2023-1190

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ACLR, LLC,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal From The United States Court of Federal Claims in Case No. 1:15-cv-00767-PEC, Judge Patricia E. Campbell-Smith

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BRIEF OF DEFENDANT-APPELLEE

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, defendant-appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUES

1. Whether the trial court appropriately found that the Government did not breach its contract with ACLR by constructively terminating for convenience two audits, pursuant to the termination for convenience clause in the contract, Federal Acquisition Regulation (FAR) 52.212-4(l) .

2. Whether the trial court appropriately found that ACLR failed to meet its burden of proving termination for convenience damages pursuant to FAR 52.212-4(l), as set forth in the contract.

STATEMENT OF THE CASE

I. Nature Of The Case

ACLR appeals the judgment of the United States Court of Federal Claims in favor of the United States, *see* Appx9, based upon its decisions granting the United States' motions for summary judgment. Appx1.

II. Background Of The Case

In this action, ACLR filed a series of lawsuits, all arising out of the same January 2011 recovery audit contract awarded by the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) to ACLR to provide recovery audit services in connection with the Medicare Part D prescription drug program.

Under the terms of the contract, ACLR was to be paid a contingency fee calculated based on amounts actually recovered by CMS as Part D program overpayments. The contract did not provide any basis for payment to ACLR other than this contingent fee. Between 2011 and 2015, ACLR worked on approximately 20 audits, seven of which it successfully completed and ACLR was paid contingency fees totaling $3,389,712 for those seven audits. Those payments and audits are not at issue in this action, nor are 11 other audits that ACLR worked on, but did not successfully complete, and for which it was not paid any contingency fees.

Rather, in this action, ACLR focuses on CMS's early termination of two audits, the Plan Year (PY) 2007 Duplicate Payment Audit (2007 audit) and the PY 2010 Duplicate Payment Audit (2010 audit). ACLR filed a series of lawsuits under the Contract Disputes Act (CDA), 41 U.S.C. § 7101 *et seq*, alleging that CMS's termination of the audits resulted in a breach of contract. The trial court consolidated the first two cases, No. 15-767C (*ACLR I*), and No. 16-309C (*ACLR II*), and ultimately dismissed them, granting summary judgment for the Government, and denying summary judgment for ACLR, in three separate opinions.

In its April 6, 2020 decision, the trial court granted summary judgment for the Government, determining that CMS's termination of the 2007 and 2010 audits

effectuated constructive terminations for convenience, based upon the termination for convenience clause in the contract, FAR 52.212-4(l). Appx5120. That same month, the trial court remanded the case to the agency to consider ACLR's over $5 million termination for convenience claims for the two audits. Appx5122. On October 7, 2020, the contracting officer issued a final decision denying all but $157,318 of the claim, which ACLR rejected. Appx5135.

In January 2021, ACLR moved for summary judgment, seeking $6,095,118.35 in damages for the constructive termination for convenience of the 2007 audit and 2010 audits. By decision dated December 15, 2021, the trial court denied ACLR's motion, *see* Appx7198, and set the case for trial. On November 3, 2022, before the case was set to go to trial, the trial court granted our motion for summary judgment, holding that ACLR failed to prove its revised claim for over $5.5 million in termination for convenience costs. Appx1.

ACLR now appeals from the November 2, 2022 judgment of the trial court.

III. Statement Of Facts

A. Background Of The Contract: The Termination For Convenience Clause: FAR 52-212-4(l)

On June 17, 2010, ACLR entered into a Federal Supply Schedule Financial and Business Solutions (FABS) contract for financial and business solutions issued by the General Services Administration (GSA), contract number GS-23F-0074W

(GSA Contract). Appx4604. The GSA Contract included a contract clause from the FAR titled "Contract Terms and Conditions-Commercial Items (March 2009) (Deviation February 2007)." Appx4621. That clause entitles the ordering agency, *e.g.*, CMS, to terminate the contract at its convenience:

> Termination for the Ordering Activity's convenience. The ordering activity reserves the right to terminate this contract, or any part hereof, for its sole 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 Government 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 that reasonably could have been avoided.

Appx4624; *see also* 48 C.F.R. § 52.212-4(l)).

On December 2, 2010, CMS issued Request for Quote (RFQ) # CMS-RFQ-2011-110462, for Recovery Audit Services in Support of Medicare Part D, inviting submission of proposals for award of a Firm-Fixed Price Contingency Fee Task Order for recovery audit services. Appx1919. In relevant part, the RFQ advised in ¶ (F), "Disclosure After Award," that the "Government may [] terminate for convenience if it deems such termination to be in the best interest of the

Government." Appx1940-1941.

B. ACLR's Proposal:

On or about December 16, 2010, ACLR submitted a proposal for Recovery Audit Services in Support of Medicare Part D, in response to the RFQ. Appx1057-1058. In relevant part, ACLR included in its proposal the language from ¶ (F)(1) of the RFQ concerning termination for convenience: "The Government may, [], terminate for convenience if it deems such termination to be in the best interest of the Government." Appx1940-1941.

Throughout its proposal, ACLR characterized itself as a firm of highly qualified audit professionals with decades of experience. *See e.g.*, Appx1059 ("ACLR is staffed with highly qualified recovery audit professionals with experience in many types of improper payments and industries"); Appx1091-1092 ("ACLR: We are a firm employing recovery audit professionals with decades of varied and layered improper payment experience. ACLR professionals have extensive experience in numerous areas of recovery audits . . . ACLR Audit Team Members remain current on evolving accounting [] matters affecting the industry").

Among its corporate officers, Christopher Mucke, ACLR's managing principal, is a certified public accountant (CPA) with a degree in accounting from the University of Tennessee. Mr. Mucke has over 30 years of experience in national recovery auditing, forensic auditing and accounting, for such major clients

as Ford Motor Company and General Electric Company. Appx1095, Appx1098, Appx1101, Appx5343-5344 (¶ 3). Mr. Mucke summed up his role at ACLR and that of his company, as follows:

> Managing Principal responsible for the management of a multi-million dollar firm specializing in a wide range of business solutions from recovery and forensic auditing, accounting, regulatory compliance, and management consulting.

Appx1101.

C. Task Order

On January 13, 2011, pursuant to the GSA Contract, CMS awarded ACLR task order HHSM-500-2011-00006G (task order) to identify improper payments and to recover overpayments made under the Medicare Part D program. Appx1172-1173. The task order initially provided for a base period of performance of January 13, 2011, through January 12, 2012, along with four 12-month option periods. Appx1174. Pursuant to a bilateral modification, the base period of performance was extended to December 31, 2013, and allowed for two 12-month option periods - that were exercised - continuing the period of performance through December 31, 2015. Appx2034, Appx1404, Appx1446.

The termination for convenience clause, FAR 52.212-4(l)), *see* Appx4624, was included in the task order, pursuant to the GSA Contract. Appx1174 (¶ 1) ("This task order shall be performed in accordance with the terms and conditions of

the GSA contract under the FABS schedule and the terms and conditions contained therein"). The task order further provided that 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". *Id*.

The task order provided for a firm, fixed-price contingency fee of 7.5 percent. Appx1174 (¶ 2). The task order specified that any payments to ACLR were contingent upon the recovery of improper payments from plan sponsors, and were to be fixed as a percentage of such recoveries, which was set at 7.5 %. Appx1175 (¶ 5).

D. Performance Work Statement

The task order incorporated a Performance Work Statement (PWS) that ACLR prepared and submitted with its proposal, with a term of performance that extended from January 13, 2011 through December 31, 2013. Appx1174, Appx2034, Appx4047 (¶ 118).

The PWS generally described the audit process and methodologies, *see* Appx1202-1227. One type of potential improper payment that ACLR proposed to explore in the PWS was the existence of duplicate payments, where the same prescriptions were entered more than once by plan sponsors as separate, duplicative PDE records. Appx1206, Appx1214.

E. Statement Of Work

In the first year of contract performance, CMS found the PWS unworkable and sought to revise it. Appx2358-2359. On November 30, 2011, CMS and ACLR discussed the need to replace the PWS with a Statement of Work (SOW). Appx2173-2174. On December 9, 2011, CMS provided a draft of the SOW to ACLR, and invited ACLR to provide review and comments. Appx1504. CMS and ACLR continued to negotiate and revise the draft SOW until it was finalized and issued pursuant to bilateral contract modification 13 on December 31, 2013. Appx1404, Appx1412. Thereafter, the SOW replaced the PWS in its entirety. Appx2164. The SOW explicitly required CMS approval for any audit conducted by ACLR. Appx1415, Appx1412. The SOW also included a schedule of deliverables. Appx2021 (¶ I.12), Appx2400.

F. ACLR Completed And Was Paid Contingency Fees For Seven Audits Under The Contract

During the course of contract performance, between 2011 and 2015, ACLR worked on a total of 20 audits. Appx2723-2724. Of these, ACLR worked on 13 audits which CMS ultimately disapproved, and for which ACLR received no contingent fee. *Id*. CMS terminated two audits, the 2007 audit and the 2010 audit, which are the subject of this appeal. *Id*.

