishing the same "on a national scale." Appx1047. On December 14, 2010 and in accordance with 48 C.F.R. § 37.602, ACLR submitted its technical proposal and Performance Work Statement ("PWS") to the Government. Appx1058-1113.

1. Part D RAC Contract - Base Year 2011 - PWS

On January 13, 2011, the Government awarded ACLR Contract No. GS-23F-0074W/Task Order No. HHSM-500-2011-00006G, which incorporated ACLR's PWS in its entirety ("Part D RAC Contract"). Appx1173-1243. The Part D RAC Contract included an initial 12-month base period "from January 13, 2011 through January 12, 2012" and four 12-month option periods (Appx1174) and payment terms (Appx1175) stating in pertinent part:

> The contingency fee shall be paid once the recovery audit contractor collects the Medicare overpayments. The recovery audit contractor shall be paid a percentage of the amount that is collected through their recovery efforts.... If the provider files an appeal disputing the overpayment determination and the appeal is adjudicated in the provider's favor at the first level, the recovery audit

> contractor shall repay Medicare the contingency payment for that recovery.

Appx1175.

As articulated under the PWS, ACLR was to recover improper payments through audit processes consisting of duplicate payment and data and documentation audit reviews (Appx1205-1212), provide post-audit recovery and appeal assistance (Appx1212-1213, Appx1223), interact with an oversight board, and generate status reports to keep CMS informed of ACLR's Part D recovery efforts. Appx1218-1219. ACLR anticipated audit teams would be formed by region and that 15-20 teams will be required for full program implementation. Appx1207. Due to the sensitive nature of the Part D payment data, ACLR was required to develop a secure infrastructure necessary to secure Part D prescription drug event ("PDE") payment data. Appx1226-1228, Appx1197-1200. An Authorization to Operate ("ATO") authorizing ACLR to receive the PDE data necessary for ACLR to commence recovery audits was issued on October 7, 2011. Appx1299, Appx1307-1310. In addition to PWS performance requirements for ACLR's work efforts, Section 17 of the Part D RAC Contract required that ACLR "comply with the requirements of any revisions in legislation or regulations which may be enacted or implemented during the period of performance of this contract and are directly applicable to the performance requirements of this contract." Appx1186.

2. Plan Year 2007 Duplicate Payment Audit

On November 17, 2011, CMS started transmitting Part D payment data to ACLR. Appx1489-1492. ACLR immediately commenced duplicate payment reviews in accordance with its PWS (Appx1207, Appx1129-1130), as approved by CMS (Appx1275, Appx1487, Appx1152-1153), using an audit methodology deemed "technically acceptable" by CMS (Appx1036) and identified $313,808,241 in plan year 2007 duplicate payments. Appx3967-3968, Appx4082. Pursuant to the Part D RAC Contract at that time, ACLR was entitled to a 7.5% contingency fee. Appx295, Appx934.

In a November 30, 2011 conference call, ACLR Managing Principal Christopher Mucke, CPA, notified CMS Contracting Officer ("CO") Desiree Wheeler, Contracting Officer Representative ("COR") Marnie Dorsey, and CMS Program Integrity Director Tanette Downs that ACLR, as outlined in the Part D RAC Contract, would begin issuing notification of improper payment letters ("NIPs") to plan sponsors to recoup improper payments associated with the plan year 2007 duplicate payment audit. Appx1267-1268. During this call, COR Dorsey informed ACLR that the PWS was simply a proposal and not approved by CMS (Appx2748, Appx1301-1305) and CO Wheeler told ACLR to not issue the plan year 2007 duplicate payment audit NIPs. Appx1269, Appx1284-1288. This action eliminated ACLR's ability to be paid for its work efforts prior to the end of the period of

performance of January 12, 2012. Appx1174. CO Wheeler did not issue a contract modification for this deviation from the Part D RAC Contract. Appx1282-1283.

Shortly thereafter, CMS provided ACLR with a draft Statement of Work ("SOW") on December 9, 2011 (Appx1504-1524) and a third contract modification executed on January 31, 2012 required a complete deviation from the PWS, including waiving the key personnel requirement and the portion of Part D overpayment collections associated with risk-sharing from ACLR's contingency fee calculation. Appx1529-1534. On April 26, 2012, CMS denied ACLR's Request for Equitable Adjustment arising from CMS's actions regarding the plan year 2007 duplicate payment audit on the basis that the Part D RAC Contract provided that "the recovery audit contractor shall not receive any payments for the identification of the underpayments or overpayments not recovered/collected." Appx1554.

3. CMS Actions - 2011 Base Year

In January 2011, Division Director Cynthia Moreno, responsible for the overall implementation of the Part D RAC program (Appx1033-1034), tasked a different contractor, Booz Allen Hamilton ("BAH") to assist in the development and implementation of the Part D RAC program (Appx1028, Appx1249-1250), which included the development of a statement of work and Business Process Model ("BPM") designed to capture the activities associated with the Part D RAC. Appx1499, Appx1502.

On July 8, 2011, in preparation for congressional testimony, CMS's Office of Legislation noted that Deputy Administrator for Program Integrity for the Centers for Medicare and Medicaid Services Dr. Peter Budetti, was concerned that there would "not be any recoupments for the first year" by the Part D RAC. Appx1290. Division Director Moreno attributed this lack of recoupments to CMS's efforts to "implement the program." Appx1033. She also acknowledged that ACLR couldn't perform any audit activities until the program had been implemented (Appx1033-1034) and failed to notify ACLR and the CO that ACLR would not be able to execute the Part D RAC Contract to recoup overpayments and be paid during 2011. Appx1030. CMS even conceded that it did not adhere to the Part D RAC Contract as former Part D RAC Contract CO Theresa Schulz documented that the "contract was awarded with the acceptance of the PWS, but the reality is that we never authorized the contractor to perform IAW the PWS" (Appx1352) and testified that this disagreement was the rationale for "doing the statement of work." Appx1251. In addition to the lack of payments for its work efforts in 2011, ACLR also did not receive any payments under the Part D RAC in 2012. Appx2211.

4. Part D RAC Contract - Base Year Extension 2012/2013

Beginning on January 31, 2012, through the December 31, 2013, ACLR and CMS executed a series of 10 contract modifications numbered 000003 through 000012. Appx1529, Appx2034. These modifications permitted ACLR to conduct

special studies limited to select audit issues (Appx1529, Appx1569, Appx2029) and changed contracted deadlines (Appx1557), personnel (Appx1530, Appx1640), and period of performance. (Appx1529, Appx1556, Appx1640, Appx2034).

On January 31, 2012, Modification 000003 was executed to permit ACLR a "special study recovery audit related to excluded providers for the year 2007" ("2007 Excluded Provider Review"). Appx 1529. This modification included contractual deadlines, which had they not been subsequently modified (Appx1557), would have culminated in a payment to ACLR on August 14, 2012 for amounts collected. Appx 1531. The 2007 Excluded Provider Review consisted of identifying payments made to excluded providers as required under 42 CFR §1001.1901 (2011) and listed in the List of Excluded Individuals and Entities ("LEIE") and the Medicare Exclusion Database ("MED"). Appx1487, Appx1541, Appx2524, Appx2541, Appx2544.

ACLR timely submitted its 2007 Excluded Provider Review findings in the amount of $27.9 million to CMS on February 15, 2012. Appx1531, Appx1541. CMS subsequently eliminated excluded pharmacists (Appx1547) and excluded pharmacies (Appx1587) and permitted the application of appeal findings to all contracts who did not appeal ACLR findings. (Appx1562). CMS's actions significantly reduced anticipated recoverable amounts (Appx1549) and net recouped amounts from this audit totaled only $1.8 million. Appx1545, Appx1574.

On October 1, 2012, Sonja Brown was assigned as the COR and received an appointment letter from CMS on October 17, 2014. Appx1647-1649. As part of her appointment, COR Brown was advised that she was not authorized to direct ACLR "in any way that could change the terms and conditions of the contractual instrument." Appx1648.

On April 5, 2012, CMS executed Modification 000004. Appx1557. The modification eliminated ACLR's payment deadline for the 2007 excluded provider audit, added additional appeal requirements, and extended deadlines for other review contractors, while noting that the modified timelines represented "a best case scenario." Appx1558. No additional consideration was provided to ACLR for Modification 000004 actions. Appx1557-1560. The extended deadlines effected by CMS for the 2007 excluded provider audit resulted in a final payment for the audit being made to ACLR on April 26, 2013, which was 254 days after the original Modification 3 contracted payment deadline (Appx1531, Appx1566), 451 days after Modification 000003 execution (Appx1529), and 834 days after Part D RAC Contract award. Appx1173, Appx1539.

On February 6, 2013, CMS executed Modification 000006 authorizing ACLR to extend its review of excluded providers to calendar years 2008-2011 ("2008-2011 Excluded Provider Audit"). Appx1569-1572. Continuing delays by CMS (Appx1574-1582, Appx1584-1585, Appx1587, Appx1589), including rescinded

appeal decisions (Appx1591), resulted in a final payment of the 2008-2011 Excluded Provider Audit 455 days after Modification 000006 execution. Appx1593.

During December 2013, ACLR engaged in multiple attempts with CMS to resolve ACLR's requests for equitable adjustments to address delays effected by CMS during the execution of Part D RAC contract in prior years (Appx1579), delays in the execution of a SOW that had been reviewed and approved by ACLR in April 2012 (Appx1271-1272), and the loss of Part D payment periods arising therefrom. Appx1273.

Despite the failure of these negotiations to resolve issues between the parties, CMS attempted to insert a last-minute Statement of Release absolving CMS of all its actions during contract execution. Appx1579. ACLR notified CMS of its belief that the inclusion of this statement directly contradicted CMS's assurances to act in good faith. Appx1579. ACLR Managing Principal Christopher Mucke informed CMS that ACLR would not execute the contract with the Statement of Release and the language was removed. Appx1579.

5. Statement Of Work

On December 31, 2013, CMS executed Modification 000013 to the Part D RAC ("OY1 SOW") (Appx1404), which replaced the PWS with a statement of work containing, among other things, a new process for submitting and approving audit issues through the submission of a New Audit Issue Review Package ("NAIRP"),

modified recovery audit processes that included the use of an Improper Payment Review Package ("IPRP") for submitting the results of ACLR's audit findings to a data validation contractor ("DVC") responsible for ensuring the IPRPs comply with the approved NAIRP audit methodology. Appx1404-1442, Appx1246-1247. The OYI SOW also incorporated a Part D RAC Activities Timeline outlining individual tasks, deadlines, and responsible parties from NAIRP submission (104 days) (Appx1439-1440), and once approved, additional 389 days for audits requiring additional documentation and 299 days for all others through RAC payment. Appx1440-1442. As outlined in the OY1 SOW, "the RAC begins recovery audit activities" once the NAIRP is approved. Appx1418. The OY1 SOW also provided that "CMS's approved methodology, for each audit issue, must be used by the RAC to determine the improper payment amount." *Id.*

6. Plan Year 2010 Duplicate Payment Audit.

On January 2, 2014, ACLR submitted its NAIRP for plan year 2009-2012 duplicate payment audits. Appx1398, Appx2431. After multiple revisions, which also eliminated a review of the 2009 plan year, CMS approved ACLR's review of plan year 2010-2012 duplicate payment audits on May 28, 2014 - 83 days after contracted deadlines. Appx1600, Appx2431. After ACLR had completed its initial audit and was preparing to issue RFIs to plan sponsors, CMS, noting that "this piece of the process is not in the current contract," (Appx1612) informed ACLR that it

could not send RFIs to plan sponsors until the DVC, using "the approved methodology," (Appx1610) had reviewed the RFIs and that the DVC's validation process "should be no longer than a week." Appx1160, Appx1610-1614, Appx1617-1618.

ACLR submitted its RFI findings to CMS on June 10, 2014. Appx1399, Appx2432, Appx2754. In addition to its validation work for the Duplicate Payment RFI Report, the DVC deviated from the methodology approved in the NAIRP and applied a "dosage increase" percentage to identify possible permissible dosage changes. Appx1399, Appx1629-1632, Appx2432. By applying a revised methodology that was not part of the approved NAIRP, the DVC reviewed PDE data fields not contained within CMS data submissions to ACLR for the 2011 and 2012 plan years duplicate payment audit causing CMS to only approve the release of plan year 2010 duplicate payment RFIs. Appx1399, Appx1634, Appx2432. On July 8, 2014, ACLR submitted the RFIs for improper plan year 2010 duplicate payments to plan sponsors requiring, in accordance with the OY1 SOW, that evidentiary support be submitted within 60 days. Appx1399, Appx2432, Appx2756.

CMS unilaterally extended the evidentiary support deadline for plan sponsors an additional 60 days. Appx1160, Appx1636-1637. CMS's extension to the plan sponsors was inconsistent with the timeline set forth in the OY1 SOW. Appx1160-1161. Ms. Sonja Brown was assigned as the COR on October 1, 2012 and was

advised that she was not authorized to direct ACLR "in any way that could change the terms and conditions of the contractual instrument." Appx1640, Appx1648. On October 22, 2014, CMS instructed ACLR to apply a revised CMS methodology, based on its interpretation of the DVC report, to the 2010 duplicate payment RFI PDEs to eliminate possible permissible dosage changes and to submit new RFI IPRPs to CMS for subsequent resubmission to plan sponsors. Appx1165, Appx1659, Appx1399-1400. On December 24, 2014, after completing its review of evidentiary support submitted in response to the RFIs, ACLR submitted IPRPs to CMS for improper plan year 2010 duplicate payment amounts totaling $15,909,552, in accordance with OY1 SOW requirements. Appx1662-1666, Appx1400, Appx2757. Pursuant to the Part D RAC Contract at that time, ACLR's contingency fee would have entitled it to $2,209,146. Appx.520. On January 8, 2015, ACLR was directed by CMS to resubmit ACLR's IPRPs to the DVC in accordance with CMS's revised methodology. Appx1668-1669.

Based upon ACLR's belief that CMS's direction was a Part D RAC Contract deviation, ACLR referred the matter to CO Hoey. Appx1400, Appx2434. On April 24, 2015, COR Brown terminated the plan year 2010 duplicate payment audit through a "Technical Direction Letter." Appx1672-1674. The justification for terminating the plan year 2010 duplicate payment audit was that "although the revised methodology used by CMS was able to reduce the number of PDE records

identified as improper submissions, CMS continued to have concerns with the validity of overall results." Appx1166-1167. There was no language in the Part D RAC Contract that allowed CMS to terminate an approved audit. Appx1168-1170. There was no language in the Part D RAC Contract that allowed CMS to apply a revised methodology to plan year 2010 duplicate payment reviews. Appx1150-1151, Appx1169-1170.

7. Constructive Termination For Convenience Costs

On April 6, 2020[1], the CFC granted the Government's Cross-Motion for Summary Judgment finding that "Government's termination of the 2007 and 2010 audits was not a breach of the contract, but rather a constructive termination for convenience" (Appx5116) and remanded the termination for convenience claims costs to CMS on April 21, 2020. Appx5122-5123. On October 7, 2020, CMS issued a final decision on ACLR's cost claim stating "ACLR is owed $157,328.00 for the terminations of the 2007 and 2010 audits, plus interest for the period beginning June 26, 2020 until the date of payment of the claim." Appx5124-5138.

[1] As the CFC has noted, because the parties had no redactions to the sealed opinion, that opinion and the public opinion are otherwise identical. Appx5105. In this Brief, any citation to the CFC's opinion granting the Government's Cross-Motion for Summary Judgment will be to the public opinion.

On January 27, 2021, ACLR submitted a Motion for Summary Judgement on termination costs amounts due to ACLR for the plan year 2007 and 2010 duplicate payment audits. Appx5306-5053. To support its motion for summary judgement, ACLR submitted an affidavit to attest to evidence (Appx5343-5352) of its termination for convenience costs including bank statements (Appx5355-5399), payroll costs summary (Appx5401-5406), supporting W-2s and payroll reports (Appx5408-5912), managing principle cost summary (Appx5914-5916) including the GSA rate schedule (Appx5918-5930), office lease cost summary (Appx5932-5935) including supporting lease documentation (Appx5937-6305), loan interest cost summary (Appx6307) including supporting loan statements and agreement (Appx6309-6338), general and administrative cost summary (Appx6340-6343) including supporting invoices (Appx6346-6810), plan year 2010 costs summary (Appx6812-6816), settlement expenses from March 2020 to date of filing of the cost summary (Appx6818-6823) including supporting attorney fee invoices (Appx6825-6860), settlement expenses prior to March 2020 (Appx6873-6875) including supporting attorney fee invoices (Appx6877-7020), reasonable profit (Appx7022-7033), interest calculation (Appx7035-7052), and a total termination for convenience cost summary for the 2007 and 2010 audits. Appx7054-7055. Those costs totaled $6,895,118.35. Appx5315.

Procedural Posture:

On July 12, 2015, ACLR filed a Complaint against the Government in the CFC alleging breach of contract and breach of duty of good faith and fair dealing against CMS. Appx25-40. ACLR's claims arise from CMS's actions in connection with the Part D RAC Contract. *Id.* First, the Complaint contends that the Government breached the contract with ACLR by failing to permit ACLR to recover improper payments during the base year of the RAC Contract and contracting with other vendors to implement the same recovery audit processes. Appx38. Second, the Complaint contends that the Government breached its duty of good faith and fair dealing by unreasonably delaying and hindering contract performance, and specifically targeting ACLR through audit issue delays until the final rule CMS-4159-F implementation date. Appx39.

On April 26, 2018, ACLR filed a Motion for Partial Summary Judgement on its claims that the Government breached the Part D RAC Contract and its duty of good faith and fair dealing in connection with the plan year 2007 and 2010 duplicate payment audits.[2] Appx950-1016. On May 25, 2018, the Government filed a Cross-Motion for Summary Judgement arguing that the RAC Contract did not required CMS to pay ACLR contingency fees for audit issues never approved or completed,

[2] The Motion for Summary judgment briefings also concerned ACLR's 2012 and 2013 sales tax audit which was the subject of another case that had been consolidated with this case regarding duplicate payment audits.

that no improper payments were recouped for the audits at issue, and that ACLR's damages were speculative. Appx1827-1908. On July 6, 2018, ACLR filed a Response and Reply to the Government's Cross-Motion for Summary Judgement and Response to ACLR's Motion for Partial Summary Judgment. Appx3791-3837. On August 3, 2018, the Government filed a Reply in support of its Cross-motion for Summary Judgment. Appx4463-4488. On November 1, 2018, the CFC issued a Scheduling Order seeking briefing from ACLR on additional issues. Appx4489-4490. On December 19, 2018, ACLR filed its Sur-Reply Brief. Appx4491-4522. On June 26, 2019, the CFC issued another Scheduling Order seeking additional briefing from ACLR and the Government on additional issues. Appx4535-4537. On August 7, 2019, ACLR filed its supplemental brief on the *Christian* doctrine. Appx4538-4558. On August 15, 2019, the Government filed its response to ACLR's supplemental brief. Appx4559-4602. On September 13, 2019, the Government filed its supplemental sur-reply brief in support of its Cross-Motion for Summary Judgement. Appx5064-5087.

On April 6, 2020, the CFC granted the Government's Cross-Motion for Summary Judgment finding that "defendant's termination of the 2007 and 2010 audits was not a breach of the contract, but rather a constructive termination for convenience" (Appx5116) and that ACLR's good faith and fair dealing claim was premised on the same factual allegations as the breach claims. Appx5120. In

granting the Government's Cross-Motion for Summary Judgment, the CFC also held that ACLR was entitled to compensation for the Government's termination for convenience and directed the parties to file a joint status report proposing next steps to address the remaining issues. Appx5120-5121.

On April 21, 2020, the CFC stayed the case and remanded the termination for convenience claims costs to CMS. Appx5122-5123. On October 7, 2020, CMS issued a final decision on ACLR's cost claim. Appx5124-5141. On October 30, 2020, the CFC directed the clerk to lift the stay and directed ACLR to file an amended complaint to include its termination for convenience damages claim. Appx5140-5141. On November 6, 2020, ACLR filed its First Amended Complaint seeking termination for convenience damages. Appx5142-5146. On January 27, 2021, ACLR submitted a Motion for Summary Judgement on termination costs amounts due to ACLR. Appx5306-5317. On April 9, 2021, the Government submitted its response to ACLR's Motion for Summary Judgment. Appx7055-7097. On May 28, 2021, ACLR filed its Reply in support of its Motion for Summary Judgment on the termination cost issue. Appx7122-7147. On December 15, 2021[3], the CFC denied ACLR's Motion for Summary Judgment. Appx7198-7215. On

[3] As the CFC has noted, because the parties had no redactions to the sealed opinion, that opinion and the public opinion are otherwise identical. Appx7180, Appx7198. In this Brief, any citation to the CFC's opinion denying ACLR's Motion for Summary Judgment on its cost claims will be to the public opinion.

August 4, 2022, the CFC entered a Revised Pre-Trial Scheduling Order setting trial to commence on November 9, 2022. Appx7221-7225. On October 12, 2022, over ACLR's objection (Appx7229-7231), the CFC granted the Government's request to file a Motion for Summary Judgment "because the contours of the plaintiff's standard record keeping system are central to the resolution of this case" and directed ACLR to initially file a notice attaching a summary describing ACLR's standard record keeping system. Appx7232-7233. In accordance with the CFC's October 12, 2022 Order, ACLR filed its Notice of Summary of its Standard Record Keeping System. Appx7234-7239. On October 19, 2022, the Government filed its Motion for Summary Judgment as to ACLR's standard record keeping system. Appx7240-7281. On October 24, 2022, ACLR filed its Response to the Government's Motion for Summary Judgment. Appx7366-7400. On October 27, 2022, the Government filed its Reply in support of its Motion for Summary Judgment on ACLR's standard record keeping system. Appx7432-7455. On November 2, 2022, the CFC granted the Government's Motion for Summary Judgment based upon the conclusion that ACLR's cost evidence was not from a standard record keeping system and directed the clerk to enter final judgment in the Government's favor. Appx1-8. On November 2, 2022, final judgment was entered in favor of the Government. Appx9.

SUMMARY OF ARGUMENT

The CFC erred in denying ACLR's Motion for Summary Judgment on its breach of contract claim as to the plan year 2007 duplicate payment audit because there was undisputed evidence of the Government's breach of the Part D RAC Contract. The CFC erred in imposing a retroactive constructive termination for convenience as to ACLR's plan year 2007 and 2010 duplicate payment audits. Constructive termination for convenience cannot apply here because the Government entered into the Part D RAC Contract with no intent to honor the contract, the Government waived any constructive termination for convenience defense, and there are unique facts here that do not justify constructive termination for convenience. The CFC erred in granting the Government's Motion for Summary Judgment as to ACLR's breach of duty of good faith and fair dealing claims because the facts on which ACLR relied for this claim are unique from the facts supporting ACLR's breach of contract claim. The CFC erred in holding that ACLR was not entitled to compensation for a percentage of its contract price as a percentage of the contract price can be determined under the Part D RAC Contract. The CFC erred in denying ACLR's Motion for Summary Judgment as to as the preparation, presentation, and pursuit of settlement claim costs related to the settlement claim as ACLR's evidence and the law support a ruling in ACLR's favor. The CFC erred in granting the Government's Motion for Summary Judgment on the issue of ACLR's

standard record keeping system as ACLR maintained a standard record keeping system from which ACLR could prove its costs.

ARGUMENT

Standard Of Review

The standard of review on cases from the CFC is de novo review on matters of law and clear error on findings of fact. *Banks v. U.S.*, 314 F.3d 1304 (Fed Cir. 2003). The CFC made both legal errors as well as clearly erroneous factual findings in granting summary judgment to the Government and denying ACLR's motions for summary judgement.

1. The CFC Erred In Not Granting ACLR Summary Judgment On Its Plan Year 2007 Duplicate Payment Breach Of Contract Claim.

The CFC erred in not granting ACLR summary judgment on its plan year 2007 duplicate payment breach of contract claim because there were undisputed material facts of CMS breaching the Part D RAC Contract. ACLR's evidence established that CMS had no intent to allow ACLR to perform under the PWS. For example, in preparation for its testimony before Congress in July of 2011, CMS acknowledged the following: "Peter had indicated that the Part D RAC implementation might be a bit tricky to talk about given there will not be any recoupments the first year but it will be good to get cleared Q&A on what we can say about the Part D RAC since Carper will likely ask at hearing and other staffers

want to know in coming months." Appx1290. How could CMS contend that it was going to allow ACLR to proceed under the Part D RAC Contract when CMS had decided by at least July 2011 that there would be no recoupments during that year? In internal CMS communications from December 2013, CO Teresa Schultz wrote "our concern has always been that this contract was awarded with the acceptance of the PWS, but the reality is that we never authorized the contractor to perform IAW the PWS." Appx1352. Teresa Schultz in December 2014 further reflected "As we have stated in the past, this is where CMS is very vulnerable. If the PWS did not take into consideration CMS Policies and processes, it should not have been accepted in the first place." Appx1356. In her deposition, Theresa Schultz testified that because CMS would not allow ACLR to perform in accordance with the PWS, CMS developed the statement of work that was entered into almost three years after the Part D RAC Contract was initially agreed to. Appx1251. CMS Director Moreno testified that ACLR would be unable to recover improper payments or collect fees until the program had been implemented in a manner that was satisfactory to CMS. Appx1033-1034. The CFC's April 6, 2020 Opinion and Order disregarded these and other material facts in denying ACLR's Motion for Summary Judgment as to breach of contract on the plan year 2007 duplicate payment audit. Moreover, the Government offered no evidence to show that CMS intended to allow ACLR to proceed with the PWS and collect plan year 2007 duplicate payments.

The CFC examined a similar claim resulting in a breach of a recovery audit contract in the case of *Horn & Assocs., Inc. v. United States*, 140 Fed. Cl. 142 (2017). There, the CFC found that there had been a breach and noted that the agency thwarted the contractor's ability to obtain the consideration set forth in the contract. Specifically, the CFC found that the agency had:

> . . .worked against the ability of the plaintiff to perform and ran counter to Horn & Associates' reasonable expectations of NASA's cooperation during contract performance
> . . . .
>
> Taking the performance under the contract as a whole, however, plaintiff's performance was severely impaired, and defendant's conduct including lack of cooperation, prevented plaintiff's ability to complete the totality of the contract requirements. Defendant's conduct demonstrates a breach on defendant's part.

Id. at 183 and 185.

Here, as in *Horn*, ACLR, a recovery audit contractor, was severely impaired by CMS's actions such that ACLR was not allowed to pursue the recovery of duplicative payments that would have triggered ACLR's right to contingency fee payments for the recovery of those duplicate payments. Pursuant to the Part D RAC Contract at the time of the plan year 2007 duplicate payment audit, ACLR was entitled to a 7.5% contingency fee. Appx295, Appx934. The CFC erred in denying ACLR's Motion for Summary Judgment as to its breach of contract claim for the

plan year 2007 duplicate payment audit and judgment should be entered for ACLR on this issue.

2. The CFC Erred In Imposing A Retroactive Constructive Termination For Convenience Given The Underlying Facts Of This Case.

The CFC's application of a retroactive constructive termination for convenience as to ACLR's plan year 2007 and 2010 duplicate payment audits was reversible error. Constructive termination for convenience should not be applied given the evidence CMS entered into the Part D RAC Contract knowing that it would not honor the contract. "[T]he government may not resort to the doctrine of constructive termination for convenience if it 'envinced bad faith or a clear abuse of discretion in its actions. . . . The government acts in bad faith when, for example, it 'contracts with a party knowing full well that it will not honor the contract.'" *JKB Solutions and Services, LLC v. United States*, 18 F.4th 704, 709 (Fed. Cir. 2021). In *Torncello v. United States,* 681 F.2d 756, 768 (Ct. Cl. 1982), the CFC limited the constructive termination for convenience doctrine by holding that the Government may not reserve for itself "an unlimited right to escape its promises, as termination on knowledge acquired before the contract award surely is," since such a right would risk "violating one of contract law's most fundamental principles, that all contracts must be supported by consideration." (citing *Nash & Cibinic, Federal Procurement Law* 1115 (3d ed. 1980).

As discussed above, there are undisputed material facts that CMS entered into the Part D RAC Contract knowing full well that CMS would not allow ACLR to proceed with the contract, including collecting plan year 2007 duplicate payments. *See supra* Argument, section 1. Cases have also held that a retroactive termination for convenience cannot be applied when there has been a breach by the Government. In *Erwin v. United States,* 19 Cl. Ct. 47, 54 (1989), the CFC stated that it will apply a retroactive termination for convenience only when a contractor is unwilling to perform the requirements of the contract. The CFC made no such finding in its April 6, 2020 Opinion and Order and disregarded ACLR's evidence to the contrary. In *Poston Logging*, AGBCA 97-168-1, 99-1 BCA ¶ 30188, 41 GC ¶ 60, the respective Board of Contract Appeals held that the Government had breached a timber sales contract by not permitting the contractor to harvest trees that it was permitted to cut under a reasonable interpretation of the contract. The Board rejected the Government's argument that it was entitled to the protection of a retroactive application of a termination clause, stating:

> What the [Government] has attempted to do here with the environmental termination clause is to reach back in time to exercise a right of cancellation which it had available at one time (while the contract was still in effect), but which it never acted upon. The right to terminate under the environmental clause does not go on indefinitely. Here, [the contractor] has proven that the disputed matter ripened into a material breach and it has further shown that it properly elected to declare the contract in breach (in this case, well before the [Government] even considered

> application of the termination clause). Under the facts here, we have decided to limit the use of the termination clause.

More germane to the matter at hand, when a litigant claims that an agency has breached a contract due to its failure to exercise good faith and fair dealing, the burden of showing that the agency acted appropriately shifts to the Government. ACLR's plan year 2007 and 2010 duplicate payment audits identified at least hundreds of millions of dollars in overpayments that CMS was legally required to recover. Nevertheless, CMS acknowledged that as of May 2015, CMS had collected less than $10 million in Part D improper payments. Appx2771.

The CFC justified its implementation of a constructive termination for convenience ruling based in part on CMS's "concerns regarding the validity of the data generated by the audits, and its uncertainty about the workability of the PWS as it pertained to the 2007 audit." Appx5116. The CFC relied on the audit data validity issues related to the plan year 2010 audit. Appx5114. The CFC conflates the plan year 2007 and 2010 audits in the statement, "the parties agree that CMS did not allow plaintiff to proceed with the 2007 audit after it had reviewed the data and presented defendant with its findings" (Appx5115), which is a reference to the plan year 2010 audit issue - not the plan year 2007 audit issue. Appx2785. [4] The CFC's reliance on

[4] ACLR does not disagree that CMS had concerns about the workability of the PWS for the Part D RAC Contract as CMS advised ACLR of such on November 30, 2011. Appx4403

CMS's express concerns on the uncertainty about the workability of the PWS as it pertained to the plan year 2007 audit directly relates to material facts in dispute. Appx5114. The CFC acknowledged the "PWS does not expressly require approval by CMS for data audit activity undertaken by plaintiff." Appx5109. In *Metcalf Const. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014), the CFC held as follows:

> Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. Restatement (Second) of Contracts § 205 (1981) ("Restatement"), quoted in *Alabama v. North Carolina,* 560 U.S. 330, 130 S.Ct. 2295, 2312, 176 L.Ed.2d 1070 (2010). Failure to fulfill that duty constitutes a breach of contract, as does failure to fulfill a duty "imposed by a promise stated in the agreement." Restatement § 235. We have long applied those principles to contracts with the federal government. *E.g., Precision Pine & Timber, Inc. v. United States,* 596 F.3d 817, 828 (Fed.Cir.2010); *Malone v. United States,* 849 F.2d 1441, 1445–46 (Fed.Cir.1988).

The CFC also erred in finding that a constructive termination for convenience on the plan year 2007 duplicate payment audit would not render the contract illusory because "plaintiff eventually did begin its work under the contract." Appx5109, Appx5116. Here, the CFC confuses a multi-year task order with a multiple year task order with separate work statements and ignores the express contract provisions related to the initial period of performance with the assigned PWS from January 12, 2011 through January 12, 2012. Appx1173-1229. As defined in 48 CFR Subpart

17.103, the "difference between *multi-year contracts* and multiple year contracts is that *multi-year contracts*...buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an *option* for each program year after the first." Under the Part D RAC Contract, these options and related modifications required continuous renegotiation as Modification 3 required deviation from the PWS. Appx1529-1534. The Government confirmed, "Until the SOW was finalized, the only recovery audits ACLR pursued were ones authorized by CMS through formal contract modifications…" starting at Modification 3 which required deviation from the PWS as written.[5] Appx3760, Appx1529. Until CMS-4159-F was established on May 23, 2014, there were no legislative or regulatory changes to the Part D RAC program. Appx1846-1847. "An illusory contract is an agreement in which one party gives consideration that is so insignificant that an actual obligation cannot be imposed." *Woll v. United States*, 45 Fed. Cl. 475, 478 (1999).

The CFC also justified a ruling for constructive termination for convenience writing "a constructive termination for convenience does not leave plaintiff without

[5] A SOW describes the work that the contractor needs to accomplish and directs the contractor how to accomplish the work where a PWS describes what needs to be done but does not say how the work is to be accomplished allowing a contractor to be innovative. "If there is not a specific procedure that must be followed, the use of a PWS will usually yield better results and often at a lower cost." https://www.dau.edu/aap/pages/ArticleContent.aspx?itemid=18384

consideration for its bargain." Appx5116. In that same Opinion and Order, the CFC indicated that ACLR was entitled to compensation for the constructive termination for convenience. Appx5120. However, the CFC's subsequent rulings in this case have left ACLR with absolutely no compensation for the constructive termination for convenience and have burdened ACLR with hundreds of thousands of dollars in attorneys' fees to obtain a finding of retroactive constructive termination and ultimately a dismissal of all of ACLR's cost claims.

The CFC also erred in applying a retroactive termination for convenience because the Government waived that defense. A termination for convenience defense is an affirmative defense. *See Van Engers v. Perini Corp.*, No. CIV. A. 92-1982, 1993 WL 235911, at *10 (E.D. Pa. June 28, 1993); *Millgard Corp. v. E.E. Cruz/Nab/Fronier-Kemper*, No. 99 CIV.2952 LBS, 2003 WL 22801519, at *5 (S.D.N.Y. Nov. 24, 2003) (analyzing affirmative defense of termination for convenience). "An affirmative defense is an assertion raising new facts and arguments that, if proven, defeat the plaintiff's claim even if the allegations in her complaint are true." *Lua v. United States*, 123 Fed. Cl. 269, 275 (2015), *aff'd,* 843 F.3d 950 (Fed. Cir. 2016) (citations omitted).

United States Court of Federal Claims Rule 8(c)(1) provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." "The general rule is that affirmative defenses are waived when

not pleaded in the answer." *Stockton E. Water Dist. v. United States*, 70 Fed. Cl. 515, 528 (2006). Here, the Government never raised the affirmative defense of termination for convenience in its Answer. Appx42-53. During discovery, the Government never raised the affirmative defense of termination for convenience. Appx56-57.

If the Government had raised the affirmative defense of termination for convenience prior to the close of discovery, ACLR could have specifically sought evidence that would have directly undermined the defense such as evidence that the Government did not intend to have a termination for convenience right in the Part D RAC Contract due to the unique nature and timing of the consideration due to ACLR.[6] Because ACLR had no notice of the Government's termination for convenience affirmative defense prior to the Government first raising the defense in the Government's Reply Brief, ACLR has been unfairly prejudiced. Appx4500. If the Part D RAC Contract or any portion of it had been terminated for convenience, ACLR should have had an opportunity to challenge that termination and seek damages prior to spending significant sums in attorneys' fees prior to the Government raising the defense for the first time in its summary judgment reply brief and then have the CFC grant summary judgment to the Government based upon

[6] While ACLR did not seek evidence directed at the issue of whether there was a termination for convenience, the evidence supports a finding that a termination for convenience did not occur. *See infra* at 10-12.

a retroactive constructive termination for convenience. *See Tigerswan v. United States*, 118 Fed. Cl. 447, 454-55 (2014) ("At trial, the court will have to determine whether the government's decision to terminate TSI because TSI could not provide the services was rational based on the objective evidence that was available to the CO at the time."). The CFC erred in finding that the Government did not waive its termination for convenience affirmative defense.

The CFC also erred in finding a partial termination for convenience because the removal of the PWS as the work statement governing ACLR's performance under the task order was so drastic that the removal should be considered cardinal in nature. "A cardinal change is a breach that occurs when the Government effects a change in the work so drastic that it effectively requires the contractor to perform duties materially different from those in the original bargain." *Krygoski Constr. Co., Inc. v. United States*, 94 F.3d 1537, 1543 (Fed. Cir.1996)" *Intern. Prod. v. U.S.*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). If not consider a cardinal change, the only duty to be performed by ACLR would be retain the title of the Part D RAC and await direction from CMS.[7] This Court should reverse the CFC's finding of constructive termination for convenience.

[7] The Part D RAC Contract was governed by the PWS in effect during the period of January 13, 2011 through January 31, 2012 (Appx1173, Appx1529, Appx1557, Appx1640, Appx2029, Appx2034), specific work statements from February 1, 2012 through December 31, 2013 (Appx1529, Appx1404), and then two separate SOWs. Appx1404, Appx1446.

3. The Court Erred In Granting Summary Judgment As To ACLR Breach Of Duty Of Good Faith And Fair Dealing Claims As To The Plan Year 2007 And 2010 Duplicate Payment Audits.

The CFC erred in the dismissing ACLR's breach of good faith and fair dealing claims as to the plan year 2007 and 2010 duplicate payment audits because those claims are not based the same facts and circumstances as ACLR's breach of contract claims. In granting summary judgment to the Government on ACLR's breach of duty of good faith and fair dealing claims, the CFC held that ACLR's "good faith and fair dealing claim is premised on the same factual allegations as its breach claims." Appx5120. In so doing, the Court ignored significant facts that were unique to ACLR's breach of duty of good faith and fair dealing claims and were not grounds upon which ACLR relied for its breach of contract claims.

"The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). "Both the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing." *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 820 (Fed. Cir. 2010). "'Subterfuges and evasions violate the obligation of good faith,' as does lack of diligence and interference with or failure to cooperate in

the other party's performance." *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir.), *modified*, 857 F.2d 787 (Fed. Cir. 1988) (citations omitted).

ACLR offered significant evidence of CMS's interference, hinderance, and lack of cooperation with ACLR in connection with ACLR's plan year 2007 and 2010 duplicate payment audits. Nevertheless, the CFC ignored CMS's simultaneous hiring in January 2011 of a separate contractor Booz Allen Hamilton, Inc. ("BAH") to develop the Part D RAC program and corresponding statement of work. Appx959, Appx991, Appx1027-1029, Appx1249-1250, Appx1809-1810, Appx5042-5053. The CFC also ignored the testimony of a CMS Director who determined that ACLR would be unable to recover improper payments or collect fees until the program had been implemented in a manner that was satisfactory to CMS and made no attempt to notify ACLR that CMS would not execute the Part D RAC Contract or modify it so that ACLR could be compensated for its work efforts prior to an implementation of a statement of work. Appx1030-1032, Appx1033-1035. The CFC disregarded evidence that CMS required ACLR to provide the data store CMS was required to develop, failed to meet the IT Security Audit 90 day time requirement, denied ACLR the ability to collect improper payments, and failed to follow the appeals process. Appx990-992, Appx1197-1199, Appx1205, Appx2739, Appx2742.

The CFC overlooked evidence of CMS's delays and process changes to the plan year 2010 duplicate payment audit timetable in the first option year SOW, after

three years of SOW design. Appx1481-1482, Appx2424-2434. These facts include contract deviations adding 42 extra days to achieve audit issue approval, an added seven-day validation period causing the 2011-2012 audit to be removed, providing a 60 extension for industry response, tasking ACLR to modify a previously approved protocol due to industry complaints, and eventually having COR Brown issue a Technical Direction Letter to terminate the plan year 2010 duplicate payment audit on April 24, 2015 without contract modification. Appx1397, Appx1481-1482, Appx1610-1614, Appx1617-1618, Appx1629-1632, Appx1634, Appx1150-1151, Appx1160-1170, Appx1399-1400, Appx2586-2588, Appx2573.