ACLR, however, successfully completed a total of seven approved audits for

which it was paid contingency fees under the GSA Contract and task order, as summarized, below:

Audit Issue	Original NIP	Recoveries	Contingency Fee Paid
2007 Excluded Providers	**$8,500,760.21**	**$1,865,110.50**	**$223,813.26**
2008-2011 Excluded Providers	**$3,400,190.89**	**$2,675,516.61**	**$749,144.65**
2009-2011 Unauthorized Prescribers	**$5,274,689.13**	**$5,161,919.28**	**$619,430.31**
2010-2011 DEA Schedule Refill Errors	**$2,759,332.65**	**$2,510,860.89**	**$502,172.18**
2012-2013 Excluded Providers	**$442,159.71**	**$291,005.30**	**$81,481.48**
2013 Unauthorized Prescribers	**$914,562.79**	**$561,548.34**	**$67,385.80**
2012-2013 DEA Schedule Refill Errors	**$6,598,149.83**	**$5,731,421.44**	**$1,146,284.29**
TOTAL	**$27,889,845.22**	**$18,797,382.40**	**$3,389,711.98**

Appx7099-7101 (¶ 4); Appx5110 n.5.

G. Problems With The 2007 Duplicate Payment Audit

On August 25, 2011, CMS sent an email to ACLR's managing principal Christopher Mucke asking ACLR to submit a draft of a proposed process for "how ACLR would go about auditing a plan on excluded providers and duplicate

payments." Appx2443. On November 17, 2011, CMS first began transmitting Part D 2007 PDE records to ACLR, and ACLR began reviewing the 2007 PDE records shortly thereafter. Appx2041 (¶ 6), Appx2170-2171.

On November 30, 2011, during a conference call with the CMS contracting officer and other agency personnel, Mr. Mucke informed CMS for the first time that ACLR already had identified approximately $175 million in potential duplicate payments in the 2007 PDE records, and that ACLR was going to commence the recovery of improper payments. Appx2041 (¶ 7), Appx2170-2171. ACLR, however, had not identified for CMS the specific PDE records that ACLR contended were duplicate payments, and did not submit any documentation at that time, nor had any entity (other than ACLR) validated ACLR's findings. Appx2171-2172. Consequently, CMS did not concur with ACLR's plan, and the contracting officer, Desiree Wheeler, ordered ACLR to "cease all efforts pertaining to the issuance of demand letters to plan sponsor[s]," which terminated the 2007 Duplicate Payment Audit on November 30, 2011. Appx 2401 (¶ 7), Appx2425. During the November 30, 2011 conference call, in the words of Mr. Mucke, "CMS killed the [2007 audit] review." Appx2165. No duplicate payments were recovered as a result of the 2007 audit, and accordingly CMS did not pay ACLR any contingency fees.

Despite this direction, in December 2011, ACLR continued analyzing 2007

PDE records for potential duplicate payments, *after the audit had been terminated by the contracting officer*, ACLR purportedly determined that it had identified a total of $313,808,241 potential duplicate payments in the terminated 2007 audit, and claimed $23,535,616 in contingency fees. Appx2424-2425.

H. Problems With The 2010 Duplicate Payment Audit

In January of 2014, after the issuance of the SOW, CMS authorized ACLR to conduct duplicate payment audits for calendar year 2010, and ACLR conducted the 2010 audit in 2014-15, pursuant to the GSA contract, the task order, and the SOW. First, following the submission of an initial new audit issue review package (NAIRP) on January 2, 2014, and, after many revisions, a final revised NAIRP on May 13, 2014, *see* Appx2436, CMS approved the revised duplicate payment NAIRP on May 28, 2014. Appx2555. On June 9, 2014, ACLR submitted to CMS relevant PDE records from 2010 through 2012, identified as potentially duplicative, *see* Appx733-734, and submitted its final 2010 duplicate payment review package to CMS on or about December 23, 2014. Appx2425. According to ACLR, it identified duplicate payments totaling $15,909,552 in the 2010 audit, for which ACLR sought contingency fees of $2,209,146. *Id*.

Throughout the plan year 2010 audit process, however, CMS and its data validation contractor (DVC), found numerous errors in ACLR's audited data, and questioned thousands of ACLR's potential duplicate payment findings, which, after

repeated requests and delays, ACLR failed to address. Appx2561-2562, Appx2583-2584, Appx792-794, Appx2724 (table, comments, Duplicate Payments). By letter dated April 24, 2015, CMS rescinded the 2010 audit, due to unaddressed concerns about the validity of ACLR's audit results. Appx792-794. No duplicate payments were recovered as a result of the 2007 audit, and accordingly CMS did not pay ACLR any contingency fees.

I. ACLR Did Not Track The Hours Of Its Managing Principal And Employees During Performance Of The Contract

ACLR's Managing Principal, Christopher Mucke, did not receive a salary and he "did not record the hours [he] worked" on the Part D RAC contract, including the 2007 and 2010 audits. Appx5330-5331, Appx5345 (¶¶ 14, 17). Mr. Mucke "estimated" that he "devoted approximately 3,023 hours" on the 2007 audit. Appx5345-5346 (¶ 18).

ACLR's "personnel did not maintain time sheets that attributed work to a particular project." Appx5335. Mr. Mucke "estimated" that ACLR personnel worked "approximately 4,376 hours" on the 2010 audit which involved "prepar[ing] and exchang[ing] thousands of email communications internally and with CMS," and "compil[ing], analyz[ing], and review[ing] thousands of other documents." Appx5349 (¶¶ 42, 43).

J. ACLR Did Not Allocate Its Costs To The 2007 And 2010 Audits At Issue

In performing the contract, ACLR worked on 20 audits, and often worked on multiple audits simultaneously, including while performing the 2007 and 2010 audits at issue. Appx2543, Appx2545-2546, Appx5348 (¶ 41). Nevertheless, ACLR did not allocate, or contemporaneously document, costs to particular projects, including for the 2007 and 2010 audits at issue. *See* Appx7375 (admitting "ACLR did not track or otherwise assign costs to individual documents generated on CMS's behalf"), Appx7377 (admitting "the [plaintiff's] exhibits . . . in this category do not specifically reference any cost"), Appx5330-5331 (admitting Mr. Mucke did not record his hours), Appx5335 (admitting ACLR employees did not maintain time sheets showing work on particular projects).

III. The Course Of Proceedings And Disposition Below

A. The Trial Court Denied ACLR's Breach Claims, But Held The Cancellation Of The 2007 And 2010 Duplicate Payment Audits Resulted In A Constructive Termination For Convenience

On July 22, 2015, ACLR filed a complaint in the trial court pursuant to the Contract Disputes Act, 41 U.S.C. § 71-1 *et seq*, alleging breach of contract (Count I) and the breach of the duty of good faith and fair dealing (Count II). Appx25, Appx38-39. ACLR alleged, among other things, that CMS breached the contract by "failing to permit ACLR to recover improper payments identified during the

base year of the contract," *see* Appx38 (¶ 76), *i.e.*, for cancelling the 2007 and 2010 audits. Appx29 (¶¶ 22-25), Appx35-36 (¶ 58).

On April 6, 2020, following discovery, extensive briefing and oral argument, the trial court issued a decision granting the Government's cross-motion for summary judgment and denying ACLR's motion for partial summary judgment pertaining to ACLR's claims for contingency fees for the cancelled 2007 and 2010 audits. Appx5105.

The trial court identified certain undisputed predicate facts, *i.e.*, that the "parties agree[d] they had a valid contract," and that the "parties agree[d] that the GSA contract, the task order, and the PWS or the SOW's controlled the parties' relationship." Appx5112-5113 (citations omitted). The trial court found that the GSA contract and task order specifically included the termination for convenience clause, FAR 52.212-4(l). Appx5108.

The court determined that CMS's termination of the 2007 and 2010 audits effectuated "constructive terminations for convenience," pursuant to the applicable termination for convenience clause in the GSA contract, FAR § 52.212-4(1). Appx5113, Appx5115-5116, Appx5119. The court did not reach the question of whether ACLR was entitled to recover any costs, finding, in effect, that neither party had presented sufficient argument and evidence at that juncture for the court to resolve that issue. Appx5120.

B. Remand On Termination For Convenience Claims

Thereafter, on April 21, 2020, the court remanded the case, pursuant to the Contract Disputes Act, 41 U.S.C. § 7107 and RCFC 52.2, to the Department of Health and Human Services, CMS, to consider ACLR's termination for convenience claims for the 2007 and 2010 audits. Appx5122.

In a final decision dated October 7, 2020, applying FAR § 52.212-4, the termination for convenience clause in the GSA Contract and task order, the contracting officer denied ACLR's claim for the 2007 audit in its entirety, finding that ACLR had not submitted any contract "deliverables" for the audit or relevant documents to substantiate its claims. Appx5131-5132. For the 2010 audit, CMS disagreed with ACLR's calculations and denied all but $157,318.00. Appx5135. The contracting officer decided that ACLR should be awarded that amount for the terminations of the 2007 and 2010 audits, plus interest beginning on June 26, 2020. Appx5137. ACLR did not agree with the contracting officer.

Instead, on November 6, 2020, ACLR filed an amended complaint seeking termination for convenience damages "of at least $5,923,754" plus interest and attorney fees. *See* Appx5142, Appx5145.

C. ACLR Moved For Summary Judgment On Its Termination For Convenience Claims, Which The Trial Court Denied

On January 27, 2021, ACLR moved for summary judgment, seeking

$6,095,118.35 in damages for the constructive termination of the 2007 and 2010 audits. Appx5318, Appx5339. Following briefing, on December 15, 2021, the trial court denied ACLR's motion. *See* Appx7198.

Among its findings, the trial court again confirmed that ACLR's termination for convenience claims were governed by FAR 52.212-4(l), as set forth in the GSA contract and task order. Appx7202-7204. In denying ACLR's summary judgment motion, the trial court found that genuine disputes of material fact existed regarding ACLR's claims for reasonable charges and the sufficiency of its evidence. Appx7205, Appx7208-7209, Appx7213-7214. Thereafter, the court set the case for trial for November 9, 2022. Appx7216-7219.

Trial did not occur, however. Instead, following a status conference with the parties on October 4, 2022, wherein the matter was thoroughly discussed, the trial court acceded to our request to file a motion for summary judgment to address and resolve the predicate question that the court identified for trial: "the court must determine the 'contours of plaintiff's standard record keeping system,' and whether that system comports with the applicable regulation," FAR 52.212-4(l). Appx2. Following briefing on the matter, the trial court held that ACLR's standard record keeping system did not comport with regulation, and it granted our motion and cancelled the trial. Appx7.

SUMMARY OF THE ARGUMENT

The trial court correctly granted summary judgment to the United States in two decisions, and correctly denied summary judgment to ACLR, on ACLR's claims involving the constructive termination for convenience of the 2007 and 2010 audits. In the first of these decisions, because ACLR's contract contained a termination for convenience clause, FAR 52.212-4(l), and under this Court's longstanding precedent, the trial court appropriately held that the Government's cancellation of the two audits resulted in a constructive termination for convenience, not a breach of contract.

In the second opinion, the trial court correctly denied ACLR's motion for summary judgment for failing to prove entitlement to termination for convenience damages. In the third opinion, the trial court correctly granted the Government's motion for summary judgment, finding that ACLR failed to demonstrate compliance with FAR 52.212-4(l)'s requirement of maintaining a "standard record keeping system" to demonstrate termination for convenience costs.

Instead of demonstrating error in the trial court's decisions, ACLR, and the Coalition for Government Procurement (Coalition), which entered an appearance in this case as amicus curiae in support of ACLR, raise a host of new arguments that ACLR failed to make before the trial court and are therefore waived.

Moreover, because ACLR, and amicus, provide no reason to overturn the

trial court's judgment, indeed, ACLR fails to challenge numerous findings of the court below, this Court should affirm.

ARGUMENT

I. Standard Of Review

This Court reviews "the Court of Federal Claims' grant of summary judgment de novo, applying the same standard applied by the court below." *Nutt v. United States*, 837 F.3d 1292, 1295 (Fed. Cir. 2016). "A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." RCFC 56(a). "The court shall grant summary judgment 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." *Id.*

"By its very terms, this standard provides 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 v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis supplied, interpreting Fed. R. Civ. P. 56). A dispute is "genuine" only if a reasonable fact-finder could resolve a factual matter in favor of either party. *Bubble Room, Inc. v. United States*, 159 F.3d 553, 561 (Fed. Cir. 1998) (citing *Anderson*, 477 U.S. at 247). A fact qualifies as "material" only if it would affect "the outcome of the case." *Id.*

This Court has opined that summary judgment must be granted against a party who "has not introduced evidence sufficient to establish the existence of an essential element of that party's case, on which the party would bear the burden of proof at trial." *See Univ. of W. Virginia Bd. of Trustees v. VanVoorhies*, 278 F.3d 1288, 1295 (Fed. Cir. 2002) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); Appx7344-7345, Appx7347, Appx7364-7365; *see also Filtroil, N.A., Inc. v. Maupin*, 178 F.3d 1310, 1998 WL 851131 at *3 (Fed. Cir. 1998) ("a promise to produce evidence at trial is not sufficient to forestall summary judgment"); *see also Raitport v. United States*, 74 F.3d 1259, 1996 WL 15909 at *2 (Fed. Cir. 1996) (because appellant "did not introduce sufficient evidence, the Court of Federal Claims correctly granted the United States summary judgment motion for laches").

II. The Trial Court Appropriately Held That Cancellation Of The 2007 And 2010 Audits Were Constructive Terminations For Convenience

ACLR argues that the trial court erred in not granting it summary judgment on its breach of contract claim for the cancellation of the 2007 audit. Applnt. Br. at 22-25. In its opening brief, ACLR does not make a similar "breach of contract" argument for the cancellation of 2010 audit, *see id.*, and such argument is therefore waived. *SmithKline Beecham Corp. v. Apotex Corp.,* 439 F.3d 1312, 1320 (Fed. Cir. 2006) (deeming an argument waived because it was not presented as a developed argument in the opening brief). Likewise, in the April 6, 2020 opinion,

the trial court dismissed ACLR's claims regarding the Government's denial of a proposed 2012/2013 Sales Tax audit. Appx5116-5119. In its opening brief, ACLR has not challenged the trial court's decision on this matter and the issue is waived. *SmithKline,* 439 F.3d at 1320.

ACLR argues that the trial court erred in holding that the Government's cancellation of the 2007 and 2010 audits were retroactive constructive terminations for convenience. *See* Applnt. Br. at 25-32. These assertions lack merit.

First, on its breach claim pertaining to the 2007 audit, ACLR argues that "CMS had no intent to allow ACLR to perform under the PWS," *see* Applnt. Br. 22-23, and that "CMS entered into the [contract] knowing full well that CMS would not allow ACLR to proceed with the contract." *See* Applnt. Br. at 26. ACLR cites to various email and deposition statements of agency contractor personnel to support its assertion. Applnt. Br. at 22-23 (citations omitted). ACLR contends that the trial court "disregarded" this evidence in denying ACLR's breach claim for cancellation of the 2007 duplicate payment audit. Applnt. Br. at 23.

In fact, ACLR raised the same argument, and cited much of the same evidence, in a supplemental brief to the trial court. *See* Appx5042-5043 (ECF 73) (arguing "evidence of CMS's breach is acknowledged by CMS personnel directly . . . They admitted that CMS did not meet PWS requirements").

The trial court fully considered ACLR's argument and evidence on this

issue. *See* Appx5116 ("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") (citing *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1992)). The trial court rejected ACLR's argument, holding that the Government's cancellation of the two audits did not result in a breach, but were constructive terminations for convenience:

> 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 [2007 audit], 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.

Appx5116.

The trial court's holding is fully in accord with this Court's binding precedent. In *Maxima*, for example, the Court explained the doctrine of constructive termination for convenience:

> A Government directive to end performance of the work will not be considered a breach but rather a convenience termination- if it could lawfully come under the clause - even though the contracting officer wrongly calls it a cancellation, mistakenly deems the contract illegal, or erroneously thinks that he can terminate the work on some other ground.

Maxima Corp. v. United States, 847 F.2d 1549, 1553 (Fed. Cir. 1988) (citing *G.C.*

Casebolt Co. v. United States, 421 F.2d 710, 712 (Ct. Cl. 1970)).

The *Maxima* Court held, "the concept of constructive termination for convenience enables the government's actual breach of contract to be retroactively justified," in situations where "'the government has stopped or curtailed a contractor's performance for reasons that turn out to be questionable or invalid.'" *See Maxima*, 847 F.2d at 1553 (quoting *Torncello*, 681 F.2d at 759).

The only instances in which the doctrine of constructive termination for convenience does not apply are when the Government evinces bad faith or clear abuse of discretion in its actions, *see Kalvar Corp. v. United States*, 543 F.2d 1298, 1304 (Ct. Cl. 1976), or "where the [g]overnment enters into a contract with no intention of fulfilling its promises." *See Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1545 (Fed. Cir. 1996).

Absent a finding that the Government acted in bad faith or clearly abused its contracting discretion, a deletion of work from a contract - such as the Government's cancellation of the 2007 and 2010 audits here - results in a termination for convenience, not a contract breach. Appx12. *See Krygoski*, 94 F.3d at 1541; *see also Kalvar*, 543 F.2d at 1304 ("[i]n the absence of bad faith or a clear abuse of discretion, the effect of a constructive termination of convenience is to *moot all breach claims* and to limit recovery to costs which would have been allowed had the contracting officer actually invoked the [termination for the

convenience of the government] clause") (emphasis added).

Even if the Government contests the contractor's breach claims (as we did here), the Court "need not consider the merits of any claim for breach of contract" because "[a]ny award of damages must be limited to items specifically allowed by the termination clause." *Kalvar*, 543 F.2d at 1304-1305. Similarly, in *Nesbitt v. United States*, the Court of Claims explained that, although the plaintiff claimed that the Government had breached the contract and the Government contended that it had not, "[w]e need not resolve any of these disputed questions." *Nesbitt v. United States*, 345 F.2d 583, 585 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 926 (1966). The Court of Claims noted that, "[f]or the purposes of our determination we can assume, without deciding, that the contracts obligated the Government" to perform the action that the plaintiff claimed it had not performed, and "[e]ven so, there was in each contract a standard termination clause" and "that clause nevertheless sets the limit to any possible recovery." *Id*.

In this instance, the trial court noted the parties' conflicting arguments as to the merits of ACLR's breach claims (including, specifically, the Government's argument that it could terminate the audits for nonconformance, a matter that was extensively briefed), but the trial court did not attempt to resolve that issue. *See* Appx5113 ("the court need not resolve this argument"); *see Kalvar*, 543 F.2d at 1304-1305; *Nesbitt*, 345 F. 2d at 585. Instead, the trial court, in effect, gave ACLR

the benefit of the doubt and held that the Government's cancellation of the 2007 and 2010 audits was "questionable and invalid," and resulted in a termination for convenience. Appx5116 (citing *Torncello*, 681 F.2d at 759, *Maxima*. 847 F.2d at 1553).

In its opening brief, ACLR reprises its breach claim, and makes many of the same arguments it made to the trial court (which did not decide the merits of the breach claim), but fails to demonstrate that the trial court wrongly decided that the audit cancellations resulted in a constructive termination for convenience, not a breach. *See* Applnt. Br. at 22-24, 28-29.