No duplicate payment audit was ever done through the entire time the Part D RAC Contract was in existence. With respect to contracts for supplies and services, the Government has given the authority to enter into and modify contracts to only a limited class of government employees: contracting officers. *See* 48 C.F.R. § 1.601(a) (vesting agency heads with authority to contract for supplies and services and mandates that "[c]ontracts may be entered into and signed on behalf of the Government only by contracting officers"); 48 C.F.R. § 43.102 ("Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government."). *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007). Despite ACLR's several request through to the COR and directly to the Contracting Officer Hoey, no action was taken.

Appx3565-3566, Appx4312, Appx4317-4321, Appx4314-4316. Contracting Officer Hoey ignored recommendations from HHS to issue a termination for convenience resulting in seven years of litigation. Appx7176-7179. ACLR's evidence, at the very least, establishes unique material facts in dispute on its breach of duty of good faith and fair dealing claims upon which the CFC should have not granted the Government's Motion for Summary Judgment.

4. The CFC Erred In Holding That ACLR Is Not Entitled To Compensation For A Percentage Of The Contract Price.

In the CFC's December 15, 2021 Opinion and Order, the CFC ruled that ACLR was not entitled to compensation for a percentage of its contract price. Appx7204-7205. In any termination for convenience action, a contractor's work efforts must be compensated. As held by the CFC as applicable here, FAR 52.212-4(l) states in pertinent part:

> the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination.

This provision, as articulated in SWR, 15-1 BCA ¶ 35,832, contains two prongs from which compensation may be derived. The first prong reflects a percentage of contract price analysis while the second prong looks to additional "reasonable charges" resulting from the terminated contract.

In its December 15, 2021, Opinion and Order, the CFC determined that ACLR "had performed some portion of the work under the contract" but that it's "contract price was to be paid based on a contingency fee." Appx7205. The CFC further noted that while ACLR's "had performed some of the work under the contract, the amount to which plaintiff was technically entitled under the terms of the contract remained at zero." Appx7205. Ultimately, the CFC concluded that "pursuant to the plain language of the FAR provision, award plaintiff compensation under the first category of recovery—any percentage of zero is zero." Appx7205. The CFC's rationale was flawed because it eliminates the possibility that contractors operating under contingency fee contracts can recover under the first prong of 52.212-4(l) in a constructive termination for convenience scenario if no funds have been recovered even though work has been performed. Here, ACLR identified $313 million for 2007 duplicate payments (Appx920) and $15.9 million for 2010 duplicate payments (Appx3983) prior to their respective constructive terminations for convenience. As noted by the CFC, it had "previously held that the agency terminated plaintiff's 2007 and 2010 audits for convenience after plaintiff had reviewed the data for each and presented defendant with its findings." Appx7205. The CFC's acknowledgment that work had been performed establishes the necessary components for recovery under the first prong of FAR 52.212-4(l). Namely, some events have occurred from which a percentage of completion could be calculated and the submission of findings from

which a contract price could also be drawn. If the CFC's holding is allowed to stand, the incentive for contractors to enter into contingency fee contacts with the Government will be undermined as they will be confronted with the possibility of terminations for convenience when contractors are on the brink of a recovery that would ultimately trigger payment from the Government.

A contract price analysis scenario for a recovery audit contractor similar to that of ACLR was considered in *Horn & Assocs., Inc. v. United States*, 140 Fed. Cl. 142 (2017). While *Horn* included assertions of fraud against the contractor in its claim for amounts arising from the Government's interference with its contract, the CFC's findings in *Horn* should be applied here. In *Horn*, the CFC noted that the Government admitted that "there were $992,557.38 in valid overpayments that NASA had failed to pursue and process." *Horn*, 140 Fed. Cl at 158. While the Government refuses to make a similar concession here, ACLR presented evidence of its contract price for plan year 2007 duplicate payments (Appx4417) and 2010 duplicate payments. Appx4099. As outlined in 31 U.S.C. § 3321 and supplemented by Guidance by the Office of Management and Budget establishes an improper payment as:

> Any payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other legally applicable requirements. Incorrect amounts are overpayments and underpayments (including inappropriate denials of payment or service). An improper payment includes any payment that was

> made to an ineligible recipient or for an ineligible service, duplicate payments, payments for services not received, and payments that are for the incorrect amount. In addition, *when an agency's review is unable to discern whether a payment was proper as a result of insufficient or lack of documentation, this payment must also be considered an error* (Emphasis added).

As defined, establishing improper payments is relatively straightforward process in that it requires only a determination as to whether a payment was correct "under statutory, contractual, administrative, or other legally requirements" or by establishing that a payment cannot be determined as proper "as a result of insufficient or lack of documentation." *Id*. ACLR's submission of findings in the plan year 2007 and 2010 duplicate payment audits are determinative of contract price as quantified by FAR 52.212-4(l), or at the very least sufficient to establish material facts in dispute that would preclude the CFC's ruling that ACLR cannot recover a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination.

ACLR also offered other evidence of work performed prior to termination from which a percentage of the work performed could be calculated. As part of the plan year 2007 duplicate payment audit, ACLR was required to, and did, develop a secure infrastructure necessary to secure Part D prescription PDE payment data. Appx1226-1227, Appx1197-1200. In addition to conducting its audits and submitting its findings to CMS, ACLR was also required to develop and implement

recovery audit processes, Part D RAC stakeholder communication processes, and project plans and implementation schedules. Appx1204-1213, Appx1221-1222, Appx1226-1229, Appx 5344. Without a secured infrastructure, ACLR could not obtain payment data to conduct reviews and identify improper payments. Similarly, for the plan year 2010 duplicate payment audit, ACLR was required to "run reports, analyze data, provide feedback to CMS personnel, and conduct special studies designed to confirm the veracity of CMS's duplicate payment audit methodology" Appx3409-3416, Appx5348. ACLR undertook and completed these activities as provided on the completed and required Duplicate Payment Audit Report. Appx1423, Appx3406-3416, Appx3981-3984. This Court should reverse the CFC's ruling and grant summary judgment to ACLR on this issue.

5. The CFC Erred In Failing To Grant Summary Judgment To ACLR As To The Preparation, Presentation, And Pursuit Of Settlement Claim Costs Related To The Settlement Claim.

In the CFC's December 15, 2021 Opinion and Order, the CFC denied ACLR's claim for compensation for its preparation, presentation, and pursuit of settlement claim costs related to the settlement claim finding that "costs associated with prosecuting a claim against the United States are not allowable costs" (Appx7214) and that ACLR failed to segregate its costs and to argue the reasonableness of its fees. Appx7213-7214. The CFC noted that ACLR had separated settlement costs

"into two phases – prior to the court's March 2020 opinion and after the March 2020 opinion." Appx 7213.

With respect to post March 2020 Opinion costs, ACLR and its legal counsel kept detailed hourly records pertaining to its work efforts in connection with ACLR's preparation, presentation, and pursuit of settlement claim costs related to the settlement claim of its retroactively constructively terminated plan year 2007 and 2010 duplicate payment audits. Appx6818-6860. Despite ACLR providing a summary of both legal fees and internal work costs (Appx6818-6823) including supporting legal invoices (Appx6825-6860), the CFC concluded that ACLR had failed to explain the reasonableness of the costs (Appx7214) thereby ignoring documentation listing the hours worked, a description of the tasks performed during those hours, ACLR's applicable GSA Schedule rates for each individual performing the tasks, and a calculation applying the rate to the hours worked to identify the total charges associated with each task. Appx6818-6823. With respect to charges associated with ACLR personnel settlement preparation costs, ACLR submitted detailed descriptions noting, among other things, that it "[F]inalize cost submission for settlement proposal" and "[C]ompile cost determination and settlement write-up for CMS." Appx 6820-6823. Similarly, invoices from legal counsel were equally detailed. Appx6825-6860.

The CFC also complained of ACLR's failure to make "any argument about the reasonableness of those costs." Appx7214. The CFC's March 2020 Order that retroactively constructively terminated the Part D RAC Contract as it pertained to the plan year 2007 and 2010 audits required "additional submissions from the parties on this issue." Appx 5120. The CFC's direction for ACLR and the Government to address termination for convenience costs arising from the CFC's ruling should sufficiently demonstrate reasonableness. Moreover, it has been long established that costs incurred in preparing a settlement claim are the reasonable attorney fees incurred in preparation and filing the claim after the court order. *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298, 1306 (Fed. Cir. 1976).

With respect to pre-March 2020 settlement costs, the CFC ruled that ACLR's submission of pre-constructive termination settlement fees were disallowed as they were "associated with prosecuting a claim against the United States are not allowable costs, absent a waiver of sovereign immunity by statute or contractual provision." Appx7214. The CFC's application of the judicial doctrine of a retroactive constructive termination for convenience absent a statue or contractual provision and then applying 48 C.F.R. § 31.205-42(g)(1)(i)(A) (providing for the recovery of settlement expenses, including "[t]he preparation and presentation, including supporting data, of settlement claims to the contracting officer" as justification for non-compensation is fundamentally flawed. Appx7214. This is especially true for a

recovery auditor such as ACLR where payment is contingent upon the collection of improper payments with a Part D Contract providing "the recovery auditor shall not receive any payments for the identification of the underpayment or overpayments not recovered/collected." Appx1554. The very language cited by Government's Contracting Officer in the denial of ACLR's claim from which these judicial proceedings commenced:

> There are no provisions in the contract allowing CMS to reimburse ACLR's costs or otherwise pay ACLR for performing audit recovery work for CMS in any manner other than on a contingency fee basis. In the claim and accompanying documents, ALCR has submitted no evidence of collections that would support the payment of a contingency fee.

Appx3034.

In the end, ACLR's only recourse for compensation was to act as proffered by the Contracting Officer and:

> bring an action directly in the United States Court of Federal Claims (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision.

Appx3034-3035.

Had the contracting officer complied with her legal obligations under the FAR, as the CFC opines (Appx5114), ACLR would have been issued a timely termination for convenience of the Part D RAC Contract in November 2011 and would not be seeking the reimbursement of legal fees incurred because of the contracting officer's

decision and sole course of recourse. It is only by granting the return of these settlement fees that ACLR may be made whole.

The CFC also erred in its reliance on *SWR, Inc.* 15-1 BCA ¶ 35,832 at 175,231 (citing *Dairy Sales Corp. v. United States*, 593 F.2d 1002, 1005 (Ct. Cl. 1979) for its reasoning that the "path to an award of attorneys' fees is narrow—the only compensable fees are those that are incurred in the preparation of a termination settlement proposal and its presentation to the contracting officer" since here the contracting officer never terminated ACLR's plan year 2007 and 2010 duplicate payment audits. Appx7214. In *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298, 1306 (Cl. Ct. 1976), the CFC did not take such a narrow interpretation stating "the constructive termination for convenience limits the contractor to those claims he would have incurred had there been an actual termination, it is only fair to allow the contractor the equivalent of the legal expenses he would have incurred in preparing a settlement claim after actual termination…as a result of the court's order" which is limiting to the CFC's time of ruling. *Kalvar Corp.,* 543 F.2d at 1306. The CFC's decision in *Kalvar* still falls short of addressing the reasonable settlement fees a contractor incurs in a retroactive constructive termination for convenience finding approximately ten years after the events upon which the retroactive constructive termination are based.

In the end, ACLR as a small business was left to incur legal fees totaling $617,307, incurring 5,481 labor hours over 4 year and 8 months to only find out that its plan year 2007 and 2010 duplicate payment audits were constructively terminated for convenience. Appx6873-6875, Appx7201. "A contractor is not supposed to suffer as the result of a termination for convenience of the Government, nor to underwrite the Government's decision to terminate. If he has actually incurred costs . . ., it is proper that he be reimbursed those costs when the Government terminates for convenience and thereby custs [sic] off his ability to amortize those costs completely." *Jacobs Engineering Group, Inc. v. U.S.*, 434 F.3d 1378, 1381 (Fed. Cir. 2006) (citations omitted). Without compensation for settlement fees in a retroactive constructive termination for convenience, contracting officers may arbitrarily and without recourse refuse convenience terminations with the knowledge that any adverse court ruling will have nominal cost consequences for their actions. Here, ACLR has endured well over seven years of litigation since its July 15, 2015 Complaint (Appx25-39) only to obtain a retroactive constructive termination for convenience and no corresponding compensation. In the end, a contractor should not have to make a cost decision on whether the pursuit of legally entitled compensation will cost more than the compensation available upon a timely termination had its contracting officer acted accordingly. If this Court finds that ACLR is not legally entitled to its preparation, presentation, and pursuit of settlement

claim costs related to the settlement claim, the unfair burden imposed on ACLR by the retroactive constructive termination for convenience is an additional basis for overturning the CFC's application of the retroactive constructive termination for convenience doctrine.

6. The CFC Erred In Granting The Government Summary Judgment On The Issue Of ACLR's Standard Record Keeping System Under FAR 52.212-4(L).

The CFC's November 2, 2022 Opinion granted summary judgment to the Government determining that no reasonable compensation from the retroactive constructive termination of ACLR's plan year 2007 and 2010 duplicate payment audits was owed to ACLR on the basis that it did not maintain a *standard record keeping system* in accordance with FAR 52.212-4(l). Appx1-8. The CFC erred by misinterpreting and misapplying the concept of ACLR's standard record keeping system determining that ACLR:

> has pieced together the voluminous evidence in its possession precisely because no standard system for tracking the relevant data was in place. It simply belies the plain meaning of a standard system to conclude that virtually every document in plaintiff's possession, along with estimates to supply records not kept contemporaneously, meets this regulatory requirement.

Appx7. Essentially, the CFC concluded that ACLR's records including a two-page termination for convenience cost summary (Appx7054-7055), 61 pages of summarizing each of the ten cost elements (Appx5401-5406, Appx5914-5916,

Appx5932-5935, Appx6307, Appx6340-6343, Appx6812-6816, Appx6818-6823, Appx6873-6875, Appx7022-7033, Appx7035-7052), a nine-page affidavit (Appx5343-5352), and 1608 pages provided specifically to support the veracity of the cost summaries within the filing only if needed (Appx5343-7055) were too voluminous to meet the standard record keeping requirements. The CFC essentially acquiesced to the Government's position that ACLR's filing included "every conceivable document in [plaintiff's] possession" (Appx6), and that "ACLR's enormous compilation of over 100,000 pages of exhibit documents contain no such specificity in seeking its over $5.5 million in claimed charges…do not clearly allocate costs to the two audits at issue." Appx7447-7448.

The CFC's Opinion pertaining to ACLR's record keeping system arose from a last-minute summary judgment motion filed by the Government on October 19, 2022 - 22 days prior to the trial to be held to determine reasonable compensation for the constructive termination of ACLR's contract and 334 days after the CFC's Opinion and Order wherein the CFC expressly justified its ruling by holding that ACLR "Is Entitled to Compensation for Defendant's Termination for Convenience." Appx5120.

In its Opinion, the CFC "did not find, binding precedent describing the precise requirements of a standard record keeping system within the meaning of FAR 52.212-4(l)." Appx 5. Citing to *Info. Tech. & Applications Corp. v. United States*,

316 F.3d 1312, 1320 (Fed. Cir. 2003), the CFC determined that it would consult dictionaries to ascertain the meaning of a standard record keeping system. The CFC provides no rationale as to why it focuses its plain language analysis to only four words within the language of FAR 52.212-4(l) but, in preparation for its analysis, notes:

> For purposes of this inquiry, the court assumes that plaintiff's evidence involves records of some kind, and that those records have been kept. The court will more carefully consider what it means for those records to have been kept as part of a standard system.

Appx5.

Having determined that record keeping involves some kind of records that have been kept, the CFC examined the definitions of a standard system ultimately concluding "that a standard system is a regularly used, carefully thought-out method that involves a set of organizing and orderly procedures." Appx6. Combining the CFC's determination that record keeping meant "records that have been kept" with the CFC's conclusions pertaining to a standard system, one could posit, paraphrasing and combining the words of the CFC, that a standard record keeping system was "a carefully thought-out method that involves a set of organizing and orderly procedures for keeping records." The CFC ultimately concluded, however, that a standard record keeping system was defined under FAR 52.212-4(l), as: "a regular, organized method for tracking relevant costs." Appx7. Essentially, the CFC's

Opinion sets the unwarranted precedent that a services contractor can only recover costs under FAR 52.212-4(l) if it has an elaborate time keeping system that tracks specific time with a corresponding description of the work performed sufficient to equate that time to contract tasks *and* a system that also assigns costs paid to those same tasks utilizing the same time tracking allocation methodology, including in situations involving fixed fee and contingency fee contracts. In the CFC's estimate, the failure to "require each employee working on their contracts to track the time spent on the contracts and correlate that time to the specific task that each employee was working on" (Appx6) is fatal to ACLR's claim of recompense on its constructively terminated contract and that FAR 52.212-4(l) requires "a regular, organized method for tracking relevant costs." Appx7.

The CFC's Opinion also completely ignores the reference to "its" in the phrase "its standard record keeping system." FAR 52.212-4(l). The phrasing is meant to allow the contractor to demonstrate costs by using "***its*** standard record keeping system," not some specific or overly sophisticated time tracking system that the Government appears to insist on in this case.

It should also be noted that one of the reasons ACLR planned on offering extensive emails and other documents to demonstrate the work and related time costs in connection with the plan year 2007 and 2010 duplicate payment audits was that the Government took the position that there was no evidence to prove the amount of

work performed on those audits. Similarly, the Government's Contracting Officer denied ACLR's submission of cost information, stating in pertinent part:

> A check register is not, by itself, sufficient documentation to demonstrate actual costs incurred. There were no ACLR accounting records to illustrate G&A costs incurred… does not include lease
> statements or contemporaneous proof of payments made.

Appx5131-5132. Mr. Mucke and other ACLR witnesses were prepared to testify with supporting documents as to the amount of time that was spent on the audits which could then be correlated to ACLR's costs. Apparently, the CFC believed such evidence was insufficient given a flawed interpretation of FAR 52.212-4(l).

Curiously, the CFC did not find an insufficiency of ACLR's records outside the context of the CFC's misconstrued interpretation FAR 52.212-4(l). Indeed, in its Motion for Summary Judgment, the Government concedes that ACLR proffered documentation containing "tens of thousands of pages of documents consisting of e-mails, technical data, computer file directories, agency documents, note, and third-party correspondence…various bank statements, W-2's, invoices, and receipts" and "documents related to loan interest costs and legal billings." Appx7250. Despite the Government's calculations, it is this very level of detail that drives the CFC's flawed view that ACLR does not meet the confines of FAR 52.212-4(l):

> [H]ere, the problem is that plaintiff merely describes a vast collection of documents, some of which reflect post hoc estimates, rather than a systematic or organized method of

> tracking costs relevant to a particular project. Indeed, it appears that plaintiff has pieced together the voluminous evidence in its possession precisely because no standard system for tracking the relevant data was in place.

Appx7.

The CFC reasons that "It simply belies the plain meaning of a standard system to conclude that virtually every document in plaintiff's possession, along with estimates to supply records not kept contemporaneously, meets this regulatory requirement." Appx7.

The CFC's Opinion also does not consider, and seemingly ignores, the CFC's findings in *Horn*. There, as here, a recovery auditor attempted to calculate compensation amounts by determining an hourly estimate because "recovery auditors didn't post hours because we all worked on a contingency audit basis." *Horn & Assocs., Inc. v. United States*, 123 Fed. Cl. 728, 747 (2015). The CFC noted that "plaintiff had not kept detailed records, **nor was it required to do so**, as it had not anticipated seeking reimbursement for costs expended, as opposed to collecting its contingency fees." *Id.* at 784 (emphasis added). Like *Horn*, ACLR did not anticipate seeking reimbursement for costs expended given the contingency fee structure of the Part D RAC Contract. Here, however, ACLR does not solely rely on unsubstantiated hourly estimates to calculate reasonable charges and offered evidence to substantiate any hourly estimates such as monthly progress reports documenting monthly work efforts (Appx7403-7406), training materials developed by ACLR for Part D

Stakeholders (Appx7407-7417), and check registers generated from ACLR's QuickBooks accounting system. Appx7426-7428.