First, ACLR cites a decision of the lower court, *Horn & Assocs. Inc. v. United States*, 140 Fed. Cl. 142 (2017) (*Horn II*), which ACLR argues involved "a similar claim resulting in a breach of a recovery audit contract" at issue. *See* Applnt. Br. at 24. This reliance is misplaced.

Unlike the instant case, *Horn* does not involve a constructive termination for convenience. *Horn* is a breach case and was decided on that basis. *See Horn*, 140 Fed. Cl. at 191 ("the court finds that defendant breached the contract with Horn"). *Horn* is thus wholly inapplicable to this appeal.

ACLR cites another lower court decision, *Erwin v. United States*, 19 Cl. Ct. 47 (1989), and an Agriculture Board of Contract Appeals case, *Poston Logging,* AGBCA No. 97–168–1, 99–1 B.C.A. (CCH) ¶ 30,188, to contend that "[c]ases

have also held that a retroactive termination for convenience cannot be applied when there has been a breach by the Government." *See* Applnt. Br. at 26 (citations omitted). These cited non-binding cases contain no such holding, and ACLR misstates the law, which is virtually the opposite of what ACLR contends. *See Maxima*, 847 F.2d 1553 ("constructive termination for convenience enables the government's actual breach of contract to be retroactively justified").

Again, because the effect of a constructive termination for convenience is to "moot all breach claims," absent a showing of bad faith or abuse of discretion, *see Kalvar*, 543 F.2d at 1304 - a showing that ACLR cannot demonstrate, as we next discuss - the merits of ACLR's breach arguments (which the trial court appropriately declined to decide) are not at issue and the Court need not consider them. *See id.* at 1304-1305.

ACLR fails to meet its heavy burden of proving bad faith or abuse of discretion. First, ACLR misstates its burden of proof, asserting that "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. Applnt. Br. at 27. In fact, it is "[t]he contractor's burden to prove the Government acted in bad faith," a burden that is "very weighty," and contractors rarely satisfied. *Krygoski*, 94 F.3d at 1541 (citing *Kalvar*, 543 F.2d at 1301) ("Any analysis of a question of Governmental bad faith

must begin with the presumption that public officials act 'conscientiously in the discharge of their duties'"). This Court has held that, it is "well-established . . . 'that a high burden must be carried to overcome this presumption,' amounting to clear and convincing evidence to the contrary." *See Road and Highway Builders, LLC v. United States*, 702 F.3d 1365, 1368 (Fed. Cir. 2012) (citing *Am-Pro Protective Agency v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002). Stated more plainly, to prove that the Government acted in bad faith, ACLR was required to demonstrate "clear and convincing" evidence of the Government's "specific intent to injure the plaintiff." *Road and Highway Builders*, 702 F.3d at 1369 (citing *Am-Pro*, 281 F.3d at 1240). ACLR can point to no such evidence, and accordingly fails to do so in its brief.

To the contrary, ACLR's contention that "CMS would not allow ACLR to proceed with the contract," as purported evidence of the Government's bad faith, *see* Applnt. Br. at 22, 26, is flatly contradicted by the record. As the trial court noted, ACLR "completed seven audits for which it was paid contingency fees under the GSA contract and task order." Appx5110 n.5. Indeed, ACLR performed the contract for five years and received $3,389,711.98 in payment for the successfully completed audits, as its pay vouchers show. Appx2723-2734. The record therefore shows that the Government did not interfere with ACLR's ability to complete contracts, when ACLR was able to do so.

Nor is it accurate that "CMS had no intent to allow ACLR to perform under the PWS," as ACLR contends. Applnt. Br. at 22. As the trial court found, *see* Appx5116 and ACLR acknowledges, "CMS had concerns about the workability of the PWS," *see* Applnt. Br. at 27 n.4. But, the Government and ACLR resolved this issue, by mutually agreeing to replace the PWS with the SOW, which was effectuated via a bilateral contract modification. Appx1404, Appx1412, Appx2164. ACLR thereafter conducted audits under the SOW, including the seven successfully completed audits for which it was paid. Appx2723-2734.

ACLR argues, for the first time on appeal, that the "removal of the PWS as the work statement governing ACLR's performance under the task order" represented "a cardinal change," and a breach of contract. Applnt. Br. at 32. ACLR cannot raise this argument on appeal because it did not do so before the trial court. *See Kachanis v. Dep't of the Treasury*, 212 F.3d 1289, 1293 (Fed. Cir. 2000) ("This court has long held that appellants may not raise issues on appeal for the first time").

In any event, even if the argument were not waived, which it is, ACLR's "cardinal change" contention is nullified by the fact that the SOW replaced the PWS via a bilateral modification – *i.e.*, a change that ACLR approved of, and voluntarily executed, along with the Government. Appx1404; *see also Amertex Enter., Ltd. v. United States,* 1995 WL 925961 (Fed. Cl. 1995) at *61, *aff'd* 108

F.3d 1392 (Fed. Cir. 1997) (holding that the plaintiff's cardinal change assertion "is fatally undercut by the bilateral modifications made to the delivery schedule in 1988.... Because of plaintiff's agreement to produce the modified suits, we find no cardinal change"). ACLR was allowed to perform the contract for five years under the SOW, and was paid for completing seven audits, all of which undermines any claim of bad faith.

Next, ACLR argues that the trial court "erred in finding that a constructive termination for convenience on [the 2007 audit] would not render the contract illusory because 'plaintiff eventually did begin its work under the contract.'" *See* Applnt. Br. at 28 (citing Appx5109). In so doing, ACLR misrepresents the trial court's finding, because in the section of the decision that ACLR cites, Appx5109, the trial court is merely providing a factual history of ACLR's contract performance and not making any legal rulings. *Id*. Elsewhere, the trial court specifically addressed ACLR's "illusory contract" argument and promptly disposed of it, finding it: "unavailing. The contract was not fully performed such that a constructive termination for convenience would effectively permit a unilateral renegotiation." Appx5116 (citing *Maxima*, 847 F.2d at 1554-55).

In other words, constructive termination for convenience is generally unavailing where "the contract was fully performed on both sides." *See Maxima*, 847 F.2d at 1554. The trial court correctly pointed out that ACLR's contract was

"not fully performed," *see* Appx5116, thereby rendering this particular rule of *Maxima* inapplicable to ACLR, and validating the determination of constructive termination for convenience. Indeed, ACLR's opening brief does not challenge the trial court's actual finding on this issue and ACLR has therefore waived the matter. *See SmithKline*, 439 F.3d at 1319.

Next, ACLR argues that "termination for convenience is an affirmative defense," that the Government waived by not raising in its answer. Applnt. Br. at 30-31. To support its argument, ACLR cites two unpublished district court cases which state, without explanation, that termination for convenience is an affirmative defense. *See* Applnt. Br. at 30 (citing *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)). ACLR's argument lacks merit and its reliance upon non-binding district court cases, neither of which substantively address constructive terminations for convenience, *see id*., is entirely misplaced.

We are aware of no authority, nor has ACLR cited any, which holds that constructive termination for convenience is an "affirmative defense" that must be "pled" by a litigant or else it is "waived," as appellant contends. Applnt. Br. at 30-31. Rather, as this Court made expressly clear, "[c]onstructive termination for convenience is a *judge-made doctrine*," that grants courts discretion to find "the

government's actual breach of contract to be retroactively justified." *See Maxima*, 847 F.2d at 1553 (emphasis added). It was upon this unimpeachable legal grounding that the trial court issued its ruling. *See* Appx5116 (citing *Maxima*, 847 F.2d at 1553). The Court should, therefore, reject ACLR's "affirmative defense" argument as spurious.

Next, ACLR argues that the trial court erred in dismissing its "good faith and fair dealing claims as to" the cancelled 2007 and 2010 audits. *See* Applnt. Br. at 33. ACLR points to CMS's purported "interference, hindrance and lack of cooperation" in connection with the 2007 and 2010 audits," the Government's hiring of a validation contractor (Booz Allen Hamilton), and "CMS's delays and process changes to the [] 2010 audit." Applnt. Br. at 34-35. ACLR also contends that, "[n]o duplicate payment audit was ever done through the entire time the [] contract was in existence." *See* Applnt. Br. at 35. With these contentions, ACLR largely repeats the arguments it made to the trial court, and disagrees with the trial court's holding, but fails to demonstrate the court erred. *See* Applnt. Br. at 33-36.

Addressing ACLR's good faith and fair dealing argument, the trial court commented that ACLR's "reasonable expectation of pursuing recovery audit payments and receiving a 'sizable contingency fee payment' was thwarted by defendant's actions in delaying, denying, and ultimately terminating the audits at issue here." Appx5119 (citation to ACLR brief omitted). The trial court found that

["]underlying [ACLR's] assertions regarding breach of the duty of good faith and fair dealing are the same facts and circumstances that inform [ACLR's] breach of contract assertions," and as such, were "merely a breach allegation couched in different language." Appx5119. Accordingly, citing the court's relevant authority, the trial court held that ACLR failed to demonstrate that its breach of contract and breach of good faith and fair dealing claims were founded upon different allegations. Appx5119 (quoting *CFS Int's Capital Corp. v. United States*, 118 Fed. Cl. 694, 701 (2014) ("[b]reach of the duty of good faith and fair dealing is a theory of beach of the underlying contract, not a separate cause of action").

This Court has stated, "[e]very contract, including one with the federal government, imposes upon each party an implied duty of good faith and fair dealing in its performance and enforcement." *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) (citation omitted). However, "[t]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Id*. (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)). "[A]n act will not be found to violate the duty . . . if such a finding would be at odds with the terms of the original bargain, whether by altering the contract's discernible allocation of risks and benefits or by conflicting with a contract provision." *Metcalf Const. Co. v. United States*, 742 F.3d 984, 991 (Fed.

Cir. 2014).

As the trial court alluded, ACLR's contract did not guarantee "uninterrupted performance but expressly contemplates modification, suspension, or cancellation." Appx5120 (paraphrasing *Precision Pine*, 596 F.3d at 831). To the contrary, the trial court held that the Government's "terminations of the 2007 and 2010 audits fell within [the Government's] contemplated contractual rights to cancel." Appx5120 (citing *Precision Pine*, 596 F.3d at 831).

In short, ACLR offers a litany of its disagreements with CMS during the pendency of the 2007 and 2010 audits, *see* Applnt. Br. at 33-35, and ACLR also argues, confusedly, that the contracting officer "ignored recommendations from [the agency] to issue a termination for convenience resulting in seven years of litigation," *see* Applnt. Br. at 36, but ACLR fails to demonstrate that the trial court wrongly decided the matter. It did not.

Addressing ACLR's good faith and fair dealing claim, the trial court concluded that, ACLR's "claim that [the Government'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.'" Appx5119 (citing *Dotcom Assocs., LLC v. United States*, 112 Fed. Cl. 594, 596 (2013)). ACLR presents no arguments that call the trial court's holding into question.

III. The Trial Court Appropriately Denied ACLR's Motion For Summary Judgment For Termination For Convenience Damages

Next, ACLR argues that the trial court erred in denying it summary judgment on its termination for convenience claims pertaining to the Government's cancellation of the 2007 and 2010 audits, as set forth in the December 15, 2021 opinion (Appx7198-7215). *See* Applnt. Br. at 36-40. Specifically, ACLR makes two broad arguments: (1) ACLR argues that the trial court erred in holding that ACLR was not entitled to compensation for a percentage of its contract price, under the first prong of the termination for convenience clause, FAR 52.212-4(l), Applnt. Br. at 36-37; and (2) ACLR argues that the trial court erred in denying it summary judgment on its claim for settlement costs, including its claim for attorney fees. Applnt. Br. at 40-46. We will address each of these arguments, in turn.

As initial matter, however, we call to the Court's attention that ACLR raised additional arguments in its summary judgment briefing, which the trial court ruled upon and denied in the December 15, 2021 opinion. ACLR has not challenged those determinations on appeal, and any arguments related to such are, therefore waived.

Specifically, on summary judgment, ACLR claimed seven broad categories of damages allegedly incurred from the constructive termination of the 2007 and

2010 audits: (1) personnel and managing principal costs, (2) general administrative (G&A) costs, (3) office lease costs, (4) loan interest costs, (5) reasonable profit, (6) settlement costs, and (7) (Contract Disputes Act (CDA) interest. The trial court denied ALCR's summary judgment motion in all seven categories. Appx7206-7209 (personnel costs), Appx7209 (G&A costs), Appx7210, (office lease costs) Appx7211, (loan interest costs) Appx7212, (reasonable profit) Appx7213-7214, (settlement costs) Appx7214-7215, and 7214-7215 (CDA interest).

Of these seven adverse findings, in its opening brief, ACLR challenges the trial court's denial of only one, its settlement cost claim. *See* Applnt. Br. at 40-46. ACLR has not raised, or developed, argument regarding the other six adverse findings. Therefore, any argument on these issues is waived. *See SmithKline*, 439 F.3d at 1320.

As we demonstrate in further detail, below, ACLR has also never before argued that it was due compensation under the first prong of FAR 52.212-4(l), and this argument is also waived. *See Kachanis*, 212 F.3d at 1293. Before addressing this matter, we provide a brief overview of FAR 52.212-4(l).

A. Termination For Convenience Is Governed By FAR 52.212-4(l), Which Has Two Categories Of Recovery

The applicable termination for convenience clause that governs this action, as set forth in the GSA Contract and task order, is FAR 52.212-4(l). Appx4624,

Appx1174 (¶ 1); *see also Krygoski*, 94 F.3d at 1540, 1545 (the termination for convenience clause in a contract "governs the legal relations of the parties").

FAR 52.212-4(l), breaks the contractor's termination settlement recovery into two categories, or prongs, based upon (1) a percentage of the contract price reflecting the percentage of the contract work performed, plus, (2) "reasonable charges the Contractor can demonstrate . . . using its standard record keeping system, have resulted from the termination":

> 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 Government using its standard record keeping system, have resulted from the termination.

Appx4624; 48 C.F.R. § 52.212-4(l).

The first prong of FAR 52.212-4(l), generally, "establishes a presumption" that a contractor whose contract is terminated for convenience, therein, "will be adequately compensated by payment of a 'percentage of the work performed prior to' the termination." *See Red River Holdings, LLC v. U.S.*, 802 F. Supp. 2d 648, 661 (D. Md. 2011); (quoting 48 C.F.R. § 52.212-4(l)).

As for the second, "reasonable charges" prong, it serves as a "safety valve," of sorts, to capture those costs that "may not be fully reflected as a percentage of the work performed," in the first prong of § 52.212-4(l)). *See Red River*, 802 F.

Supp. 2d at 661. As the *Red River* court noted, it "is worth repeating that § 52.212-4(l)'s second, 'reasonable charges' component contemplates *only* those expenses that – even after a percentage-of-work-performed payment – would otherwise go uncompensated." *See Red River*, 802 F. Supp. 2d at 661 n.17 (emphasis in original).

B. ACLR Based Its Claim For Damages Upon The Wrong Termination For Convenience Clause –FAR 52.249-2 – That Is Not In The Contract

Notwithstanding the express invocation of FAR 52.212-4(l) in ACLR's contract, in its opening summary judgment brief, ACLR paid lip service to this clause, citing it once, *see* Appx5328 (citing 48 C.F.R. § 52.212-4(l)), but otherwise completely ignored it.

ACLR skipped the first prong of FAR § 52.212-4(l) entirely, which required ACLR to demonstrate the "percentage of the *contract price* reflecting the percentage of the *work performed* prior to the *notice of termination*." Appx4624; *see also* 48 C.F.R. § 52.212.-4(l) (emphasis added). ACLR presented no such evidence or argument to the trial court. *See* Appx5318-5339 (ACLR summary judgment brief).

Instead, in moving for summary judgment, ACLR cited a *different* FAR clause, 48 C.F.R. § 52.249-2, throughout its brief, a termination for convenience clause that is *not* found in the contract, and argued for various "costs" based solely

upon this clause. *See* Appx5330, Appx5331-5332, Appx5333, Appx5334, Appx5336, Appx5337 (citing 48 C.F.R. § 52.249-2), Appx7202-7203. In its summary judgment reply brief, ACLR confirmed that it "utilized the methodology of FAR § 52.249-2 to determine the costs associated with the terminations." Appx7133. The GSA contract makes no reference to FAR § 52.249-2 either expressly or by incorporation.

It is with this background, that the trial court addressed ACLR's termination for convenience claims. The trial court agreed with the Government that FAR 52.212-4(l), not FAR 52.249-2, was the applicable termination for convenience clause that governed this action. Appx7202-7203.

Thereafter, in its summary judgment ruling on ACLR's termination for convenience claims, the Court held that ACLR could not recover termination for convenience damages under the first prong of FAR 52.212-4(l), *i.e.*, for a "percentage of the contract price," under a contingency fee contract, "when plaintiff is not due any payment under the contract." Appx7203-7205 (citing among other Armed Services Board of Contract Appeal (ASBCA) cases, *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,382, 2014 WL 7084933). Specifically, the trial court explained, that "[ACLR's] contract price was to be paid based on a contingency fee – a portion of [ACLR's] recovery of any improper payments." Appx7205. *See* Appx1175 (¶ 5) (contingency fee provision in the contract). The

two audits were terminated at the "data analysis stage," however, before any fees could be recovered, and well before the contingency fees amounts could be established. Under these circumstances, the trial court correctly determined that at the time of termination, the contract price (based upon the unrealized contingency fees) "remained at zero" and no recovery was available under the first prong of FAR 52.212-4(l). Appx7205. The court's holding is further bolstered by the fact that, erroneously relying upon a different FAR clause not found in contract, ACLR presented no evidence of the "percentage of work performed" under the first prong of FAR 52.212-4(l). Appx7204.

The Court held, however, that ACLR was not precluded from seeking recovery under the second, "reasonable charges" prong of FAR 52.212-4(l). Appx7205 (citing, among other authority, *Red River Holdings*, 802 F. Supp. 2d at 662 ("The reasonable charges category is designed to capture those costs that '*are not adequately reflected as a percentage of the work performed*'") (emphasis in original).

C. ACLR Waived Its Argument That The Trial Court Erred in Holding That ACLR Was Not Entitled To Compensation For A Percentage Of The Contract Price

ACLR never argued to the trial court that it was entitled to recover a "percentage of the contract price," based upon the first prong of FAR 52.212-4(l). Indeed, ACLR admitted as much by noting in its reply brief that, "ACLR does not

waive its right to present evidence at trial or in subsequent briefing of the percentage of the contract price," Appx7133 n.4,[1] thereby confirming that it never presented this argument or evidence during summary judgment briefing.