In *Perfect Form Mfg. LLC v. United States*, 142 Fed. Cl. 778 (2019), the Court recognized QuickBooks as a standard record keeping system for financial information. *Id.* at 790 n.9. In *Appeal of -- Trirad Techs. Inc.*, ASBCA No. 58855, 15-1 B.C.A. (CCH) ¶ 35898 (Feb. 23, 2015), the Armed Services Board of Contract Appeals recognized that a standard record keeping system did not need a particular level of sophistication.

> The termination for convenience clause specifically provides that a contractor may recover, 'reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination' (finding 3). We do not interpret the language 'using its standard record keeping system' so narrowly as to preclude recovery if a contractor's 'standard record keeping system' is lacking sophistication (finding 17 n.4). Indeed, in *SWR* we relied upon 'records other than the contractor's own standard record keeping system, e.g., contemporaneous Army and SWR emails discussing the Pineridge Farms site lease' when we allowed SWR to recover a $15,000 payment to end a lease. *SWR, Inc.*, 2014 ASBCA LEXIS 412, at *104 n.4.

Id. In *Appeal of Swr, Inc.*, ASBCA No. 56708, 15-1 B.C.A. (CCH) ¶ 35832 (Dec. 4, 2014), the Board of Contract Appeals clarified that it would not narrowly interpret what constitutes a standard record keeping system.

> Finally, the dissent suggests we impose a 'special evidentiary burden' on commercial item contractors barring them 'as a matter of law' from demonstrating their convenience termination claims with any evidence other than a 'contractor record.' Once again, we do no such thing here. In resolving this appeal, we examine and rely on, among other things, emails sent by the government, invoices generated by lessors, and bills of lading obtained by FES, none of which constitutes a 'contractor record.'

Id.

ACLR has a standard record keeping system and the exhibits to support its cost claim are from or derived from a standard record keeping system which includes the use of Quickbooks, an accounting software package, to track costs; Microsoft File Explorer, which electronically stores vendor invoices, client work product, and archived communications data; Microsoft Outlook, which tracks company communications; external suppliers and various external file storage devices used to back up and secure company data to ensure against data loss; and paper files for employee and client contract information. Appx7237. All of ACLR's work efforts on behalf of CMS in its execution of the Part D RAC Contract utilized specific components of ACLR's standard record keeping system. Appx7238. The portion of ACLR's standard record keeping system used to track costs, accounting, and tax related information was Quickbooks. Appx7238. Amounts paid or incurred by ACLR were individually inputted into Quickbooks and consisted of amounts paid for goods and services and were supported by vendor invoices, receipts, credit card

statements, payroll information, bank statements and checks. Appx7238. ACLR's vendor invoices, receipts, credit card statements, payroll, and bank records are used to support cost, accounting, and tax related information input and tracked in Quickbooks and kept in an electronic format stored in Microsoft File Explorer. Appx7238. In addition to tracking amounts paid or incurred by ACLR, ACLR utilizes Quickbooks to generate a variety of reports for accounting and tax purposes, including, but not limited to, expense reports, check registers, balance sheets, trial balances, income statements, and its general ledger. Appx7238. Individual payments outlined in each of these check registers are individually referenced and tracked in ACLR's bank statements. Appx7238.

ACLR contracted with Automatic Data Processing, Inc. ("ADP") to provide payroll services. Appx7239. ADP payroll services included making payroll and expense reimbursement payments to ACLR employees, filing pertinent federal, state, and local payroll reports/returns, and generating W-2 and other tax information necessary for ACLR to comply with federal and state law. Appx7239. ADP was also responsible for maintaining employee records pertaining to employee commencement/termination dates, pertinent personal information, employee deduction information including 401k, insurance, garnishment, direct deposit and pay records, and filing and paying federal, state, and local taxes on behalf of ACLR. Appx7239. The records generated through ADP were kept and maintained within

the Microsoft File Explorer portion of ACLR's standard record keeping system. Appx7239. Invoices and payroll reports generated by ADP as well as invoices and related supporting documentation for all other vendors providing goods and services to ACLR were kept and maintained in an electronic format in Microsoft File Explorer and on external storage devices and at various external suppliers. Appx7239.

Work product, communications, and records supporting work efforts performed by ACLR personnel and related stakeholders on behalf of the Part D RAC contract in the plan year 2007 and 2010 duplicate payment audits were maintained on ACLR's standard recordkeeping system - specifically, Microsoft Outlook, File Explorer, and external backup repositories and suppliers. Appx7239. The CFC wholly ignores Mr. Mucke's Declaration in concluding that ACLR did not maintain a standard record keeping system.

The CFC's Opinion also appears to be predicated in part on its December 15, 2021 Opinion and Order. There, the CFC laid the foundation for its determination that detailed accounting documentation and estimates of hours were insufficient to meet the requirements of FAR 52.212-4(l) based on the CFC's conclusion that the Government "awarded plaintiff the task order to conduct audits for multiple years." Appx7207. This determination is not supported by the evidence. As outlined in the Task Order, Section 3, Period of Performance:

> The 12 month base period of the task order is from January 13. 2011 through January 12, 2012. The task order also includes four (4) 12-month optional periods. No contingency fees shall be paid after the end of the period of performance.

Appx1174. The Government contracted for a one-year requirement including the PWS which was removed as governing the contract in Modification 3. Appx1173-1174, Appx1529-1530. The CFC's belief that the Part D RAC Contract was a multi-year contract fails in this determination as the contract included optional periods and well-established precedent that "the mere existence of an option does not require the holder to exercise it." *Magic Brite Janitorial v. United States*, 72 Fed. Cl. 719, 721 (2006) and there is nothing in the record to support that CMS planned to execute an option period. ACLR presented evidence in response to the Government's Motion for Summary Judgment of ACLR's standard record keeping system and costs sufficient, at the very least, to support a denial of the Government's Motion for Summary Judgment as to ACLR's standard record keeping system. Appx7237-7239.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

WHEREFORE, ACLR prays that this Honorable Court REVERSE the CFC's awards of summary judgment in favor of the Government; GRANT ACLR's Motion for Summary Judgment on the Government's breach of contract awarding ACLR its damages as set forth in the Complaint and remand ACLR's breach of duty of good faith and fair dealing claims for a trial on the merits. In the alternative, ACLR prays

that this Honorable Court REVERSE the CFC's determination that ACLR was not owed compensation for the constructive termination of its contract, award ACLR a percentage of the contract price for its plan year 2007 and 2010 duplicate payment audits and its costs for the preparation, presentation, and pursuit of settlement claim costs as outlined in this appeal, and remand this case for a determination of ACLR's other costs in connection with its plan year 2007 and 2010 duplicate payment audits.

Respectfully Submitted,

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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 23-1190

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ADDENDUM

In the United States Court of Federal Claims

No. 15-767C

(E-Filed: November 2, 2022)

ACLR, LLC, Plaintiff, v. THE UNITED STATES, Defendant.	Summary Judgment; RCFC 56; FAR 52.212-4(l); Constructive Termination for Convenience; Standard Record Keeping System.

Thomas K. David, Reston, VA, for plaintiff. John A. Bonello, of counsel.

Joseph A. Pixley, Trial Attorney, with whom were Brian M. Boynton, Principal Deputy Assistant Attorney General, Patricia M. McCarthy, Director, Martin F. Hockey, Jr., Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Augustus J. Golden, Department of Justice, Washington, DC, and Lucy Mac Gabhann, United States Department of Health and Human Services, Baltimore, MD, of counsel.

OPINION

CAMPBELL-SMITH, Judge.

Defendant's motion for summary judgment, brought pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC), is currently before the court. See ECF No. 168. Plaintiff responded to the motion, see ECF No. 169, and defendant replied, see ECF No. 170. The motion is now fully briefed, and ripe for decision. The parties did not request oral argument, and the court deems such argument unnecessary.

The court has considered all of the parties' arguments and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, defendant's motion for summary judgment is **GRANTED**.

I. Background

A. Procedural Background

This court has ruled on summary judgment motions in this case on two prior occasions. See ECF No. 120 (November 19, 2021 opinion and order, reported at ACLR, LLC v. United States, 157 Fed. Cl. 324 (2021)); ECF No. 76 (March 23, 2020 opinion, reported at ACLR, LLC v. United States, 147 Fed. Cl. 548 (2020)). On November 6, 2020, plaintiff amended its complaint, which now includes one count for termination for convenience damages. See ECF No. 101 (amended complaint). Trial in this case is scheduled to be held between November 10, 2022, and November 30, 2022. See ECF No. 166 (October 12, 2022 scheduling order).

The court has allowed defendant to file the instant motion for summary judgment, despite the nearness of trial, to resolve a predicate legal issue. Specifically, before this case can proceed, the court must determine the "contours of plaintiff's standard record-keeping system," and whether that system comports with the applicable regulation, Federal Acquisition Regulation (FAR) clause 52.212-4(l), termination for the government's convenience. ECF No. 166 at 1; ECF No. 164 (October 5, 2022 order).

Because the scope of the present motion is limited to a legal issue, and because the court has detailed the extensive procedural and factual background of this case in its previous opinions, see ECF No. 120 and ECF No. 76, the court will address only those facts immediately relevant to the task of determining whether what plaintiff has presented as its "standard record keeping system" is legally sufficient to proceed with evidence at trial.

B. Defining Plaintiff's Standard Record Keeping System

The court held a status conference in this case on October 4, 2022, to address the scope of matters for trial. See ECF No. 172 (status conference transcript). The following day, on October 5, 2022, the court instructed the parties that the forthcoming trial would be limited to addressing the following foundational issues:

1. What is, as a factual matter, plaintiff's standard record keeping system?

2. Does that system comport with the legal requirements of 48 C.F.R. § 52.212-4(l)?

3. Do the categories of supporting evidence that plaintiff intends to present at trial satisfy the relevant legal requirements?

ECF No. 164 (order). The parties then proposed a schedule for pretrial deadlines, including for the filing of plaintiff's "summary describing its standard record keeping systems," and for the subsequent briefing of defendant's motion for summary judgment. ECF No. 165 at 1 (joint status report).

Plaintiff filed a notice of summary of its standard record keeping system on October 14, 2022, to which it attached a declaration of plaintiff's Managing Principal, Mr. Christopher Mucke. See ECF No. 167 (notice); ECF No. 167-1 (declaration). Therein, Mr. Mucke stated as follows:

> [Plaintiff's] standard record keeping system includes the use of Quickbooks, an accounting software package, to track costs; Microsoft File Explorer, which electronically stores vendor invoices, client work product, and archived communications data; Microsoft Outlook, which tracks company communications; external suppliers and various external file storage devices used to back up and secure company data to ensure against data loss; and paper files for employee and client contract information.

ECF No. 167-1 at 1. Based on this characterization of the manner in which plaintiff's evidence is kept, defendant now argues it is entitled to summary judgment because plaintiff's system does not comport with the legal requirements of FAR 52.212-4(l). See ECF No. 168 at 9.

II. Legal Standards

According to RCFC 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted).

A genuine dispute of material fact is one that could "affect the outcome" of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The moving party . . . need not produce evidence showing the absence of a genuine issue of material fact but rather may discharge its burden by showing the court that there is an absence of evidence to support the nonmoving party's case." Dairyland Power, 16 F.3d at 1202 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). A summary judgment motion is properly granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. Celotex, 477 U.S. at 324.

The Supreme Court of the United States has instructed that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. A nonmovant will not defeat a motion for summary judgment "unless there is sufficient evidence favoring the nonmoving party for [the fact-finder] to return a verdict for that party." Id. at 249 (citation omitted). "A nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law." Dairyland Power, 16 F.3d at 1202 (citing Celotex, 477 U.S. at 323).

III. Analysis

As the court has previously determined, FAR 52.212-4(l) governs plaintiff's damages claim.[1] See ECF No. 120 at 5-7. The provision states, in relevant part, that upon termination for convenience, "the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination."[2] FAR 52.212-4(l).

To recover its reasonable charges, plaintiff bears the burden of "proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting Willems Indus., Inc. v. United States, 295 F.2d 822, 831 (Ct. Cl. 1961)). And importantly for the instant motion, the plain language

[1] In its response to defendant's motion for summary judgment, plaintiff argues that the decision from the United States Court of Appeals for the Federal Circuit in JKB Solutions & Services, LLC v. United States, 18 F.4th 704 (Fed. Cir. 2021), controls here. See ECF No. 169 at 15-19. According to plaintiff, the holding in JKB would require this court to find that FAR 52.212-4(l) does not govern in this case. See id. Defendant, in its reply, insists that plaintiff misreads JKB. See ECF No. 170 at 5-8. The court has reviewed the Federal Circuit's decision but notes that, despite the fact that the decision issued nearly one year ago, on November 17, 2021, plaintiff has not presented this argument by way of an appropriate motion, such as a motion for relief from the court's previous order. Because the import of JKB here, is not properly before the court, the court makes no finding on the issue.

[2] As the court noted in its previous opinion, "the language of the termination for convenience provision incorporated in plaintiff's contract differs slightly from that in FAR 52.212-4(l), but the differences are de minimus and do not change the meaning of the provision." ECF No. 120 at 3 n.3. The court, therefore, does not distinguish between the two in this opinion.

of the regulation also requires that plaintiff prove its reasonable charges "using its standard record keeping system." FAR 52.212-4(l).

The parties did not present, and the court did not find, binding precedent describing the precise requirements of a standard record keeping system within the meaning of FAR 52.212-4(l). See generally ECF No. 168, ECF No. 169, ECF No. 170. In the absence of such authority, the court will consider the regulation's "plain language," and will interpret "terms in accordance with their common meaning." Lockheed Corp. v. Widnall, 113 F.3d 1225, 1227 (Fed. Cir. 1997) (citations omitted). The court must construe the plain language "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Baude v. United States, 955 F.3d 1290, 1305 (Fed. Cir. 2020) (quoting Corley v. United States, 556 U.S. 303, 314 (2009)). "If the regulatory language is clear and unambiguous, then no further inquiry is usually required." Mass. Mut. Life Ins. Co. v. United States, 782 F.3d 1354, 1365 (Fed. Cir. 2015) (citation omitted). Here, the parties agree that the language at issue is unambiguous. See ECF No. 168 at 27 (defendant emphasizing that the regulation "must be interpreted by its plain language") (capitalization removed); ECF No. 169 at 19 (plaintiff stating that the regulation "contains clear and objective guidelines"). When the language at issue is "plain and unambiguous," the court will "assume that terms have their ordinary, established meaning, for which [it] may consult dictionaries." Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1320 (Fed. Cir. 2003) (reviewing definitions from Webster's Third International Dictionary).

To decide the motion at bar, the court must consider the definition of the phrase "standard record keeping system." FAR 52.212-4(l). For purposes of this inquiry, the court assumes that plaintiff's evidence involves records of some kind, and that those records have been kept. The court will more carefully consider what it means for those records to have been kept as part of a standard system. First, the term "standard" denotes a measure of commonness or regularity. Webster's Third New International Dictionary defines standard to mean "a carefully thought-out method of performing a task," and "not novel or experimental." Standard, WEBSTER'S 3D NEW INT'L DICTIONARY (2002). Similarly, the New Oxford American Dictionary defines standard as "used or accepted as normal or average," and "(of a size, measure, design, etc.) such as is regularly used or produced, not special or exceptional." Standard, NEW OXFORD AM. DICTIONARY (3d ed. 2010).

The term "system" indicates orderliness and organization. According to Webster's dictionary, a system is "an orderly working totality," and "an organized or established procedure or method." System, WEBSTER'S 3D NEW INT'L DICTIONARY (2002). The New Oxford American dictionary defines a system as "a set of principles or procedures according to which something is done, an organized scheme or method," and "orderliness, method." System, NEW OXFORD AM. DICTIONARY (3d ed. 2010).

Thus, taken together, these definitions indicate that a standard system is a regularly used, carefully thought-out method that involves a set of organizing and orderly procedures. In the court's view, plaintiff's record keeping, as characterized by Mr. Mucke and as demonstrated by the additional evidence plaintiff offers, does not satisfy this definition.

In his declaration, Mr. Mucke states as follows:

> [Plaintiff's] standard record keeping system includes the use of Quickbooks, an accounting software package, to track costs; Microsoft File Explorer, which electronically stores vendor invoices, client work product, and archived communications data; Microsoft Outlook, which tracks company communications; external suppliers and various external file storage devices used to back up and secure company data to ensure against data loss; and paper files for employee and client contract information.

ECF No. 167-1 at 1. Defendant argues that this description "is so vastly overbroad as to include every conceivable document in [plaintiff's] possession, from electronically saved documents to 'paper files,' rendering the term 'standard record keeping system' in FAR § 52.212-4(l) essentially meaningless." ECF No. 168 at 9.

In its response, plaintiff asserts that its record keeping system involves a multitude of documents stored in various places by various parties. See ECF No. 169 at 22-30. Plaintiff also describes estimates that were required specifically because contemporaneous records were not created. For example, plaintiff argues that it should be compensated for Mr. Mucke's time despite the fact that he admittedly "did not specifically track his hours." Id. at 28; see also ECF No. 172 at 19 (plaintiff's counsel acknowledging that time was not contemporaneously tracked and representing that plaintiff is "reconstructing [hours worked] to the best of [its] ability"); id. at 20 (stating that Mr. Mucke "had to estimate [his time] because he didn't pay himself"). According to plaintiff, the fact that the contract at issue involved a contingency fee meant that "there was no need or requirement for him to track his hours." ECF No. 169 at 28.

Plaintiff also estimates the hours for its personnel more generally based on "thousands of email communications" and other work performed for the audits. ECF No. 169 at 29; see also ECF No. 172 at 20 (plaintiff's counsel stating that the costs for one of the audits were calculated "by estimating the employees that worked on [it]—the time that they spent on that audit"). Plaintiff insists that it "may use estimates to support its cost claims," ECF No. 169 at 28, and even suggests that it would be unfair or unreasonable for defendant to expect contractors to "require each employee working on their contracts to track the time spent on the contracts and correlate that time to the specific task that each employee was working on." Id. at 25.

As the court understands the regulation, however, a regular, organized method for tracking relevant costs is required. The method chosen need not be "elaborate[,] costly[,] and burdensome," as plaintiff argues it necessarily would be. Id. Here, the problem is that plaintiff merely describes a vast collection of documents, some of which reflect post hoc estimates, rather than a systematic or organized method of tracking costs relevant to a particular project. Indeed, it appears that plaintiff has pieced together the voluminous evidence in its possession precisely because no standard system for tracking the relevant data was in place.

It simply belies the plain meaning of a standard system to conclude that virtually every document in plaintiff's possession, along with estimates to supply records not kept contemporaneously, meets this regulatory requirement. To find that plaintiff's records are sufficient to recover pursuant to FAR 52.212-4(l) would be to read both "standard" and "system" out of the regulation, an approach that would not conform with precedential canons of interpretation. See Baude, 955 F.3d at 1305 (quoting Corley, 556 U.S. at 314) (stating that the court must construe the plain language "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

Because defendant has succeeded in demonstrating that plaintiff has failed to prove an essential element of its case—namely that its method of proving reasonable costs comports with the legal requirement of the governing regulation—defendant is entitled to summary judgment in its favor. See Dairyland Power, 16 F.3d at 1202 (citing Celotex, 477 U.S. at 323) ("A nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law."). Thus, the court will cancel the scheduled pretrial conference and trial in this case.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Defendant's motion for summary judgment, ECF No. 168, is **GRANTED**;

(2) The clerk's office is directed to **CANCEL** the **November 9, 2022 pretrial conference** and **November 10, 2022 trial** in this case; and

(3) The clerk's office is directed to **ENTER** final judgment in defendant's favor, **DISMISSING** plaintiff's complaint, with prejudice.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 15-767 C
Filed: November 2, 2022

ACLR, LLC
Plaintiff

JUDGMENT

v.

THE UNITED STATES
Defendant

Pursuant to the court's Opinion, filed November 2, 2022, granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant, and plaintiff's complaint is dismissed with prejudice.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

In the United States Court of Federal Claims

No. 15-767C
(consolidated with 16-309C)

(E-Filed: April 6, 2020)[1]

ACLR, LLC, Plaintiff, v. THE UNITED STATES, Defendant.	)	Summary Judgment; RCFC 56; Termination for Convenience; Constructive Termination for Convenience; Breach of Contract.

Thomas K. David, Reston, VA, for plaintiff. John A. Bonello, of counsel.

Adam E. Lyons,[2] Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Martin F. Hockey, Jr., Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Lucy Mac Gabhann, Office of General Counsel, United States Department of Health and Human Services, Baltimore, MD, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Currently before the court are plaintiff's motion for partial summary judgment, ECF No. 51, and defendant's cross-motion for summary judgment, ECF No. 52, which

[1] This opinion was issued under seal on March 23, 2020. Pursuant to ¶ 3 of the ordering language, the parties were invited to identify proprietary or confidential material subject to deletion on the basis that the material was protected/privileged. No redactions were proposed by the parties. Thus, the sealed and public versions of this opinion are identical, except for the publication date and this footnote.

[2] Mark E. Porada was the Trial Attorney on defendant's response and cross-motion for summary judgment.

have been extensively briefed. The parties' motions are brought pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC). In ruling on the motions, the court has also considered: (1) plaintiff's motion for partial summary judgment memorandum, ECF No. 51-1; (2) plaintiff's proposed findings of uncontroverted fact, ECF No. 51-11; (3) plaintiff's exhibits, ECF No. 51-2 through 51-10; (4) defendant's response to plaintiff's motion and cross-motion for summary judgment, ECF No. 52; (5) defendant's proposed findings of uncontroverted fact and response to plaintiff's proposed findings of uncontroverted fact, ECF No. 53; (6) defendant's appendices, ECF No. 52-1 and 52-2; (7) plaintiff's response/reply brief, ECF No. 58; (8) plaintiff's response to defendant's proposed findings of uncontroverted fact, ECF No. 58-6; (9) plaintiff's supplemental exhibits, ECF No. 58-1 through 58-5; (10) defendant's reply brief, ECF No. 61; (11) plaintiff's sur-reply brief, ECF No. 65; (12) plaintiff's supplemental brief, ECF No. 69; (13) defendant's response to plaintiff's supplemental brief, ECF No. 70; (14) plaintiff's addendum to its supplemental brief, ECF No. 71; (15) plaintiff's supplemental reply brief, ECF No. 73; (16) defendant's supplemental sur-reply, ECF No. 74.[3] The parties did not request oral argument, and the court deems such argument unnecessary.

For the following reasons, plaintiff's motion for partial summary judgment is **DENIED**, and defendant's cross-motion for summary judgment is **GRANTED**.

I. Background

A. Procedural History

Jurisdiction in these consolidated cases is governed by the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109 (2012) (CDA). As required by the CDA, plaintiff filed two certified claims with the contracting officer. The first—which was submitted on March 12, 2015, in the amount of $28,506,591—included damages related to the 2007 audit and the 2010 audit. See ECF No. 52-1 at 132-36. That certified claim was denied on June 5, 2015. See id. at 138-45. Plaintiff filed suit in this court on July 22, 2015, contesting the denial of its certified claim for $28,506,591. See ACLR, LLC v. United States, Case No. 15-767C, ECF No. 1 (complaint).

The second certified claim—which was submitted on September 10, 2015, in the amount of $79,314,795—included damages related to the 2012/2013 sales tax audit. See ECF No. 52-1 at 164-67. This certified claim was denied on January 15, 2016. See ECF No. 51-9 at 30-34. Plaintiff filed suit in this court on March 9, 2016, contesting the denial of its certified claim for $79,314,795. See ACLR, LLC v. United States, Case No.

[3] The court recognizes the extensive briefing in this case. Subsequent briefing to the parties' initial cross-motions revealed and narrowed the dispositive issues in this case. The court addresses herein only those dispositive issues.

16-309C, ECF No. 1 at 6 (complaint). Plaintiff increased its claimed damages in the suit before this court to $112,002,489. See id. at 8.

Following discovery these two cases were consolidated on February 8, 2018. See ECF No. 48 (order). Plaintiff seeks summary judgment on all of its claims related to the 2007 audit and 2010 audit (in Case No. 15-767C), and partial summary judgment on its claims related to the 2012/2013 sales tax audit (in case No. 16-309C). See infra n.5. Defendant seeks summary judgment in its favor on all of plaintiff's claims, and dismissal on jurisdictional grounds of the portion of plaintiff's claim in Case No. 16-309C that was not presented to the contracting officer. The motions are fully briefed and ripe for decision by the court. See ECF No. 74.

B. Medicare Part D

This lawsuit arises out of the Medicare Part D program, which is a voluntary prescription drug reimbursement program that went into effect on January 1, 2006. See ECF No. 51-1 at 7-8; ECF No. 52 at 10 (citing 42 U.S.C. § 1395w-101 et seq. (2012)). The prescription drug coverage is offered by private providers, known as plan sponsors, who pay the costs for the prescription drugs and are reimbursed by their beneficiaries and the government. See ECF No. 52 at 10.

The Centers for Medicare & Medicaid Services (CMS), a component of the United States Department of Health and Human Services (HHS), "pays plan sponsors a monthly prospective payment throughout each year for each beneficiary enrolled in the plan." Id. (citation omitted). The payments are then reconciled after the end of each year with the plans' "actual level of enrollment, risk factors, levels of incurred allowable drug costs, reinsurance amounts, and low-income subsidies." Id. at 11 (citation omitted). Final reconciled plan years can be reopened and corrected within four years for good cause. See id.

CMS uses electronic records submitted by the plans called prescription drug events (PDEs) to conduct the reconciliations. See id. Plan sponsors submit a PDE recording information about the drug prescribed, its cost, payment details, and other information "[w]henever a Medicare Part D beneficiary fills a prescription." Id. For the years at issue in this dispute, HHS estimated that gross payment errors (both over- and under-payments) in its Medicare Part D payments to plan sponsors ranged from just over one billion dollars at the lowest to over five billion at the highest. See ECF No. 51-1 at 28; ECF No. 53 at 32-33.

C. The General Services Administration (GSA) Federal Supply Schedule Contract

On June 17, 2010, plaintiff entered into a federal supply schedule contract for financial and business solutions issued by the General Services Administration (GSA),

contract number GS-23F-0074W (GSA contract). See ECF No. 70 at 12. Pursuant to the contract, plaintiff offered "Financial Management & Audit Services" including "Recovery Audits." ECF No. 71-1 at 1, 5. Plaintiff stated in its contract with GSA that it was able and ready to provide services to "accurately quantify, verify, and recover improper payments." Id. at 5.

The GSA contract contained a "Contract Clause Document" establishing the terms of the contract. ECF No. 70-1 at 6. Included in the contract terms was Federal Acquisition Regulation (FAR) clause 52.212-4(l), termination for the government's convenience, which permits the ordering agency to "terminate this contract or any part hereof, for its sole convenience." Id. at 21. Under FAR 52.212-4(l), should the agency elect to terminate the contract for convenience, plaintiff would be owed "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor [could] demonstrate to the satisfaction of the ordering [agency] using its standard record keeping system, [to] have resulted from the termination." Id.

The GSA contract also included FAR clause 52.246-4, inspection of services—fixed price, which permits the ordering agency to "inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract." Id. at 81. Under FAR 52.246-4, should the agency find that the services provided "do not conform with contract requirements, the ordering activity [might] require the Contractor to perform the services again in conformity with contract requirements." Id. "If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with the contract requirements, the ordering activity may: . . . (2) terminate the contract for default." Id.

D. The GSA Contract Recovery Audit Task Order

The passage of the Patient Protection and Affordable Care Act in 2010 required CMS to enter into a contract to obtain "recovery audit" services for Medicare Part D. See ECF No. 52 at 12 (citing PPACA, Pub. L. No. 111-148, § 6411(b), 124 Stat. 119, 775 (2010) (codified at 42 U.S.C. §1395ddd(h))). The purpose of such services was to identify and assist in recovering improper payments. Id. On December 2, 2010, CMS issued a Request for Quote (RFQ) under the GSA contract to plaintiff for recovery audit contractor (RAC) services. See id. "Pursuant to the terms and conditions of Contract No. GS-23F-0074W," CMS awarded plaintiff task order HHSM-500-2011-00006G (task order) on January 13, 2011, to identify improper payments and to recover overpayments made under the Medicare Part D program "on a national scale." ECF No. 51-3 at 152-54; ECF No. 51-1 at 8. Only the terms in the task order that were different from the GSA contract were included in the task order; otherwise, "all terms and conditions of the contract remain in effect." ECF No. 51-3 at 154.

The task order, pursuant to which the contractor was paid a firm, fixed-price contingency fee, included a base period and four option years. See ECF No. 53 at 3. Any payments to plaintiff were contingent upon the recovery of improper payments from plan sponsors and were to be fixed as a percentage of such recoveries.[4] See ECF No. 51-3 at 155.

Under the terms of the task order, ACLR was to "perform the work required in accordance with the attached Performance Work Statement (PWS)." Id. at 154; ECF No. 53 at 3. The term of the PWS extended from January 13, 2011, to December 31, 2013. See ECF No. 51-3 at 154; ECF No. 52 at 16. The PWS generally described the audit process, ECF No. 51-3 at 184-93, provided for a review of duplicate payments, id. at 186, and indicated that CMS input and approval would likely be required for the various audit processes, see, e.g., id. at 187, 190. The PWS does not expressly require approval by CMS for data audit activity undertaken by plaintiff; instead the PWS states that "[o]nce the Data Audit has been complete [ACLR] will discuss [its] findings with CMS." Id. at 189. The PWS does require CMS approval for any documentation audits. See id. The terms of the PWS did not reference or modify the terms of the task order or the GSA contract.

The parties later implemented a Statement of Work (SOW), replacing the PWS, that had two phases. The first SOW extended from January 1, 2014, through December 31, 2014 (2014 SOW), and the second SOW extended from January 1, 2015, through December 31, 2015 (2015 SOW). See ECF No. 51-5 at 6, 45. The SOWs explicitly required CMS approval for any audit conducted by plaintiff and set forth a process by which plaintiff was to request that approval. See id. at 14, 17. Neither SOW expressly addressed the cancellation of an audit after CMS had approved it.

Difficulties and delays occurred early in ACLR's contract performance. See ECF No. 51-1 at 10-11. The parties disagree regarding the extent of the difficulties and delays, and whether CMS's actions failed to meet the contract requirements. See ECF No. 53 at 5-7. Plaintiff eventually did begin its work under the contract, and plaintiff does not allege any breach by CMS during the initial period of performance. See ECF No. 51-1 at 33-34, 52. Rather, in two cases, plaintiff alleges three separate breaches by CMS as ACLR attempted to perform pursuant to the contract; the three audits are discussed more fully herein. See id.

[4] The contingency fee percentage was raised twice, pursuant to contract modifications, with respect to certain audit activities conducted by plaintiff. See ECF No. 58-6 at 11. There was also a general increase in the contingency fee percentage that was instituted in 2014, for newly approved audit tasks. See ECF No. 53 at 15.

1. Plaintiff's 2007 and 2010 Audit Claims (Case No. 15-767C)

a. 2007 Audit[5]

Plaintiff began receiving PDE data from CMS in November 2011 and immediately undertook an audit of 2007 PDEs (2007 audit). See ECF No. 53 at 9, 12. The parties do not dispute that, at the time of the 2007 audit, the GSA contract, the task order, and the PWS were in effect. See ECF No. 53 at 3. Pursuant to the task order and the PWS, ACLR was to conduct a "duplicate payments" audit for particular calendar years. ECF No. 51-11 at 6; ECF No. 53 at 10-11. What the parties do dispute is whether plaintiff was required to seek CMS approval prior to conducting an audit. See ECF No. 51-1 at 15; ECF No. 52 at 15.

According to plaintiff, its audit of the 2007 PDE records identified $313,808,241 in improper duplicate payments using a technical method deemed acceptable by CMS. See ECF No. 51-1 at 15; ECF No. 53 at 12. When plaintiff communicated its overall result to CMS, the contracting officer directed plaintiff not to issue any notification letters to the plan sponsors about these findings. See ECF No. 51-1 at 15; ECF No. 53 at 12. Plaintiff asserts that it is due $23,535,618 in contingency fees for the 2007 audit. See ECF No. 51-1 at 49.

b. 2010 Audit

CMS authorized plaintiff to conduct a duplicate payments audit for calendar year 2010 (2010 audit). See ECF No. 53 at 16-17. Plaintiff conducted the audit in 2014, pursuant to the GSA contract, task order, and the 2014 SOW. See ECF No. 51-1 at 20; ECF No. 52 at 17. In accordance with the procedure set forth in the 2014 SOW, plaintiff sought approval for the audit and the methodology it would use. See ECF No. 51-1 at 20. CMS granted its approval. See id.

According to defendant, its data validation contractor found errors in plaintiff's audited data. See ECF No. 52 at 31-33. Plan sponsors also voiced concerns that a significant portion of the duplicate payments identified by plaintiff were legitimate, rather than duplicative, but would require extensive time and effort to support. Id. Defendant, in turn, requested that plaintiff use a revised audit protocol to review the 2010 data. See id. at 33. Although plaintiff complied with the request, it now argues that defendant had no right, under the contract, to modify the previously approved methodology for plaintiff's audit. See ECF No. 51-1 at 22-23.

[5] In addition to the audits at issue here, the court notes that plaintiff completed seven audits for which it was paid contingency fees under the GSA contract and task order. ECF No. 53 at 47; ECF No. 58-6 at 24-25. The payments for these audits do not appear to have been the subject of any claim submitted by plaintiff to the contracting officer.

After reviewing the evidentiary support documentation from plan sponsors, plaintiff submitted its 2010 audit review package to CMS. See ECF No. 51-1 at 23. Defendant contends that plaintiff failed to use the revised methodology, and that defendant's data validation contractor once again found errors in plaintiff's audited data. See ECF No. 52 at 34-35. Defendant requested that plaintiff provide additional information to address the raised concerns; plaintiff declined to do so. See id. at 35. Plaintiff does not deny that it refused to comply; plaintiff explains that it refused to do so because defendant acted in contravention of the contract terms. See ECF No. 51-1 at 23.

CMS terminated the 2010 audit, reasoning that it had unaddressed concerns about the validity of the audit results. See ECF No. 52 at 35. Having identified $15,909,552 in improper duplicate payments during the 2010 audit, plaintiff seeks, as its contingency fee for that work, $2,209,146. See ECF No. 51-1 at 23.

2. The 2012/2013 Sales Tax Audit (Case No. 16-309C)

Pursuant to the 2015 SOW, ACLR prepared, in 2015, a new audit issue review package (NAIRP) for the audit of sales tax payments from calendar years 2012 and 2013 (2012/2013 sales tax audit). See id. at 25. CMS did not approve the proposed sales tax audit. See id. According to plaintiff, CMS's refusal to approve the NAIRP for the sales tax audit was procedurally and factually improper. See id. at 25-27. From the sales tax audit, plaintiff identified $626,326,618 in improper sales tax payments, which, plaintiff alleges, should have earned it $75,459,194 in contingency fees.[6] Id. at 65-66.

II. Legal Standards

According to RCFC 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted).

A genuine dispute of material fact is one that could "affect the outcome" of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The moving party . . . need not produce evidence showing the absence of a genuine issue of material fact but rather may discharge its burden by showing the court that there is an absence of evidence to support the nonmoving party's case." Dairyland Power, 16 F.3d at 1202

[6] Of note, plaintiff has not sought summary judgment for the portion of its work on the 2012/2013 sales tax audit pertaining specifically to sales tax issues in the state of Louisiana. See ECF No. 51-1 at 50 n.3, 66 n.9 ("ACLR is not seeking summary judgment on the sales tax NAIRP with respect to the Louisiana sales tax issues."). Defendant seeks summary judgment as to all of plaintiff's claims in their entirety.

(citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). A summary judgment motion is properly granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. Celotex, 477 U.S. at 324.

The Supreme Court of the United States has instructed that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. A nonmovant will not defeat a motion for summary judgment "unless there is sufficient evidence favoring the nonmoving party for [the fact-finder] to return a verdict for that party." Id. at 249 (citation omitted). "A nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law." Dairyland Power, 16 F.3d at 1202 (citing Celotex, 477 U.S. at 323).

III. Analysis

A. Defendant Did Not Breach Its Contract with Plaintiff When It Denied or Terminated the Audits

"To recover for breach of contract, a party must allege and establish: (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." San Carlos Irr. & Drainage Dist. v. United States, 877 F.2d 957, 959 (Fed. Cir. 1989) (citations omitted).

The parties agree that they had a valid contract—arising from the GSA contract, the task order, and the PWS or the SOWs—that controlled the parties' relationship. See ECF No. 53 at 3; ECF No. 69 at 10. They disagree, however, over the extent of the defendant's ability under that contract to control the work done by plaintiff. Plaintiff argues that defendant had no right to terminate or deny plaintiff's audits under either the PWS or the SOWs. See ECF No. 51-1 at 33-35, 53. Defendant argues that the terms of the GSA contract permitted it to reject plaintiff's work for nonconformance with the contract terms, if necessary, and to terminate—for its sole convenience—any part of the contract. See ECF No. 70 at 15-17. The plain language of the GSA contract establishes that defendant was entitled to terminate any portion of the contract for its sole convenience. Because defendant's actions in denying and terminating the audits were consistent with the terms of the contract, the court finds that, as discussed below, no breach of the contract has occurred.

1. Defendant Terminated Plaintiff's Work on the 2007 and 2010 Audits Pursuant to Its Contractual Authority

a. The Parties' Contract Permits Termination for Defendant's Convenience

The parties agree that the GSA contract, the task order, and the PWS or the SOWs, controlled the parties' relationship. See ECF No. 53 at 3; ECF No. 69 at 10. But plaintiff argues that "CMS cannot point to any Part D RAC Contract provisions that justify CMS's" terminations of the 2007 and 2010 audits. ECF No. 58 at 10. Defendant counters that the GSA contract's terms allow it to inspect and reject plaintiff's services for nonconformance or, alternatively, to terminate any part of the contract for its sole convenience. See ECF No. 70 at 12-14. In support of its position, defendant points to FAR clauses 52.212-4(l) (termination for convenience) and 52.246-4 (inspection of services) in the GSA contract. See id. Although defendant extensively briefed the issue of its ability to terminate the audits for nonconformance with the contract, the court need not reach this argument; the court agrees that—based on the language of the contract—defendant had the right to terminate any portion of it for defendant's sole convenience.

"Contract interpretation begins with the language of the written agreement." Bell/Heery v. United States, 739 F.3d 1324, 1331 (Fed. Cir. 2014) (quotations omitted). If the contract language is unambiguous, then it must be given its plain and ordinary meaning, such as "would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." TEG-Paradigm Envtl., Inc. v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (quoting Metric Constrs., Inc. v. Nat'l Aeronautics & Space Admin., 169 F.3d 747, 752 (Fed. Cir. 1999)).

The plain language of FAR clause 52.212-4(l) permits the government to terminate the contract, or any part of it, for its sole convenience:

> Termination for the Ordering Activity's convenience. The ordering activity reserves the right to terminate this contract or any part hereof, for its convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the ordering activity using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the ordering activity any right to audit

> the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

ECF No. 70-1 at 21 (GSA contract).

Neither party argues that "a mutually intended and agreed to alternative meaning exists" for this clause. Forman v. United States, 329 F.3d 837, 842 (Fed. Cir. 2003). Plaintiff instead points to the PWS and the SOW as support for its position, but fails to identify any part of the task order, the PWS, or the SOW that modifies the termination for convenience clause of the GSA contract. See ECF No. 73 at 6. The court, therefore, construes the words of the clause, consistent with their ordinary meaning, to permit the government to terminate any part of the contract for its convenience.

Termination for convenience—the right of the government to end a contract when there has been no fault or breach by the non-governmental party—emerged after the Civil War as a means to end war production that was no longer needed. See Torncello v. United States, 681 F.2d 756, 764 (Ct. Cl. 1982) (detailing the history of the termination for convenience clause). Throughout its evolution and eventual incorporation into non-military contracts executed during periods of peace, the clause has retained its fundamental purpose—"to reduce governmental liability for breach of contract, by allocating to the contractor a share of the risk of unexpected change in circumstances." Maxima Corp. v. United States, 847 F.2d 1549, 1552 (Fed. Cir. 1988) (citing Torncello, 681 F.2d at 765-66).