First, having neglected to present any argument or evidence on the "percentage of the contract price" prong of FAR 52.212-4(l) to the trial court, *see* Appx7204, ACLR's belated attempt to do so now fails. The argument is waived. *See Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997). Specifically, in its opening brief, ACLR argues, for the first time, that its purported "identification" of $313 million in duplicate payments for the 2007 audit and $15.9 million for the 2010 audit, represents evidence of the percentage of the work performed and "contract price." Applnt. Br. at 38-39. ACLR made no such arguments to the trial court, and any such argument is thus waived. *See Sage Prods*., 126 F.3d at 1426. Moreover, ACLR's contention that it "presented evidence of its contract price" to the trial court, *see* Applnt. Br. at 38 (citations omitted), misrepresents what it actually did – which was to present no such evidence.

Second, ACLR's attempt to preserve a right to bring such an argument, by dropping a footnote in a *reply brief*, *see* Appx7133 n.4, is also unavailing.

[1] ACLR never attempted to exercise this purported reserved right before the trial court.

See Novosteel SA v. United States, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (holding that a claim not raised in an opening brief is waived).

Third, even if ACLR's reply brief footnote could be considered an "argument," which it is not, the matter is still waived as ACLR never developed anything more than a skeletal placeholder of an argument. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 461 n.2 (2008).

Under the circumstances, especially considering that ACLR was clearly aware of the potential for waiver in the trial court proceedings, *see* Appx7133 n.4, yet still failed to make its arguments before that tribunal, there is no compelling reason why the waiver rule should not be strictly applied to bar ACLR's arguments now on appeal concerning the first prong of FAR 52.212-4(l). *See* Applnt. Br. at 36-40; *see also Sage Prods*., 126 F.3d at 1426.

D. ACLR Fails To Demonstrate That The Trial Court Erred In Denying ACLR Summary Judgment On Its Claim For Settlement Costs

Before this Court, ACLR argues that the trial court erred in denying it summary judgment on its claim for settlement costs, including its claim for attorney fees. Applnt. Br. at 40-46. This assertion lacks merit.

In ACLR's summary judgment brief, which again incorrectly cited 48 C.F.R. 52.249-2(g), ACLR claimed a total of $1,847,465.95 in legal fees "attributable to this lawsuit," which included $617,307.56 in attorney fees for work performed

prior to March 2020. Appx5336-5337. ACLR also sought reimbursement of $1,200,133.39 for "internal work effort[s]" based upon its CEO, Mr. Mucke, and ACLR personnel allegedly spending an "estimated" 5,481 hours assisting in "the lawsuit" against the United States. Appx5337-5338, Appx5350 (¶ 50).

ACLR sought additional settlement costs, including for legal fees incurred between March 23, 2020 and December 2020 of $29,025. Appx5338. ACLR also sought $154,408.83 for 678 hours of "internal work efforts" performed by Mr. Mucke and ACLR personnel on its settlement claims for the period from March 23, 2020 to December 31, 2020, for a total of approximately $183,433.83 in claimed costs. Appx5338, Appx5350 (¶ 50).

The trial court acknowledged that reasonable costs incurred for the preparation of a termination for convenience settlement proposal may be recoverable. Appx7214 (citing 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'"). The trial court found, however, that ACLR provided a "significant number of legal invoices," but made no effort to segregate its costs. Appx7214 (ACLR "failed to separate out the costs associated with its termination settlement proposal and explain how those invoices are connected to that preparation"). On appeal, ACLR fails to demonstrate that the trial court decided the matter incorrectly.

In its opening brief, ACLR argues, confusedly, that the trial court's "application of the judicial doctrine of a retroactive constructive termination for convenience absent a statu[t]e or contractual provision then applying 48 C.F.R. § 31.205-42(g)(1)(i)(A) . . . as justification for non-compensation is fundamentally flawed," but ACLR offers no explanation why that is so. Applnt. Br. at 42.

Constructive termination is not effectuated per statute or contract, as ACLR seems to argue, but is a "judge-made doctrine, and remains unrecognized in the procurement regulations that authorize 'actual' termination for convenience." *See*, *Maxima*, F.2d at 1553.

In any event, whatever point ACLR is trying to make, the trial court's holding is actually quite clear: Under FAR 31.205-42(g)(1)(i)(A), ACLR could have recovered settlement expenses related to a termination for convenience settlement claim to the contracting officer, but ACLR failed to separate out such expenses in its filings to the court. Appx7214. While ACLR submitted "a significant number of legal invoices," the trial court was not able to "make a determination of either the reasonableness of plaintiff's legal fees or their relation to the preparation of its termination settlement proposal." Appx7214. ACLR's own summary judgment filings support the trial court's finding.

To demonstrate its claimed settlement costs, ACLR offered three general categories of exhibits. First, it included a declaration from its CEO, Mr. Mucke,

who discussed purported "costs attributable to this lawsuit," in a single paragraph, which omitted any relevant detail, save for the dollar amounts claimed, the legal fees incurred, and the estimated hours he and other ACLR personnel worked on the lawsuit (which consisted largely of Mr. Mucke reviewing e-mail records). Appx5350-5351 (¶ 50).

Second, ACLR included summaries of its legal billing in Exhibit K, none of which provide any detail of settlement costs. Appx6872-6875.

Third, ACLR included 181 pages of legal invoices, in Exhibits H-1 and K-1, for an approximately seven-year period, from November 2014 to January 2021. *See*, *e.g.*, Appx6876-6877 (2014 invoice), Appx7016-7017 (2019 invoice), Appx6859-6860 (December 2020 to January 2021 invoices).

In its opening brief, ACLR contends that the trial court "ignored" the "detailed" documentation it provided. *See*, *e.g.* Applnt. Br. at 41. ACLR misses the import of the trial court's holding: ACLR's failure to "separate out" costs in the "significant number of legal invoices" it provided, left the court unable to "make a determination" as to which costs were relevant. Appx7214.

In other words, ACLR dumped 181 pages of its legal invoices and non-specific declarations upon the trial court and apparently expected the court to somehow magically separate ACLR's actual termination for convenience costs. The trial court rightly declined to do so. Appx7214. As the plaintiff in this

lawsuit, ACLR bore 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." *See Lisbon Constructors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987) (citation omitted); *see also* Appx7205 (quoting same). The trial court correctly held that ACLR failed to satisfy this standard. Appx7214.

ACLR's summary judgment briefing and legal billing exhibits made clear that ACLR sought reimbursement for the *entirety* of its costs incurred in prosecuting its claims against the United States stretching back to 2014, including future costs not yet calculated. *See* Appx5338 n.2, Appx6876-6877, Appx7016-7017, Appx6859-6860. ACLR's rationale for the broad scope of its claim was that, "[w]ithout this lawsuit, CMS would not have taken the position that there as a constructive termination for convenience." Appx5337. The trial court summarized ACLR's argument to mean, 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." Appx7213.

In denying ACLR's claim for settlement costs, however, the trial court agreed with the Government that, "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." Appx7214. The trial court correctly

explained that that the "path to an award of attorneys' fees is narrow," and is limited to "compensable fees . . . incurred in the preparation of a termination settlement proposal." Appx7214 (citing, among other authority *Dairy Sales Corp. v. United States*, 593 F.2d 1002, 1006 (Ct. Cl. 1979), FAR 31.205-42(g)(1)(i)(A)).

Before this Court, ACLR largely reprises the arguments it made to the trial court, *i.e.*, that its "only recourse," was to bring a lawsuit against the United States, *see* Applnt. Br. at 43, and it seeks reimbursement of costs incurred for "over seven years of litigation since its July 15, 2015 Complaint." Applnt. Br. at 45. ACLR's argument lacks merit. ACLR cites a variety of cases to support its argument, none of which help it. *See*, *e.g.*, Applnt. Br. at 44 (citing *Kalvar*, 543 F.2d at 1306 (holding that in a constructive termination for convenience, legal expenses are limited to settlement claim proposal costs).

First, as the trial court correctly held, the Government must affirmatively waive its sovereign immunity from suit for a plaintiff to obtain attorney fees. Appx7214. *See Library of Cong. v. Shaw*, 478 U.S. 310, 314-315 (1986). Absent a statutory waiver, such as the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, or an express contractual provision, the United States is not liable for attorney fees. *Id.* This comports with the longstanding "American Rule," that, each party is expected to bear its own attorney fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247 (1975); *see also Centex Corp. v. United*

States, 486 F.3d 1369, 1371 (Fed. Cir. 2007). To be clear, the United States has not waived sovereign immunity in this matter.

Second, the FAR makes clear that the cost to prosecute claims against the United States is not an allowable cost:

> Costs not covered elsewhere in this subsection are unallowable if incurred in connection with: (1) Defense against Federal Government claims or appeals or the *prosecution of claims or appeals against* the Federal Government.

See FAR 31.205-47(f)(1) (emphasis added); *see* Appx7213 (citing same).

ACLR thus fails to demonstrate that the trial court incorrectly denied ACLR's motion for summary judgment on this issue. Appx7214.

IV. The Trial Court Appropriately Determined That ACLR Failed To Demonstrate A Standard Record Keeping System Sufficient To Enable The Court To Find Damages

In its opening brief, ACLR argues that the trial court erred in the November 2, 2022 opinion, by granting summary judgment for the United States and dismissing ACLR's claim for damages relating to the constructive termination for convenience of the 2007 and 2010 audits. ACLR argues that the trial court misinterpreted the language in FAR 52.212-4(l) in holding that ACLR failed to satisfy the requirement of demonstrating reasonable costs in a "standard record keeping system." *See* Applnt. Br. at 46-56. Relatedly, the Coalition, appearing as amicus curiae, also argues that the trial court misinterprets the FAR clause. *See*

Amicus Br. at 5-6. The assertions of ACLR and the Coalition lack merit. We will address their respective arguments in turn.

Following the trial court's denial of ACLR's second motion for summary judgment, *see* Appx7198-7215, by order dated May 3, 2022, the court scheduled the case for trial to commence on November 9, 2022. Appx7216-7220. The sole issue for trial was whether ACLR could prove constructive termination for convenience damages for the 2007 and 2010 audits. After trial was scheduled, the Government received ACLR's full 100,000 pages of proposed trial exhibits, and the full scope of the weakness of its case became apparent. In its proposed trial exhibits (PX), ACLR included, apparently, every conceivable document in its possession, the vast majority of which failed to show costs of any kind, *see e.g.*, Appx7293-7296, and also included a host of highly questionable items such as receipts for birthday and anniversary gifts, alcohol, groceries, and gun ammunition (ammo), *see e.g.*, Appx7344, Appx7347-7349, Appx7353, Appx7365 - - *none* of which even remotely showed costs allocable to the two terminated audits at issue.

It was in this context, after presenting this information to the trial court, that the government proposed resolving this case through summary judgment. By orders dated October 5 and October 12, 2022, respectively, the Court identified three predicate questions that must be answered before any trial to consider ACLR's evidence of claimed costs:

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?

Appx7468-7469.

Thereafter, the trial court directed ACLR to provide a summary of its standard record keeping system, directed the Government to file a motion for summary judgment to address the court's questions, and set forth a briefing schedule to permit ACLR to respond. Appx7232-7233,

In response to the trial court's order, on October 14, 2022, ACLR filed a declaration from its managing principal, Christopher Mucke, that purported to answer the first question posed by the court. Appx7234-7246. ACLR asserts that its "standard record keeping system," includes the use of Quickbooks (accounting software), Microsoft File Explorer (used to store "vendor invoices, client work product, and achieved communications data"), Microsoft Outlook (used to store e-mails), "various external file storage devices" (backup storage) and "paper files" (for "contract information"). Appx7237 (¶ 3).

Thereafter, the parties filed their respective summary judgment briefs, and the trial court granted our motion for summary judgment. Appx1-7. In its

analysis, the trial court started with the plain language of the term "standard record keeping system" in FAR 52.212-4(l), commenting that the parties "agree[ed] that the language at issue is not ambiguous." Appx5.

A. The Trial Court Appropriately Interpreted FAR 52.212-4(l).

The Court must read the plain language of a regulation to give full meaning to all of its provisions. *Baude v. United States*, 955 F.3d 1290, 1305 (Fed. Cir. 2020) (a statute or regulation "'should be interpreted by its plain language, and "'should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'") (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

In this instance, using dictionary definitions for the terms "standard" and "system," the trial court stated that, "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." Appx6; *see also Nielson v. Shinseki*, 607 F.3d 802, 806 (Fed. Cir. 2010) (to determine the plain language of a statute or regulation, "it is appropriate to consult dictionaries") (citations omitted).

In the trial court's view, ACLR's "record keeping, as characterized by Mr. Mucke [in his declaration] and as demonstrated by the *additional evidence* that [ACLR] offers, does not satisfy this definition." Appx6 (emphasis added).

To put the trial court's decision in context, in its pre-trial filings, ACLR

included an exhibit list consisting of 465 exhibits, many of which are hundreds and even thousands of pages long. *See* Appx22 (ECF 144-1). Yet, in ACLR's tens of thousands of pages of exhibit documents, few, if any of plaintiff's exhibits, showed costs allocated to the 2007 and 2010 audits. Instead, ACLR proffered a data dump of well over 100,000 pages of non-relevant documents that showed neither costs, nor referenced the two audits at issue. *See* Appx7293-7296, Appx7344, Appx7347-7349, Appx7353, Appx7365, Appx6-7 (discussing ACLR's "multitude" of documents). Indeed, as previously discussed, it was this complete failure of proof that led to our raising the issue in our pre-trial filings and the court's subsequent order regarding summary judgment. Appx7468-7469.

ACLR admittedly *did not keep contemporaneous records* reflecting the hours its officers and employees worked on particular audits, tasks, or projects under the contract. ACLR's Managing Principal, Mr. Mucke, did not receive a salary and did not track the hours he worked on the Part D RAC contract. Appx5330-5331, Appx5345 (¶¶ 14, 17). Mr. Mucke "estimate[d]" that he worked "approximately 3,023 hours" on the 2007 audit, Appx5345-5346 (¶ 18), the same audit the contracting officer cancelled only two weeks after CMS first began transmitting data and ACLR began reviewing it. Appx2041 (¶ 6), Appx2170-2171. Indeed, ACLR claimed the entirety of its office lease costs to the 2007 audit for fully *five* years (2011 to 2016), *see* Appx5947-5997, Appx7210-7211, *i.e.*, even

after the 2007 audit was admittedly cancelled in November 2011, and even though ACLR used its office to perform other audits. Appx7099-7101.

ACLR admitted that its "personnel did not maintain time sheets that attributed work to a particular project." Appx5335. ACLR estimated that its managing principal, Mr. Mucke, and other personnel worked "approximately 4,376 hours on the 2010 audit," which involved "prepar[ing] and exchang[ing] thousands of email communications internally and with CMS," and "compil[ing], analyz[ing], and review[ing] thousands of other documents" for the 2010 audit. Appx5349 (¶¶ 42, 43).

It is in this context, that the trial court explained its analysis of the regulation, and its holding that ACLR failed to satisfy the requirements of the regulation,

> As the court understands the regulation [FAR 52.212-4(l)], however, a regular, organized method for tracking relevant costs is required. . . Here, the problem is that plaintiff merely describes a vast collection of documents, some of which reflect post hoc estimates, rather than a systemic 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 record keeping system to conclude that virtually every document in plaintiff's possession, along with estimates to supply records not kept contemporaneous, meets this regulatory

requirement.

Appx7 (emphasis in original).

ACLR fails to demonstrate that the trial court wrongly decided the matter.

Before this Court, ACLR argues that the trial court ignored the term "its" in the phrase, "its standard record keeping system," which phrasing, ACLR asserts, "is meant to allow the contractor to demonstrate costs 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." Applnt. Br. at 49 (emphasis in brief). In support of its assertion, ACLR cites several lower court decisions, including *Horn* and *Perfect Form Mfg. LLC v. United States*, 142 Fed. Cl. 778 (2019, and several decisions of the Armed Services Board of Contract Appeals (ASBCA), including *Triad Techs., Inc.,* ASBCA No. 58855, 15-1 BCA ¶ 35898 and *SWR Inc*., ASBCA No. 56708, 15-1 BCA ¶ 35,832. *See* Applnt. Br. at 51-53 (citations omitted). ACLR's argument lacks merit, and its reliance upon the cited, non-binding cases is misplaced.

ACLR raised a similar argument to the trial court, which appropriately dismissed it, holding that the method for tracking costs need only be "regular" and "organized," not "'elaborate[,] costly[,] and burdensome,' as plaintiff argues it necessarily would be." Appx7 (citing ACLR response brief). In other words, the trial court appropriately held that the "standard record keeping system" is not a

high bar to satisfy. *See id*. ACLR, a highly experienced audit firm, fails to articulate a legitimate reason why it failed to meet the requirement of contemporaneously tracking costs in a regular, organized manner.

In its opening brief, ACLR cites dicta in an ASBCA decision, wherein the board stated, "[w]e 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*." *See* Applnt. Br. at 52 (quoting *Triad Techs., Inc.*, ASBCA No. 58855, 15-1 BCA ¶ 35898. ACLR argues, thereby, that a standard record keeping system does "not need a particular level of sophistication." ACLR's argument lacks merit and its reliance upon *Triad* is misplaced.

In *Triad*, citing *SWR, Inc.,* the board discussed the types of "'records other than the contractor's own standard record keeping system'" that the board may consider when a contractor does not have a sophisticated record keeping system: records that clearly identify specific, claimed costs, *e.g.*, "contemporaneous Army and SWR [contractor] emails" that "allowed SWR [contractor] to recover a $15,000 payment to end a lease" as an allocable cost. *See Triad.,* 15-1 BCA ¶ 35898, 2015 WL 1009677, at * 14 (citing *SWR Inc.,* ASBCA No. 56708, 15-1 BCA ¶ 35,832 at *104 n.4). By contrast, and here is where this appeal provides this Court a factual basis to affirm without having to entertain ACLR's misplaced suggestion of legal error, and there is no legal error, ACLR's enormous

compilation of over 100,000 pages of exhibit documents contained no such specificity, as the trial court found. Appx7 ("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").

Third, as the evidence of ACLR's own proposal shows, ACLR did not hold itself out as "unsophisticated" in any way. Rather, ACLR described itself as a highly experienced and professional audit firm, experienced in such areas as forensic accounting. Appx1091-1092, Appx1101. If any contractor should be held to the requirement of having to prove its reasonable termination charges using a standard record keeping system, it is an audit firm staffed with experienced accountants retained to audit the record keeping systems of others. *See* Appx1091-1092 (ACLR self-describing as "a firm employing recovery audit professionals with decades of varied and layered improper payment experience."). Given ACLR's self-professed background, its failure to appropriately track reasonable claimed termination for convenience charges in a standard record keeping system while performing audit activities is inexcusable.

Fourth, the trial court did not hold that a standard record keeping system must be *sophisticated*, as ACLR argues, merely that it must be "a regular, organized method for tracking relevant costs," *see* Appx7, a minimal requirement

that ACLR failed to satisfy.