Although a termination for convenience clause gives the government considerable leeway in the cancellation of contracts, the clause is not unbounded. "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." Perry v. United States, 294 U.S. 330, 352 (1935). As such, the termination for convenience clause may only be invoked "'in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties.'" Maxima, 847 F.2d at 1553 (quoting Municipal Leasing Corp. v. United States, 7 Cl. Ct. 43, 47 (1984)). The government may justify a breach as a termination for convenience to minimize damages when the action lawfully falls under that clause, even if the contracting officer calls the action a cancellation or "erroneously thinks that he can terminate the work on some other ground." Id. (quoting G.C. Casebolt Co. v. United States, 421 F.2d 710, 712 (Ct. Cl. 1970)).

Defendant does not argue that the terminations at issue were, at the time, called terminations for convenience by the contracting officer. Defendant does, however, argue that it had the right to, and in fact did, inspect the services offered by plaintiff and then reject them because they failed to conform to the contract. See ECF No. 70 at 15-16. And, defendant continues, if its actions were not justified by the contract, the terminations should be considered constructive terminations for convenience. See id. at

17. Plaintiff contends that CMS breached the contract when it terminated the audits. See ECF No. 73 at 6-7. Plaintiff reasons that there is no evidence to support CMS's claim that it inspected the audits and rejected them on the basis that they failed to conform to contractual requirements. See id. at 6. The parties agree as to the material facts concerning the terminations; they disagree as to whether defendant was authorized to effect the terminations, and, if defendant was authorized to do so, they disagree as to whether those terminations can now be deemed constructive terminations for convenience. The court turns next to determine whether defendant's alleged breaches were constructive terminations for convenience.

b. Defendant Constructively Terminated Plaintiff's 2007 and 2010 Audits for Convenience Pursuant to the Contract

A constructive termination for convenience is a judicially created concept to retroactively justify a breach by the government when "the basis upon which a contract was actually terminated is legally inadequate to justify the action taken." Maxima, 847 F.2d at 1553. Thus, the court will deem a breach a termination for convenience in circumstances in which the government "has stopped or [has] curtailed a contractor's performance for reasons that turn out to be questionable or invalid." Torncello, 681 F.2d at 759; see also Praecomm, Inc. v. United States, 78 Fed. Cl. 5, 12 (2007) (deeming a "deletion of work" from the contract at issue a termination for convenience).

A constructive termination for convenience, like an actual termination, may only be employed when there has been a change in circumstances or expectations. Maxima, 847 F.2d at 1553. It may not be invoked to justify a breach in a way that leaves the non-governmental party with no consideration for its bargain. See Torncello, 681 F.2d at 769 (holding that a requirements contract, when paired with a termination for convenience clause that permitted the government to give no work, was illusory). It also may not be invoked to create a breach where there has been no breach and the contract was fully performed on both sides. See Maxima, 847 F.2d at 1554-55 (reasoning that the clause is not intended to permit "unilateral renegotiation of a contract after it has been fully performed").

The parties agree that CMS did not allow plaintiff to proceed with the 2007 audit after it had reviewed the data and presented defendant with its findings. See ECF No. 52 at 58. Defendant explains that it requested that plaintiff not proceed with the audit because plaintiff had not identified for defendant the PDE records it audited, plaintiff's findings had not been validated, and defendant had not implemented a framework for collecting the overpayments identified. See id. at 26. As with the 2007 audit, the parties agree that defendant put an end to the 2010 audit after it had approved the audit and methodology and plaintiff had undertaken review of the data. See id. at 30. Defendant explains that, through a fairly extensive back-and-forth process with plaintiff, it determined that there were issues with the validity of the data generated by the audit. See id. at 30-35.

Plaintiff argues that defendant failed to produce evidence to support the claim that defendant rejected the audits because they did not conform to contractual requirements. See ECF No. 73 at 6-7. Plaintiff further argues that defendant cannot avail itself of a "retroactive termination for convenience" because defendant entered into the contract knowingly not intending to honor its obligations. Id. (citing Torncello, 681 F.2d at 756). Plaintiff observes that defendant did not develop a recoupment mechanism until the second year of contract performance and thus, "could not have entered into the contract in good faith when ACLR's sole basis for payment relied on a mechanism that did not exist." ECF No. 73 at 7. Plaintiff claims that the contract contained no language permitting the termination of either the 2007 or 2010 audit, and plaintiff asserts that defendant's procedure for terminating the 2010 audit was flawed. See id. at 8-9.

The court may find a constructive termination for convenience when the government's reasons for halting contract performance "turn out to be questionable or invalid." Torncello, 681 F.2d at 759. Here, the court is persuaded that defendant's actions may appropriately be deemed a constructive termination for convenience. Defendant's expressed concern regarding the validity of the data generated by the audits, and its uncertainty about the workability of the PWS as it pertained to the 2007 audit, constitute changed circumstances that would have supported a termination for convenience by defendant at the time and therefore, may be constructively effected now. See ECF No. 52 at 26-27; see also Maxima, 847 F.2d at 1553; Praecomm, 78 Fed. Cl. at 12 (finding a partial termination for convenience where defendant accepted portions of plaintiff's work).

Plaintiff's contention that the finding of a termination for convenience would render the contract illusory is unavailing. The contract was not fully performed such that a constructive termination for convenience would effectively permit a unilateral renegotiation. See Maxima, 847 F.2d at 1554-55. Moreover, a constructive termination for convenience does not leave plaintiff without consideration for its bargain. See Torncello, 681 F.2d at 769. The court finds that defendant's termination of the 2007 and 2010 audits was not a breach of the contract, but rather a constructive termination for convenience. As such, plaintiff's motion for summary judgment as to these claims is denied, and defendant's motion for summary judgment as to these claims is granted.

2. Defendant Denied Plaintiff's Proposed 2012/2013 Sales Tax Audit Pursuant to Its Contractual Authority

a. The Portion of Plaintiff's 2012/2013 Sales Tax Audit Claim That Was Not Presented to the Contracting Officer Is Not Properly Before the Court

As an initial matter, the court must address defendant's jurisdictional challenge to the portion of plaintiff's 2012/2013 sales tax audit claim that exceeds the amount of the sales tax audit certified claim that plaintiff presented to the contracting officer. See ECF

No. 52 at 55-57. Plaintiff responds that its claim represents an enlarged claim and that the court should address it, as an exercise of judicial economy. See ECF No. 58 at 6-7. The court, however, lacks jurisdiction over any portion of plaintiff's claim that was not presented to the contracting officer. See, e.g., Johnson Controls World Serv., Inc. v. United States, 43 Fed. Cl. 589, 592 (1999) ("A valid final decision by the contracting officer is thus 'a jurisdictional prerequisite to further legal action thereon.'") (quoting Sharman Co. v. United States, 2 F.3d 1564, 1568 (Fed. Cir. 1993)). Plaintiff may not "circumvent the statutory role of the contracting officer to receive and pass judgment on the contractor's entire claim." Cerberonics, Inc. v. United States, 13 Cl. Ct. 415, 418 (1987). Here, plaintiff failed to present a portion of its claim to the contracting officer. Therefore the court does not have jurisdiction over that claim unless it represents an appropriate enlarged claim. Id.

To establish that its additional damages represent an enlarged claim over which this court may exercise jurisdiction, plaintiff must demonstrate that the claim arose out of the same set of operative facts as the original claim and that plaintiff neither knew, nor reasonably should have known, of the factors justifying the increased claim when it presented it to the contracting officer. See Kunz Const. Co. v. United States, 12 Cl. Ct. 74, 79 (1987). Plaintiff admitted that the increase in its claim came about when ACLR identified additional "granular and less conspicuous markers" of questionable payments in the 2012/2013 sales tax audit data after it had submitted the claim to the contracting officer. See ECF No. 58 at 6. Plaintiff is, by its own description, experienced in conducting recovery audits, and therefore plaintiff should have known of the factors needed to justify the increase in its claim when it presented the claim to the contracting officer. See ECF No. 51-3 at 42. As such, the court finds that plaintiff's enlarged claim is not permissible. See Kunz, 12 Cl. Ct. at 79 (finding that plaintiff was an experienced contractor and therefore should have known that its additional damages existed and had to be submitted to the contracting officer).

Accordingly, the portion of plaintiff's 2012/2013 sales tax audit claim (submitted under Case No. 16-309C) that was not presented to the contracting officer is dismissed for lack of subject matter jurisdiction. The court addresses herein only the portion of plaintiff's 2012/2013 sales tax audit claim that plaintiff did present to the contracting officer in its certified claim, which the contracting officer denied—that is, plaintiff's certified claim of $79,314,795.

b. Defendant Properly Denied Plaintiff's Proposed 2012/2013 Sales Tax Audit

Defendant reports that plaintiff received data from CMS regarding the 2012 calendar year in January 2014, data for the 2013 calendar year in late March 2015, and corrected data for the 2013 calendar year in June 2015. See ECF No. 52 at 38; ECF No. 52-1 at 164-65, 338-42; ECF No. 58-6 at 50. Plaintiff reviewed the data and submitted to defendant a NAIRP, which defendant denied on September 3, 2015, in a short email. See

ECF No. 51-1 at 52; ECF No. 51-9 at 11 (September 3, 2015 denial email). Because plaintiff's analysis of the PDEs, its submission of the NAIRP, and the denial of the NAIRP all occurred in 2015, the parties' contractual relationship was governed by the GSA contract, the task order, and the 2015 SOW. See ECF No. 53 at 21.

Plaintiff argues that the denial of the NAIRP constituted a breach of contract because CMS failed to follow the SOW procedures governing the approval of a NAIRP. See ECF No. 51-1 at 51-53. Defendant responds that CMS's failure to "mechanically follow all of the Appendix E timeline steps, when it already had decided to deny the sales tax NAIRP for legitimate reasons, does not invalidate its decision." ECF No. 52 at 70. The court agrees with defendant. The specific steps outlined in the SOW's "Appendix E" chart detailing the timeline for the approval of a NAIRP provide guidance, but not requirements, for every circumstance. See ECF No. 52 at 70; see also ECF No. 51-5 at 79-80 (setting forth the "New Issues Submission and Approval Process"). The SOW does not require that every NAIRP follow each step in the Appendix E approval process chart. See ECF No. 52 at 62. Instead, it calls for the contractor to "work[] with CMS[] to refine and approve or deny the NAIRP. Once approved the RAC begins audit activities." Id. On review of the SOW procedures, the court finds no contract breach occasioned by the manner in which CMS denied the proposed sales tax audit.[7]

Plaintiff also argues that the denial of the NAIRP itself constituted a contract breach. See ECF No. 51-1 at 54-57. In denying the NAIRP, CMS cites section 1.2.3 of the SOW. ECF No. 51-9 at 11. CMS notes that, pursuant to section 1.2.3, it "consistently ensures RAC efforts are not duplicative," and stated that the "audit issue is currently open and active with another CMS contractor." Id. Plaintiff asserts that because its efforts were not duplicative and because there was no other "open and active" audit for sales tax at the time, defendant breached the contract. ECF No. 51-1 at 54. Defendant responds by offering an extensive explanation of the various sales tax application issues that it was pursuing with another contractor, and insisting that CMS's right to deny a proposed audit issue was absolute and not conditioned on section 1.2.3 of the SOW. See ECF No. 52 at 69-71.

The court again agrees with defendant—the SOW does not condition CMS's ability to deny a NAIRP. Rather, it provides that a submitted NAIRP will either be revised and approved, or denied. See ECF No. 51-5 at 52 ("Once submitted the RAC works with CMS/CPI to refine and approve or deny the NAIRP."). In its denial email, defendant provided an explanation to plaintiff, and provided a fuller explanation in its briefing. See ECF No. 52 at 69-71.

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[7] In its email denying plaintiff's NAIRP, defendant offered ACLR the opportunity to learn more concerning CMS's denial, but plaintiff elected to file a certified claim regarding the proposed 2012/2013 sales tax audit instead. See ECF No. 51-9 at 11.

The terms of the SOW permitted defendant to deny plaintiff's NAIRP. Because defendant's actions were consistent with the terms of the contract, plaintiff's breach of contract claim related to the 2012/2013 sales tax audit cannot stand and must be denied. Defendant's motion for summary judgment must be granted as to this count.

3. Defendant Did Not Breach the Implied Covenant of Good Faith and Fair Dealing

As a matter of basic contract law, "[b]reach of the duty of good faith and fair dealing is a theory of breach of the underlying contract, not a separate cause of action." CFS Int'l Capital Corp. v. United States, 118 Fed. Cl. 694, 701 (2014) (citations omitted). "To state a claim for breach of the implied covenant of good faith and fair dealing, a party . . . generally must allege some kind of 'subterfuge[ ]' or 'evasion[ ],' such as 'evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, [or] interference with or failure to cooperate in the other party's performance.'" Dotcom Assocs. I, LLC v. United States, 112 Fed. Cl. 594, 596 (2013) (citing Restatement (Second) of Contracts § 205 (1981)). Importantly, to maintain both a breach of contract and a breach of good faith and fair dealing claim, plaintiff must show that each claim is founded upon different allegations. See CFS Int'l, 118 Fed. Cl. at 701.

Plaintiff argues that its reasonable expectation of pursuing recovery payments and receiving a "sizeable contingency fee payment" was thwarted by defendant's actions in delaying, denying, and ultimately terminating the audits at issue here. See ECF No. 51-1 at 38-40, 60-61. Plaintiff asserts that defendant's insistence that the audits could not proceed under the PWS, and that the audit data must have been validated, interfered with plaintiff's performance and disregarded plaintiff's consideration under the contract. See id. at 42-46, 62-63. Defendant responds that, because its actions were consistent with its contractual rights, it cannot be found to have breached the duty of good faith and fair dealing. See ECF No. 52 at 64-65. Defendant asserts that it did, in fact, act in good faith and with reason when it terminated each of the audits at issue, and that its decision was not "irrational or unreasonable under the circumstances known to the agency at that time." Id. at 73.

Underlying plaintiff's assertions regarding breach of the duty of good faith and fair dealing are the same facts and circumstances that inform plaintiff's breach of contract assertions. Plaintiff alleges that, by acting as it did to deny and terminate the audits, defendant interfered with plaintiff's ability to perform. See ECF No. 51-1 at 38-46, 60-63. This is merely a breach allegation couched in different language. Not all government action that affects a contract violates the duty of good faith and fair dealing. See Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 829 (Fed. Cir. 2010). Plaintiff's claim that defendant's interference dispensed with its consideration under the contract is not supported by the record and does not rise to the level of an "evasion of the spirit of the bargain." Dotcom Assocs., 112 Fed. Cl. at 596 (internal quotation marks

removed); see also Precision Pine, 596 F.3d at 831 (finding that government action that delays performance does not destroy the contemplated benefit or the parties' reasonable expectations under the contract when the contract does not guarantee uninterrupted performance but expressly contemplates modification, suspension, or cancellation). As already discussed, defendant's denial of the 2012/2013 sales tax audit and terminations of the 2007 and 2010 audits fell within defendant's contemplated contractual right to cancel. See supra. Because plaintiff's good faith and fair dealing claim is premised on the same factual allegations as its breach claims, plaintiff's motion for summary judgment must be dismissed, and defendant is entitled to summary judgment on this count as well.

B. Plaintiff Is Entitled to Compensation for Defendant's Termination for Convenience Pursuant to the GSA Contract

While defendant's actions do not constitute a breach of contract, the termination of the 2007 and 2010 audits effected constructive terminations for convenience. As such, under the terms of the contract, defendant is liable to plaintiff for "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the ordering activity using its standard record keeping system, [that] resulted from the termination." ECF No. 70-1 at 21 (GSA contract).

Plaintiff's current damages claim is for an amount that would "place ACLR in as good a position as ACLR would have been in if CMS had performed in accordance with the Part D RAC Contract or had complied with its duty of good faith and fair dealing." ECF No. 51-1 at 47, 64. However, "[i]n contrast with damages stemming from a breach of contract, the sum due a contractor after a termination for convenience is significantly circumscribed." Praecomm, 78 Fed. Cl. at 12. Plaintiff presented no evidence or argument as to the amount of damages owed upon a termination for convenience.

Defendant argues that even under a termination for convenience scenario, plaintiff has no damages because "it did not put in any significant work on these audits." ECF No. 70 at 20. Defendant further argues that, although plaintiff made a claim to the contracting officer for "$2,668,553 in operating costs and lost profit," plaintiff "does not know what of [that] amount" is related to plaintiff's work on the audits at issue, and "has not made a claim for it, and cannot recover." Id.

The parties have not presented sufficient evidence and argument regarding the percentage of work performed by plaintiff, or its reasonable charges resulting from a termination for convenience, to enable the court to determine the amount of compensation to which plaintiff is entitled. Plaintiff's damages calculations clearly did not contemplate a termination for convenience, and defendant's bare assertion that plaintiff is not entitled to damages is inadequate. The court will, therefore, require additional submissions from the parties on this issue.

IV. Conclusion

For the foregoing reasons:

(1) Plaintiff's motion for partial summary judgment, ECF No. 51, is **DENIED**; and plaintiff's claim for damages in Case No. 16-309C above that which it presented to the contracting officer is **DISMISSED** for lack of jurisdiction;

(2) Defendant's cross-motion for summary judgment, ECF No. 52, is **GRANTED**;

(3) On or before **April 13, 2020**, the parties shall **CONFER** and **FILE** a **notice** attaching the parties' **proposed redacted version** of this opinion, with any protectable information blacked out; and

(4) On or before **April 20, 2020**, the parties shall **CONFER** and **FILE** a **joint status report** proposing next steps for addressing the remaining issues in this matter.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

In the United States Court of Federal Claims

No. 15-767C
(consolidated with No. 16-309C)

(E-Filed: December 15, 2021)[1]

ACLR, LLC, Plaintiff, v. THE UNITED STATES, Defendant.	)	Summary Judgment; RCFC 56; Constructive Termination for Convenience; Damages.

Thomas K. David, Reston, VA, for plaintiff. John A. Bonello, of counsel.

Joseph A. Pixley, Trial Attorney, with whom were Brian M. Boynton, Acting Assistant Attorney General, Martin F. Hockey, Jr., Acting Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Robyn Littman, United States Department of Health and Human Services, Baltimore, MD, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Plaintiff's motion for summary judgment as to its damages made pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC), is currently before the court. See ECF No. 107. Defendant responded to the motion, see ECF No. 115, and plaintiff replied, see ECF No. 119. The motion is now fully briefed, and ripe for

[1] This opinion and order issued under seal on November 19, 2021. See ECF No. 120. The parties were invited to identify proprietary or confidential material subject to deletion on the basis that the material is protected/privileged. No redactions were proposed by the parties. See ECF No. 124. Thus, the sealed and this public version of this opinion and order are identical, except for the publication date and this footnote.

decision. The parties did not request oral argument, and the court deems such argument unnecessary.

The court has considered all of the parties' arguments and addresses the issues that are pertinent to the court's ruling in this opinion. For the following reasons, plaintiff's motion for summary judgment is **DENIED**.

I. Background

A. Contract Background[2]

To identify and recover improper Medicare Part D payments, the Centers for Medicare & Medicaid Services (CMS), a component of the United States Department of Health and Human Services (HHS), entered into a task order with plaintiff pursuant to a General Services Administration (GSA) federal supply schedule contract for "recovery audit" services. See ECF No. 107-2 at 5 (plaintiff's memorandum in support of its motion for summary judgment); see also ECF No. 51-3 at 154 (task order). Pursuant to the task order, the attached performance work statement, and later the statement of work, plaintiff was to conduct recovery audits for particular calendar years. See ECF No. 51-3 at 152-54. Plaintiff conducted seven audits for which it was paid contingency fees. See ECF No. 115 at 12; ECF No. 119 at 7-8. The audits at issue here, which the court determined were constructively terminated, are the 2007 and 2010 duplicate payment audits. See ECF No. 76 at 11-12 (March 23, 2020 opinion, reported at ACLR, LLC v. United States, 147 Fed. Cl. 548 (2020)).

The task order stated that plaintiff was to be paid a firm, fixed-price contingency fee for audit work detailed in a performance work statement. See ECF No. 51-3 at 152-54. Any payments to plaintiff were contingent upon the recovery of improper payments from plan sponsors and were to be fixed as a percentage of such recoveries. See id. at 155. Federal Acquisition Regulation (FAR) provision 52.212-4(l), addressing termination for the government's convenience, was included in the task order pursuant to the federal supply schedule contract. See id. at 154 (incorporating the terms of the GSA federal supply schedule contract); ECF No. 70-1 at 21 (GSA federal supply schedule contract incorporating the language of FAR § 52.212-4(l)). Under the contract's termination for convenience clause, should the agency elect to terminate the contract for

[2] The court detailed the extensive procedural and factual background of this case in its opinion on the parties' cross-motions for summary judgment, and will, therefore, only reiterate the facts necessary to this opinion. See ECF No. 76 (March 23, 2020 opinion, reported at ACLR, LLC v. United States, 147 Fed. Cl. 548 (2020)). The court notes that the contract documents associated with this case were not attached to the motion currently before the court; therefore, the court cites to the documents filed with the parties' prior cross-motions for partial summary judgment.

convenience, plaintiff would be owed "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor [could] demonstrate to the satisfaction of the ordering [agency] using its standard record keeping system, [to] have resulted from the termination."[3] Id.

B. Procedural History

Plaintiff filed this Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, suit on July 22, 2015, contesting the denial of its certified claim for $28,506,591, see ECF No. 1 (complaint), associated with two duplicate payment audits—the 2007 and 2010 audits at issue here—and filed a second suit on March 9, 2016, contesting the denial of its second certified claim for $79,314,795, see Case No. 16-309, ECF No. 1 (complaint), associated with a separate audit. Following discovery, the two cases were consolidated. See ECF No. 48 (order). The parties filed cross-motions for partial summary judgment in 2018. See ECF No. 51 (plaintiff's motion), ECF No. 52 (defendant's cross-motion).

On March 23, 2020, this court issued its opinion on the motions and found that defendant "effected constructive terminations for convenience" of plaintiff's 2007 and 2010 audits.[4] ECF No. 76 at 16. Consequently, the court held that plaintiff is entitled to damages amounting to "'a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the ordering activity using its standard record keeping system, [that] resulted from the termination.'" Id. (alteration in original) (citing ECF No. 70-1 at 21 (GSA contract)).

Because the parties had not presented "sufficient evidence and argument regarding the percentage of work performed by plaintiff, or its reasonable charges resulting from a termination for convenience," the court required the parties to confer and make additional submissions on the issue. Id. The parties agreed that the plaintiff should submit a termination for convenience settlement proposal to the agency for approval and requested

[3] The court notes the language of the termination for convenience provision incorporated in plaintiff's contract differs slightly from that in 48 C.F.R. § 52.212-4(l), but the differences are de minimus and do not change the meaning of the provision. The court will therefore refer to FAR § 52.212-4(l) throughout the opinion interchangeably with the provision in the contract.

[4] The court also found that defendant had not breached the contract or its duty of good faith and fair dealing regarding the audit about which plaintiff filed the second suit. See ECF No. 76 at 13-16. The court therefore denied plaintiff's motion for summary judgment as to the claim in case number 16-309 and granted defendant's cross-motion on the same. See id. at 14, 16. Although the cases remain consolidated, because the court granted defendant's motion for summary judgment, no claims are still pending in plaintiff's second suit, case number 16-309. The court will therefore deconsolidate this matter, and will issue judgment in favor of defendant in case no. 16-309 in due course, pursuant to the court's March 23, 2020 opinion.

that the court remand the case to CMS, which the court did on April 21, 2020. See ECF No. 82 (remand order).

Plaintiff submitted a termination for convenience settlement proposal to the agency requesting $10,418,948. See ECF No. 101-2 at 4 (revised settlement proposal). The agency denied plaintiff's claim related to the 2007 audit in its entirety and denied all but $157,318 for the 2010 audit. See ECF No. 98 at 9, 12 (CMS decision on remand). The court then lifted the stay in this matter, see ECF No. 100 (order), and plaintiff filed an amended complaint, see ECF No. 101. Therein, plaintiff seeks termination for convenience damages of "at least $5,923,754 plus interest and additional legal fees incurred in this proceeding," which was, according to plaintiff, an amount "based upon actual costs incurred." Id. at 4.

C. Plaintiff's Damages Claim

Plaintiff has now filed a motion for summary judgment arguing that it is entitled to a total of $6,095,118.35 in termination for convenience damages "through December 31, 2020." ECF No. 107-2 at 22. According to plaintiff, because the agency did not call its termination of the audits a termination for convenience at the time, plaintiff "continued to incur costs under the PWS and rightly did so to comply with its contractual obligations with the belief that it had a continuing contractual obligation with CMS" until March 23, 2020, when the court found that the termination was "'constructively effected.'" Id. at 11-12. Plaintiff alleges that "100% of its costs during the period of January 13, 2011 [through] January 31, 2012" are "reasonable charges resulting from the termination for convenience" of the 2007 audit because "this was the only audit conducted during that time period." Id. at 12. Likewise, plaintiff argues that the time period for its "work efforts" on the 2010 audit was January 2012 to April 24, 2015. Id. at 18. Plaintiff acknowledges, however, that it "was also conducting additional audits for CMS" during that time period. Id.

For the 2007 audit, plaintiff argues that it is entitled to six types of damages: "personnel costs, managing principal costs, general administrative costs, rental space costs, loan interest, and reasonable profit." Id. at 13. For the 2010 audit, plaintiff seeks $923,558.62 of personnel costs. Id. at 18. Plaintiff also seeks settlement fees, including its legal fees and "its principal[']s time and effort in this lawsuit," id., and interest on its claim pursuant to the CDA, id. at 21. In support of its claims, plaintiff attached an affidavit from Christopher Mucke, plaintiff's managing principal, and twenty-two exhibits containing plaintiff's bank statements, payroll documentation, lease documentation, loan documentation, various cost summaries and calculations, and legal expense documentation. See ECF No. 107-3 through 107-13 (exhibits); 107-3 at 1 (appendix table of contents).

II. Legal Standards

According to RCFC 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted).

A genuine dispute of material fact is one that could "affect the outcome" of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The moving party . . . need not produce evidence showing the absence of a genuine issue of material fact but rather may discharge its burden by showing the court that there is an absence of evidence to support the nonmoving party's case." Dairyland Power, 16 F.3d at 1202 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). A summary judgment motion is properly granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. Celotex, 477 U.S. at 324.

The Supreme Court of the United States has instructed that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. A nonmovant will not defeat a motion for summary judgment "unless there is sufficient evidence favoring the nonmoving party for [the fact-finder] to return a verdict for that party." Id. at 249 (citation omitted). "A nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law." Dairyland Power, 16 F.3d at 1202 (citing Celotex, 477 U.S. at 323).

III. Analysis

A. FAR § 52.212-4(l) Governs Plaintiff's Damages Claim

As an initial matter, defendant argues that plaintiff's argument is "fatally flawed" and its motion should be denied because plaintiff based its request for damages on the wrong FAR provision. ECF No. 115 at 19. Throughout its motion, plaintiff cites to 48 C.F.R. § 52.249-2(g)—the FAR termination for convenience provision for fixed-price, non-commercial item contracts. See, e.g., ECF No. 107-2 at 13-17. Plaintiff's contract, however, contains FAR § 52.212-4(l)—the termination for convenience provision for commercial item contracts. See ECF No. 76 at 4 (citing ECF No. 70-1 at 21 (GSA federal supply schedule contract)). Plaintiff explains that, because of the "lack of precedent on termination for convenience damages for contingency fee contracts," it

"utilized the methodology of FAR § 52.249-2 to determine the costs associated with the terminations." ECF No. 119 at 12.

Although neither party cites to—and the court could not locate—binding precedent involving termination for convenience damages on a contingency fee contract, there is precedent for applying FAR § 52.212-4(l) when plaintiff is not due any payment under the contract.[5] See, e.g., SWR, Inc., ABSCA No. 56708, 15-1 BCA ¶ 35,832; First Division Design, LLC, ASBCA No. 60049, 18-1 BCA ¶ 37,201. In SWR, the plaintiff had a requirements contract in which services were to be ordered by delivery orders. See SWR, 15-1 BCA ¶ 35,832 at 175,225. The Board noted that the agency never issued any delivery orders, so the plaintiff never performed any services for which the plaintiff could recover under the contract price prong of FAR § 52.212-4(l). See id. The Board went on, however, to award the plaintiff damages under the second prong of the provision, for "reasonable charges" resulting from the termination. Id. The court finds persuasive the reasoning and analysis of the Board in SWR that FAR § 52.212-4(l)—the provision contained in plaintiff's contract—may be applied when plaintiff is ultimately due no payment under the contract.

The court does not agree, however, with defendant that plaintiff's citation to FAR § 52.249-2(g) is fatal to its argument. Although the court will not apply that provision in its analysis of plaintiff's damages claims, the court does not perceive plaintiff's argument to be premised on application of FAR § 52.249-2(g) such that it must fail if the provision does not apply. Thus, the court will examine plaintiff's damages claim using the framework of FAR § 52.212-4(l).

FAR § 52.212-4(l) provides that, upon termination for convenience, "the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination." 48 C.F.R. § 52.212-4(l). The purpose of this payment is to "fairly compensate the contractor and to make the contractor whole for the costs incurred in connection with the terminated work." Nicon, Inc. v. United States, 331 F.3d 878, 885 (Fed. Cir. 2003) (citation omitted); see also Jacobs Eng'g Grp. v. United States, 434 F.3d 1378, 1381 (Fed. Cir. 2006) (quoting Kasler Elec. Co., DOTCAB 1425, 84-2 BCA ¶ 17,374) ("A contractor is not supposed to suffer as the result of a termination for convenience of the Government, nor to underwrite the Government's decision to terminate.").

[5] While it is not binding precedent, the court finds the reasoning of the Armed Services Board of Contract Appeals persuasive here, and "carefully considers the Board's expertise in interpreting government contracts." Grumman Aerospace Corp. v. Wynne, 497 F.3d 1350, 1356 (Fed. Cir. 2007).

The termination for convenience provision clearly provides for the contractor to be paid for the "percentage of the work performed prior to the notice of termination." FAR § 52.212-4(l). It also provides for payment of "reasonable charges" resulting from the termination. Id. The contract appeals boards have construed "reasonable charges" to be costs separate from those charges associated directly with the completed work, and to refer to such things as "start-up costs; unrecovered running expense; preventive maintenance; settlement charges; and other charges that are normally paid pursuant to a long form termination for convenience provision to fairly compensate a contractor." SWR, 15-1 BCA ¶ 35,832 at 175,223 (citing cases construing the word "charges"). Thus, the boards have found "three general categories of recovery," including: "(1) [t]he price of work performed under the contract prior to a notice of termination . . . ; (2) settlement expenses . . . ; and (3) . . . costs resulting from the termination." Dellew Corp., ASBCA No. 58538, 15-1 BCA ¶ 35,975 at 175,783; accord Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 662 (D. Md. 2011) (holding that FAR § 52.212-4(l) entitles a contractor to "(1) payment of 'a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination'; and (2) a payment as compensation for settlement costs or costs reasonably incurred in anticipation of contract performance, provided such costs are not adequately reflected as a percentage of the work performed, and provided such costs could not have been reasonably avoided") (emphasis in original). The court finds the reasoning and conclusions of the boards to be persuasive and will apply this framework in analyzing plaintiff's claim.

B. Plaintiff Is Not Entitled to Compensation for a Percentage of the Contract Price, but May Be Able to Recover Its Reasonable Charges

The first category of recovery—the work performed prior to termination—is "'calculated based on contract price, i.e., as a percentage of contract price reflecting percentage of work performed prior to termination.'" Dellew, 15-1 BCA ¶ 35,975 at 175,783 (quoting SWR, 15-1 BCA ¶ 35,832 at 175,224). Where there is no payment due pursuant to the contract, as in the case of a requirements contract where no orders were made or where work was not authorized under the contract, the contractor cannot recover under the first category. See id.; SWR, 15-1 BCA ¶ 35,832 at 175,225.

Defendant argues that plaintiff has failed to present evidence of its contract price, the total work to be performed, the percentage of work actually performed, and the date of termination of the 2007 and 2010 audits. See ECF No. 115 at 26. Thus, according to defendant, plaintiff is entitled to no recovery under the first category of compensation. See id. at 27. Citing Red River Holdings, defendant further argues that because the first category is "controlling," and the "bulk" of plaintiff's claimed costs "would necessarily be captured in the first prong" of the termination provision, plaintiff cannot recover under the reasonable charges prong. Id. at 27 (citing Red River Holdings, 802 F. Supp. 2d at 662).

The court agrees with defendant that plaintiff cannot recover under the first category of compensation. The court previously held that the agency terminated plaintiff's 2007 and 2010 audits for convenience after plaintiff had reviewed the data for each and presented defendant with its findings. See ECF No. 76 at 11. Thus, plaintiff had performed some portion of the work under the contract. However, plaintiff's contract price was to be paid based on a contingency fee—a portion of plaintiff's recovery of any improper payments. See id. at 4-5. Because plaintiff's work had not yet reached the stage of recovering improper payments, but was terminated at the data analysis stage, it did not collect any fees. See id. at 5-7. Therefore, although plaintiff had performed some of the work under the contract, the amount to which plaintiff was technically entitled under the terms of the contract remained at zero. The court cannot, then, pursuant to the plain language of the FAR provision, award plaintiff compensation under the first category of recovery—any percentage of zero is zero. See Dellew, 15-1 BCA ¶ 35,975 at 175,783; SWR, 15-1 BCA ¶ 35,832 at 175,225.

Plaintiff is not precluded, however, from recovering its reasonable charges and settlement costs. The reasonable charges category is designed to capture those costs that "are not adequately reflected as a percentage of the work performed." Red River Holdings, 802 F. Supp. 2d at 662 (emphasis in original); see also SWR, 15-1 BCA ¶ 35,832 at 175,223. This is in keeping with the well-established principle that the purpose of compensation for a termination for convenience is to "fairly compensate the contractor and to make the contractor whole for the costs incurred in connection with the terminated work." Nicon, 331 F.3d at 885.

C. Genuine Disputes of Material Fact Remain Regarding Plaintiff's Claims for Its Reasonable Charges

To recover its reasonable charges, plaintiff bears the burden of "proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting Willems Indus., Inc. v. United States, 295 F.2d 811, 831 (Ct. Cl. 1961)). The plain language of the FAR provision also requires that plaintiff prove its reasonable charges "using its standard record keeping system." FAR § 52.212-4(l).

Defendant argues generally that plaintiff failed to carry its burden. See ECF No. 115 at 28-40. According to defendant, plaintiff's claimed charges are unreasonable. See id. at 28. This is so, defendant contends, because plaintiff claims more than five million dollars in termination for convenience damages for two audits, while it received just over three million dollars total in contingency fees under the contract for seven completed audits. See id. Specifically, defendant argues for each of plaintiff's claimed costs that plaintiff requests far more than is reasonable given the time frame of the contracts, and that plaintiff fails to prove its charges using its standard record keeping system as

required by FAR § 52.212-4(l). See id. at 28-40. The court will address each of plaintiff's requests in turn.

1. Personnel Costs

i. 2007 Audit

Plaintiff first claims that it is entitled to its payroll costs of $408,462.83 for the full year of 2011. See ECF No. 107-2 at 13. In support of the claimed amount, plaintiff cites to the affidavit of its managing principal, Mr. Mucke, and a payroll summary attached to Mr. Mucke's affidavit as Exhibit B. See id. (citing ECF No. 107-3 at 5, 60-66).

Plaintiff also argues that it is entitled to its "managing principal costs" for Mr. Mucke's time working as the project director, as defined by the contract. See id. at 13-14. Plaintiff argues without citation that "[u]nder a fixed-fee or cost plus contract, Mr. Mucke's work would be a recoverable cost," and "[i]f Mr. Mucke had not devoted his time and attention to the [2007 audit], he would have devoted his time and attention to other business efforts that would have generated revenue for [plaintiff]." Id. at 14. Noting that, because he is an owner and not an employee, Mr. Mucke does not receive a salary, and that he did not specifically track his hours worked on the contract, plaintiff states that "[t]o determine costs associated with his efforts, Mr. Mucke estimated the number of hours he worked during the relevant time period and then multiplied those hours by his contracted GSA schedule rate" to arrive at a total of $645,730.[6] Id. (citing ECF No. 107-3 at 5-6; ECF No. 107-5).

Defendant responds by arguing that the period of performance for the 2007 audit began on August 25, 2011, "when CMS asked [plaintiff] to draft a proposed audit plan," and ran to November 30, 2011, "when CMS 'killed the review.'" ECF No. 115 at 29 (citations omitted). According to defendant, plaintiff's personnel costs include the full year of 2011 for eight employees and Mr. Mucke as managing principal. See id. at 29-33. Further, defendant contends, plaintiff's calculation of personnel costs is not based on data from its standard record keeping system, but is "ginned up 'summaries'" and "over 500 pages of year-end W-2s and payroll reports" that are not specific to the 2007 audit. Id. at 30. Likewise, plaintiff's managing principal costs, according to defendant, are not supported by "any contemporaneous documentation from [plaintiff's] 'standard record keeping system,'" and rely instead on "the self-serving testimony of Mr. Mucke of the 'estimated' hour[s] he worked." Id. at 32 (citations omitted) (emphasis in original).

Plaintiff replies that the time period for its personnel costs is reasonable because the 2007 audit was the only audit it performed in 2011, and it was "developing secure

[6] Plaintiff also, contradictorily, stated that its managing principal costs totaled $654,064. See ECF No. 107-2 at 13.

systems, developing audit and payment calculation processes, communication documents, and training materials for Part D contractors that [were] all related to the [2007 audit]." ECF No. 119 at 16. Further, plaintiff argues, it was contractually required to retain its "key personnel" until January 31, 2012, when the key personnel requirement in its contract was eliminated. See id. Plaintiff also contends that the estimates and summaries it provided were appropriate because it had no "other mechanism by which [plaintiff] could prove its managing principal's work efforts." Id. at 15. Plaintiff provided the summaries rather than "the over 1,958 email communications and 161,877 documents analyzed to make these estimates." Id.

Plaintiff's personnel costs fall under the reasonable charges category of recovery, and plaintiff is entitled to recover those personnel costs for the period of performance of the 2007 audit that it can prove using its standard record keeping system. See SWR, 15-1 BCA ¶ 35,832 at 175,228. However, the parties dispute what the relevant period of performance was: plaintiff argues it was the time from the award of the task order to termination of the 2007 audit—January 13, 2011 to November 30, 2011—and defendant argues it was from the time the agency asked plaintiff to begin developing a process for review to termination—August 2011 to November 30, 2011. See ECF No. 119 at 6, 16; ECF No. 115 at 29. The only evidence plaintiff presents in support of its claim that the entirety of its work in 2011 was directed at the 2007 audit is Mr. Mucke's affidavit. See ECF No. 119 at 16 (citing ECF No. 107-3 at 4). Defendant disputes plaintiff's assertion, stating that plaintiff did not demonstrate that its "'infrastructure' was used solely 'in connection with' the [2007 audit] as opposed to the 20 total audits that [plaintiff] participated in." ECF No. 115-2 at 2 (quoting ECF No. 107-1 at 1 (plaintiff's statement of uncontroverted facts)). According to defendant, plaintiff did not begin work on the 2007 audit until the agency requested that plaintiff draft a proposed audit plan. See ECF No. 115 at 29 (citing ECF No. 54-2 at 21 (email to plaintiff requesting that it draft an audit process)).

In the court's view, the agency did not award plaintiff the task order specifically to conduct the 2007 audit—it awarded plaintiff the task order to conduct audits for multiple years. See ECF No. 51-3 at 182-93 (PWS). Plaintiff's bare statement that it expended its efforts in 2011 solely for the 2007 audit, without more, is insufficient to prove its claim. See SWR, 15-1 BCA ¶ 35,832 at 175,230 ("An unsupported claim document that is submitted by a party seeking money is not proof of the claim that the party asserts.") (citation omitted). Without evidence from plaintiff's "standard record keeping system" connecting the claimed personnel costs to the 2007 audit, the court cannot find that no dispute of material fact exists here. 48 C.F.R. § 52.212-4(l); see also Anderson, 477 U.S. at 248.