In addition, the GSA contract that ACLR executed with the Government specifically included the termination for convenience clause, FAR 52.212-4(l). Appx4624. The December 2, 2010 RFQ, and ACLR's own December 16, 2010 proposal, included the following identical language: "the Government may [] terminate for convenience if it deems such termination to be in the best interest of the Government." *See* Appx1940-1941.

The uncontroverted evidence therefore shows that in 2010, ACLR knew, or should have known, before it ever began work on the contract in January 2011 when the task order was issued, and before it performed a single audit, that it should have maintained a standard record keeping system to track its costs in the eventuality that a termination for convenience might occur. Furthermore, ACLR is a sophisticated auditing firm, well familiar with the simple process of tracking costs and personnel time.

Next, ACLR cites dicta in the lower court's earlier decision in *Horn & Assocs. Inc. v. United States* (*Horn I*), to argue that ACLR was "not required" to keep "detailed records" of its costs. *See* Applnt. Br. at 51 (citing *Horn & Assocs. Inc. v. United States*, 123 Fed. Cl. 728, 747, 784 (2015). This reliance is misplaced. As we earlier point out in our discussion of *Horn II,* other than the superficial similarity that the plaintiff in *Horn*, like ACLR, was a recovery audit

contractor, *Horn I* does not involve FAR 52.212-4(l), nor even constructive termination for convenience. *See Horn*, 123 Fed. Cl. at 728. *Horn I* is wholly inapplicable to this appeal.

In its opening brief, ACLR admits that its documents were not produced from a unified system, but rather were collected from multiple sources: QuickBooks, Microsoft Outlook, Microsoft File Explorer, "external suppliers and various external file storage devices," and "paper files." *See* Applnt. Br. at 53-55. ACLR states that it tracks costs by inputting individual amounts paid or incurred into QuickBooks. Applnt. Br. at 53.[2] But ACLR does not identify QuickBooks as its standard record keeping system for costs, instead claiming that its practice was to keep records for costs in a variety of sources including Microsoft File Explorer, third party sources (Automatic Data Processing, Ind.), and paper files. Appx7239.

Regarding QuickBooks, ACLR cites to the lower court's decision in *Perfect Form*, claiming that in that case "the Court recognized QuickBooks as a standard record keeping system for financial information." *See* Applnt. Br. at 52 (citing *Perfect Form*, 142 Fed. Cl. at 790, n.9). *Perfect Form*, however, does not refer to QuickBooks as a "standard record keeping system." To the contrary, *Perfect Form* described the plaintiff using QuickBooks in that case as a company "without a

[2] ACLR does not explain why it failed to allocate or track these costs by project when inputting them into Quickbooks. Applnt. Br. at 53-54.

sophisticated recordkeeping system[.]" *See Perfect Form*, 142 Fed. Cl. at 787; *see also id*., at 787 n.5 (describing the plaintiff using QuickBooks as having a "lack of [] sufficient recordkeeping").

In its opening brief, ACLR regurgitates the "quantity versus quality" aspect of its scattershot document collections and their sheer volume, *see* Applnt. Br. at 50-55, thereby inadvertently confirming the trial court's conclusion that ACLR "has pieced together the voluminous evidence in its possession precisely because no standard system for tracking the relevant data was in place." Appx7 (emphasis in original).

Moreover, as occurred during trial court briefing, given the opportunity in its opening brief on appeal to point to a single exhibit document, even one, that would show costs allocable to the 2007 and 2010 audits at issue, ACLR fails to do so. *See* Applnt. Br. at 50-55. There are none, because ACLR admittedly did not contemporaneously track its costs allocable to the 2007 and 2010 audits. Instead, as we demonstrated, ACLR dumped a bag of invoices upon the trial court' bench, including invoices for ammunition, alcohol and birthday presents, expecting the court to sort it out. Appx7344, Appx7347, Appx7348-7349, Appx7353, Appx7365. That is not the responsibility of the court and ACLR should not be rewarded for this behavior.

B. The Coalition Fails To Demonstrate That The Trial Court Erroneously Interpreted FAR 52.212-4(l)

In its amicus brief, the Coalition argues that the trial court erroneously interpreted FAR 52.212-4(l), under which the court "qualitatively assesses the adequacy of ACLR's record keeping system." Amicus Br. at 5, 7. Specifically, the Coalition argues that the following language in the regulation limits the discretion of the trial court to review the adequacy of ACLR's standard record keeping system:

> 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 Government any right to audit the Contractor's records.

See Amicus Br. at 5 (quoting FAR 52.212-4(l)).

The Coalition argues that the language in the regulation prohibiting the Government from applying cost accounting standards (CAS) and prohibiting audits of a contractor's records, "support the conclusion that the phrase 'standard record keeping system' does not allow for [judicial] review of the qualitative adequacy of a contractor's system." *See* Amicus. Br. at 6; *see id*. at 7 (suggesting that a contractor's system is not "subject to a qualitative judicial assessment based on uncontextualized dictionary definitions").

The Coalition's argument that the language of the regulation "does not allow" the *trial court* to review the "qualitative adequacy of a contractor's system,"

see id., essentially means that the amount of claimed costs regarding a termination for convenience under FAR 52.212-4(l) is nonjusticiable. ACLR did not make this particular argument in either its opening brief on appeal, or in its summary judgment response brief to the trial court – which did not have the opportunity to address it. The argument is, therefore, waived and cannot be raised for the first time by amicus. *See Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000); *see also United States v. Buculei*, 262 F.3d 322, 333 n.11.

Even if this matter were not waived, which it is, the Coalition's argument on the purported limits of judicial review of termination for convenience costs under FAR 52.212-4(l) lacks merit and, frankly, does not need to be addressed anyway - this case is about ACLR's failure of proof, not a new standard being proclaimed by the trial court. In any event, FAR 52.212-4(l)'s use of the words "the ordering activity reserves the right to terminate this contract," and "the Government," clearly means "the Government" is the "ordering activity," *i.e.*, the procuring agency - - it is *not* a reviewing court.

Second, the doctrine of justiciability is well-established, and limits the review of courts in certain limited areas where they lack authority and expertise, such as military promotions. *See United States v. Shearer*, 473 U.S. 52, 58 (1985). We are aware of no authority under the Tucker Act, 28 U.S.C. § 1491, or the CDA, 41 U.S.C. § 7101, *et seq.*, that limits the Court of Federal Claims from interpreting

a *procurement regulation*, which is what FAR 52.212-4(l) is, and deciding a contractor's, *e.g.*, ACLR's, compliance with that regulation, *i.e.*, weigh the evidence. Nor does the Coalition cite any such authority.

The trial court, as the weigher of evidence, unequivocally has authority and discretion to "review the qualitative adequacy" of ACLR's system pursuant to FAR 52.212-4(l). *See* Amicus Br. at 6, 7. Furthermore, the Coalition fails to demonstrate that the trial court interpreted the regulation incorrectly.

The Coalition argues that the regulation, by "stating that CAS and the FAR 31 cost principles 'shall not apply,'" and that the contractor is not subject to audit, FAR 52.212-4(l) precludes a contractor from having to maintain a CAS-compliant accounting system - - and that the trial court "ignored" this language entirely. *See* Amicus Br. at 6-7.

The Coalition argues, instead, that because FAR 52.212-4(l) contains the word "its," the "standard record keeping system" is whatever the contractor says it is, and that cannot be questioned, even by a court. *See* Amicus Br. at 7. Besides being waived, this assertion lacks interpretive merit. The word "its" in the phrase, "plus reasonable charges the Contractor can demonstrate, to the satisfaction of the Government, usings *its* standard record keeping system," *see* FAR 52.212-4(l) (emphasis), signifies ownership or proprietorship. "Its" refers to a particular contractor's standard record keeping system, and not someone else's. A contractor

is to use "its" own standard record keeping system, assuming it has one, to "demonstrate" "reasonable charges," if it can, "to the satisfaction of the Government." *Id*. But the use of the word "its" does not erase the words "standard record keeping system" – whatever system a contractor chooses to use, that system must still satisfy the FAR's requirements, as the trial court held, *i.e.*, that it be a regular, organized method from tracking costs. Appx7. In other words, the organized method for tracking costs must give the weigher of evidence, *i.e.*, the trial court, confidence that the system is doing what it purports to do. Reduced to its essence, the Coalition's argument is that the trial court is no longer the weigher of evidence; rather a contractor can label whatever method it uses to collect costs and the court must accept it.

Moreover, we never argued, nor did the trial court hold, that a "standard record keeping system" means it must be compliant with CAS and FAR Part 31 standards. The trial court held that it understands FAR 52.212-4(l) to mean that, a "regular, organized method for tracking costs is required," *see* Appx7, which is a reasonable interpretation of the regulation, and hardly onerous. ACLR failed to meet even that minimal standard. Appx7.

The Coalition is arguing that the phrase in FAR 52.212-4(l), "plus reasonable charges the Contractor can demonstrate, to the satisfaction of the Government, usings its standard record keeping system," must exclude the phrase

"'satisfaction of the Government" in the "requirement for the contractor's 'standard record keeping system.'" Amicus Br. at 8. The Coalition's argument goes against the clear rules of statutory and regulatory interpretation, which is to read a provision as a whole and not exclude language or render it superfluous. *See Baude*, 955 F.3d at 1305.

Next, the Coalition argues that the trial court failed to consider FAR 12.403, which provides "guidance," for commercial-item terminations for convenience." Amicus Br. at 8-9. Specifically, because FAR 12.403 states, in relevant part, that a contractor "may" demonstrate charges using its "standard record keeping system," the Coalition argues that ACLR was not required to do so. Amicus Br. at 