Likewise, without support from plaintiff's standard record keeping system for plaintiff's managing principal costs, the court cannot award plaintiff summary judgment on this issue. "[T]estimony of costs incurred without support from the contractor's

standard record keeping system, is not sufficient to find recoverable costs." First Division Design, 18-1 BCA ¶ 37,201 at 181,102 (citing SWR, 15-1 BCA ¶ 35,832 at 175,230). Mr. Mucke's affidavit, without more, therefore, is insufficient to support plaintiff's claim for managing principal costs. Emails demonstrating that Mr. Mucke worked on the contract are also insufficient—they do not reflect hours recorded in a standard record keeping system. See id. at 181,103 (denying a claim for personnel compensation because the employee did not take a salary and the plaintiff could not demonstrate the hours he worked in a standard record keeping system). Because "a party seeking summary judgment always bears the initial responsibility of informing the [ ] court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact," and because plaintiff has failed to properly support its motion here, the court must deny plaintiff's motion on the issue of personnel costs for the 2007 audit. Celotex, 477 U.S. at 323.

ii. 2010 Audit

Plaintiff argues that it is entitled to $923,558.62 for the 2010 audit, based on "the number of hours that [plaintiff's] personnel worked" on the audit. ECF No. 107-2 at 18. Plaintiff states that its "personnel did not maintain time sheets that attributed work to a particular project," so Mr. Mucke "analyzed over 1,958 email communications and 161,877 documents that [plaintiff's] personnel had compiled, analyzed, and reviewed" for the 2010 audit to estimate that plaintiff's personnel had worked 4,376 hours on the audit, which he then multiplied by "each person's corresponding GSA schedule rate." Id. at 18-19 (citing ECF No. 107-3 at 9; ECF No. 107-11 at 1-6).

Defendant once again argues that plaintiff failed to support its claims with "any contemporaneous documentation" from its standard record keeping system. ECF No. 115 at 39. Defendant notes that plaintiff's only support for its claim is Mr. Mucke's affidavit in which he "'estimated'" the hours his employees worked by analyzing documents, which plaintiff did not attach to the affidavit. Id. Defendant further argues that plaintiff's use of the GSA schedule rate is inappropriate because it "reflects a 'price,' not a cost, and includes wages, benefits, overhead and profit." Id. at 40 (citation omitted). Plaintiff replies to this point by noting that its contract was a GSA schedule contract, so its use of the rate was appropriate. See ECF No. 119 at 20.

The court agrees with defendant that plaintiff's claim fails for lack of support. "[T]estimony of costs incurred without support from the contractor's standard record keeping system, is not sufficient to find recoverable costs." First Division Design, 18-1 BCA ¶ 37,201 at 181,102 (citing SWR, 15-1 BCA ¶ 35,832 at 175,230). Mr. Mucke's affidavit, without more, therefore, is insufficient to support plaintiff's claim for personnel costs. Emails and documents demonstrating the employees' work on the contract are likewise insufficient—they do not reflect hours recorded in a standard record keeping

system. See id. (denying a claim for personnel compensation because the plaintiff could not demonstrate the hours worked in a standard record keeping system). Because "a party seeking summary judgment always bears the initial responsibility of informing the [ ] court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact," and because plaintiff has failed to properly support its motion here, the court must deny plaintiff's motion on the issue of personnel costs for the 2010 audit. Celotex, 477 U.S. at 323.

2. General and Administrative Costs[7]

Citing 48 C.F.R. § 52.249-2(g)—the FAR termination for convenience provision for fixed-price, non-commercial item contracts—plaintiff claims that it is entitled to $505,569.23 in general and administrative (G&A) costs for the 2007 audit. See ECF No. 107-2 at 14-15. According to plaintiff, these costs include "travel, information technology services, computer equipment, professional services, and other miscellaneous office expense from the period January 2011 through January 2012." Id. at 15 (citing ECF No. 107-3 at 8; ECF No. 107-8; ECF No. 107-9; ECF No. 107-10).

Defendant responds that plaintiff's claimed costs are "not from its standard record keeping system" but are again summaries and a "data dump" of check registers and invoices that are not linked to the 2007 audit. ECF No. 115 at 33-34. Defendant argues that plaintiff bears the burden of proving its damages with "clear records from its standard record keeping system," and it has not met that burden here. Id. at 34. Plaintiff does not reply specifically about its G&A costs, but argues generally that it "has provided income statements, check registers, and other financial reports generated from its standard record keeping system, QuickBooks." ECF No. 119 at 14.

G&A charges may be appropriate charges for compensation pursuant to FAR § 52.212-4(l). See SWR, 15-1 BCA ¶ 35,832 at 175,231. In SWR, the Board noted that in performing a contract, a contractor incurs both direct and indirect costs—costs that can be attributed to a specific contract and those, such as "home office overhead," that cannot—and concluded that indirect costs are appropriate for inclusion as reasonable charges. Id. (citing Nicon, 331 F.3d at 878). The charges, however, must be supported by documentation and an explanation of how they are allocated to the contract at issue. See First Division Design, 18-1 BCA ¶ 37,201 at 181,104.

[7] Plaintiff's only claim pertaining to the 2010 audit appears to be its personnel costs related to that audit. Thus, the remaining costs addressed in this opinion all relate only to the 2007 audit.

Here, in support of its claim, plaintiff provided a spreadsheet listing its claimed G&A charges and 464 pages of invoices, but failed to provide any explanation connecting the charges to the 2007 audit. ECF No. 107-2 at 15 (citing ECF No. 107-8; ECF No. 107-9). The court also notes that plaintiff included charges for "Travel," "Contractor Wages," "Misc G&A Exp," and "Legal Fees," in addition to the more standard G&A charges for "IT Services" and "Equipment & Fixtures" in its G&A documentation. ECF No. 107-8 at 3-5. Because plaintiff failed to provide any "explanation for how these indirect charges are allocated" to the 2007 audit, the court has "insufficient information to ascertain how these charges are recoverable as fair compensation" for the 2007 audit. First Division Design, 18-1 BCA ¶ 37,201 at 181,104. Thus, plaintiff has failed to properly support its motion, and the court cannot grant plaintiff's motion for summary judgment on the issue. See Celotex, 477 U.S. at 323.

3. Office Lease Costs

Plaintiff argues that it is entitled to its office lease costs of $295,775.80 for the 2007 audit. See ECF No. 107-2 at 15 (citing 48 C.F.R. § 52.249-2(g)(2)(i)). According to plaintiff, to house the employees needed for the 2007 audit, it "executed a multiyear lease for expanded office space" in April 2011, with a monthly lease cost of $9,200 and a monthly electricity cost of $1,300. Id. In 2013, plaintiff moved to a smaller office and executed a sublease of its larger office, and in 2016, the lease expired and plaintiff once again moved to a smaller space. See id. at 15-16. Plaintiff calculated its lease costs based on its various leases, which it attached to its motion. See ECF No. 107-2 at 15-16 (citing ECF No. 107-6).

Defendant responds that plaintiff failed to demonstrate its claimed lease costs were directly and singly tied to the 2007 audit. See ECF No. 115 at 35. Defendant argues that plaintiff "cannot demonstrate that at the time it signed the five-year lease, it reasonably expected the 2007 audit would require five years to perform," nor can it tie the full amount of the lease costs to the term of 2007 audit. Id. According to defendant, the first five months of the lease were rent-free and were followed by a reduced lease rate for ten additional months, making the cost of the lease for the month of November 2011—the month plaintiff worked on the 2011 audit—only $4,957.88. See id. (citing ECF No. 107-6 at 323 (lease)).

Plaintiff replies that before it signed the office lease, defendant "informed [plaintiff] that 100% of its time would be dedicated to conducting CMS audits and recovering overpayments," and it signed the lease to "meet the terms of its originally proposed PWS that contemplated '20-25 audit teams.'" ECF No. 119 at 19 (quoting without citation). Plaintiff further states that during the course of the contract, defendant "only permitted [plaintiff] to perform three audits covering seven different time periods." Id. Plaintiff therefore argues that its "'incurrence of an obligation to pay'" is sufficient to permit it to recover. Id. (quoting SWR, 15-1 BCA ¶ 35,832 at 175,226).

While plaintiff's lease costs may be reasonable charges compensable under FAR § 52.212-4(l), in the court's view, plaintiff has not provided sufficient evidence from its standard record keeping system to sustain its claimed costs. As defendant points out, and plaintiff confirms, plaintiff signed the lease to "meet the terms" of the PWS, which was not specific to the 2007 audit. ECF No. 119 at 19. In addition to the parties' dispute over the term of the 2007 audit—a material fact—plaintiff failed to explain how its lease costs are allocated to the 2007 audit. Thus, because there remain material facts in dispute, and because plaintiff failed to properly support its motion, the court cannot grant plaintiff's motion for summary judgment on the issue of its office lease costs for the 2007 audit. See Celotex, 477 U.S. at 323.

4. Loan Interest Costs

According to plaintiff, it executed a "business loan agreement" for $600,000 to fund its work on the contract and the funds were "used solely to pay for items associated with completing all activities necessary to conduct" the 2007 audit. ECF No. 107-2 at 16. Plaintiff states that the loan's maturity date was extended due to its inability to make payments "as a result of CMS's delays in executing" the contract. Id. Plaintiff asserts that it paid $176,426.46 in interest on the loan to which it claims it is entitled. See id. (citing 48 C.F.R. § 52.249-2(g)(2)(i); ECF No. 107-3 at 8; ECF No. 107-7 (exhibit containing loan cost summary, bank statements, and loan agreement)).

Defendant responds that plaintiff "has no legal basis for this demand." ECF No. 115 at 36. Defendant points out that there is no provision for recovery of interest on borrowed money, and the FAR establishes that interest on borrowings is not an allowable cost. See id. (citing FAR § 31.205-20).

Plaintiff replies that FAR § 31.205-20 only applies to prohibit interest on borrowings "'paid in connection with preparing prospectuses, and costs of preparing and issuing stock rights,'" and notes that a contractor may recover interest on funds borrowed because of the government's delay in payment. ECF No. 119 at 18 (quoting FAR § 31.205-20 and citing Gevyn Constr. Co. v. United States, 827 F.2d 752, 754 (Fed. Cir. 1987)).

The court agrees with defendant that plaintiff has no legal basis to request interest on a loan it executed to fund its work on the contract. Plaintiff's characterization of FAR § 31.205-20 is incorrect—that provision states, "[i]nterest on borrowings (however represented), bond discounts, costs of financing and refinancing capital (net worth plus long-term liabilities), legal and professional fees paid in connection with preparing prospectuses, and costs of preparing and issuing stock rights are unallowable." 48 C.F.R. § 31.205-20. In context, it is clear that the qualifiers plaintiff asserts exist on the payment of interest do not actually apply. The prohibition on the payment of interest on borrowings stands alone in this list; it is not qualified in any way. See id. Similarly, plaintiff has not demonstrated that it borrowed the funds and paid interest because of a

delay in payment by defendant. Plaintiff states that it "executed a business loan agreement . . . to fund [plantiff's] work under the Part D RAC." ECF No. 107-2 at 16. "The cost of financing performance of a contract is unallowable." First Division Design, 18-1 BCA ¶ 37,201 at 181,103 (citing FAR § 31.205-20). Plaintiff's claim for loan interest must fail, and its motion for summary judgment must be denied on this issue.

5. Reasonable Profit

Citing 48 C.F.R. § 52.249-2(g)(2)(iii), plaintiff argues that it should be awarded reasonable profits of $304,885.03 on the contract. See ECF No. 107-2 at 17. Plaintiff argues that, "[g]iven the magnitude of potential improper payments that [plaintiff] could have collected" if it had performed the audit, a profit rate of fifteen percent is "completely reasonable." Id. Plaintiff calculated its profit amount by multiplying its costs by fifteen percent, with the exception of the managing principal costs because the "GSA rate already contained a profit component." Id. at 17 & n.1.

Defendant responds that plaintiff is "seeking anticipatory profits, which are not recoverable in a termination for convenience action." ECF No. 115 at 36 (citing Praecomm, Inc. v. United States, 78 Fed. Cl. 5, 11 (2007)). Defendant argues that plaintiff bases its costs on "the entirety of its payroll, Livonia office lease, loan interest, G&A, and 'settlement legal fee' expenses," "without any connection to 'work performed' on the terminated audits." Id. at 38. Defendant further asserts that, even if plaintiff is entitled to profits, its claim is "based upon pure speculation," and its profit rate of fifteen percent "contravenes the FAR." Id.

Plaintiff replies that its use of a fifteen percent profit rate is reasonable because the contracting officer "agreed to apply a profit rate of 7.5% to [plaintiff's] costs." ECF No. 119 at 19. Plaintiff further argues that its profits are not anticipatory because they are based on its costs, rather than on the "potential recoveries under the" 2007 and 2010 audits. Id. at 19-20.

Plaintiff is entitled to receive profits on "charges it recovers as part of its fair compensation, except for settlement expense and G&A indirect cost, which do not represent costs of preparations made for the terminated work." SWR, 15-1 BCA ¶ 35,832 at 175,233. Plaintiff, however, in explaining the reasonableness of its profit rate only noted that its contingency fees ranged from 7.5% to 20%, and argued that "[g]iven the magnitude of potential improper payments that [plaintiff] could have collected," its fifteen percent rate is "completely reasonable." ECF No. 107-2 at 17. This explanation is, in the court's view, insufficient to justify the reasonableness of plaintiff's profit rate. And, defendant vigorously disputes the reasonableness of that rate. See ECF No. 115 at 36-39. Thus, a reasonable rate of profit is a material fact that remains in dispute in this case, and the court cannot grant plaintiff's motion for summary judgment on this issue.

D. Genuine Disputes of Material Fact Remain Regarding Plaintiff's Claims for Compensation for Its Settlement Costs

Settlement costs are those "incurred by the contractor for the preparation and presentation of settlement claims" to the contracting officer. Dellew, 15-1 BCA ¶ 35,975 at 175,783. This includes reasonable attorneys' fees for the preparation of a settlement proposal and negotiating the amicable resolution of the charges presented in the proposal. See SWR, 15-1 BCA ¶ 35,832 at 175,231 (citing Dairy Sales Corp. v. United States, 593 F.2d 1002, 1005 (Ct. Cl. 1979)). "[N]o claim may be made for fees incurred in the preparation of claims which are not compensable." Dairy Sales, 593 F.2d at 1006.

Plaintiff argues, citing to 48 C.F.R. § 52.249-2(g)(3)(i), that it is entitled to its settlement costs, including its "legal fees as well as its principal[']s time and effort in this lawsuit that preceded the [c]ourt's March 23, 2020 Opinion and Order." ECF No. 107-2 at 19. Plaintiff contends that its "legal fees and time and effort" were "necessary precursors" to the agency taking the position that there was a termination for convenience and to plaintiff "obtaining the costs" for the 2007 and 2010 audits. Id. at 20.

Plaintiff separates its costs into two phases—prior to the court's March 2020 opinion and after the March 2020 opinion. See id. at 20-21. Prior to the March 2020 opinion, plaintiff alleges that it paid $617,307.56 to its law firm. See id. at 20 (citing ECF No. 107-12 (attorney invoices)). Plaintiff also asserts that its "internal work effort," consisting of 5,481 hours of Mr. Mucke's review of email and legal communications and "other documentation reviewed and revised by [Mr. Mucke] and [plaintiff's] personnel," cost $1,200,133.39. Id. at 20, 21 (citing ECF No. 107-11 at 62-65 (settlement expenses summary)).

Plaintiff further seeks $183,433.83 for settlement costs between March 23, 2020 and December 31, 2020, noting that it "also seeks settlement costs for activity after December 31, 2020, but does not yet have a final settlement cost amount that it can calculate." Id. at 21 n.2. Similar to the costs identified prior to March 2020, plaintiff asserts that it paid its attorneys $29,025 and tracked 678 hours its employees spent that, according to plaintiff, cost $154,408.83. Id.

Defendant responds that plaintiff has no legal basis on which to request its legal fees. See ECF No. 115 at 40-41. Defendant notes that "the cost to prosecute claims against the United States is not an allowable cost." Id. at 40 (citing FAR § 31.205-47(f)(1)). Defendant argues that "[a]bsent a statute . . . or an express contractual provision, the United States is not liable for attorney fees." Id. at 41.

Plaintiff replies that defendant conflates the "costs pertaining to [plaintiff's] termination settlement claims with that of [its] request for the reimbursement of reasonable charges associated with obtaining a retroactive termination for convenience." ECF No. 119 at 21. Plaintiff argues that its efforts related to obtaining the court's ruling

that the agency terminated its audits for convenience were "reasonably necessary" to allow it to prepare and present a claim to the contracting officer. Id. at 23 (quoting Dellew, 15-1 BCA ¶ 35,975). The balance of its costs, according to plaintiff, are permissible because they are "associated with finalizing a termination settlement." Id.

The court agrees with defendant that the costs associated with prosecuting a claim against the United States are not allowable costs, absent a waiver of sovereign immunity by statute or contractual provision. Plaintiff's attempt to overcome the broad prohibition on the award of attorneys' fees by casting the fees as reasonable charges necessary to allow it to present its claim to the contracting officer is unavailing. The path to an award of attorneys' fees is narrow—the only compensable fees are those that are incurred in the preparation of a termination settlement proposal and its presentation to the contracting officer, excluding any fees incurred for the preparation of claims that are not compensable. Dairy Sales, 593 F.2d at 1006; SWR, 15-1 BCA ¶ 35,832 at 175,231; see also 48 C.F.R. § 31.205-42(g)(1)(i)(A) (providing for the recovery of settlement expenses, including "[t]he preparation and presentation, including supporting data, of settlement claims to the contracting officer").

Plaintiff, however, has not properly supported its motion for summary judgment on this issue. While plaintiff provided a significant number of legal invoices, it failed to separate out the costs associated with the preparation of its termination settlement proposal and explain how those invoices are connected to that preparation. See ECF No. 107-2 at 21. Because the court cannot make a determination of either the reasonableness of plaintiff's legal fees or their relation to the preparation of its termination settlement proposal, plaintiff's motion for summary judgment must be denied.

Plaintiff's claim for the cost of its "internal work effort" must also fail. ECF No. 107-2 at 20. As with its legal fees, plaintiff has not parsed out the costs of preparing its termination settlement proposal, nor has it made any argument about the reasonableness of those costs. See ECF No. 107-2 at 20-21. In the court's view, plaintiff's claim that its internal work effort cost more than double that of its legal fees requires an explanation of the reasonableness of those costs that plaintiff simply has not provided. Therefore, the court must deny plaintiff's motion for summary judgment on this issue.

E. Genuine Disputes of Material Fact Remain Regarding Plaintiff's Claims for Interest Pursuant to the Contract Disputes Act

Finally, plaintiff argues that it is entitled to interest under the CDA. See ECF No. 107-2 at 21. Plaintiff asserts that the interest on its costs through December 31, 2020, amounts to $834,835.74. See id. (citing ECF No. 107-13 at 14-32 (exhibit containing plaintiff's CDA interest calculations)). Defendant responds that plaintiff both failed to prove its underlying claim and failed to properly calculate the date from which interest began to accrue. See ECF No. 115 at 42. Plaintiff responds that "[w]here there is a constructive termination for convenience finding years after [plaintiff] incurred

significant costs, it is only proper for the CDA interest to accrue from the date of the constructive termination for convenience as [plaintiff] was not in a position to submit a claim any earlier." ECF No. 119 at 24.

The court has not yet determined whether plaintiff is entitled to any compensation for the termination for convenience of the 2007 or 2010 audit, nor has it determined the amount of such compensation. Therefore, whether plaintiff is entitled to CDA interest and, if so, how much remains a disputed issue of fact, and the court cannot grant plaintiff's motion for summary judgment on this issue.

IV. Conclusion

Accordingly, for the foregoing reasons:

(1) Plaintiff's motion for summary judgment, ECF No. 107, is **DENIED**;

(2) On or before **December 3, 2021**, the parties shall **CONFER** and **FILE** a **notice** attaching the parties' **proposed redacted version** of this opinion, with any protectable information blacked out; and

(3) On or before **December 3, 2021**, the parties shall **CONFER** and **FILE** a **joint status report** proposing next steps in this litigation, and should the parties desire to pursue alternative dispute resolution, the parties shall indicate as much in their joint status report.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge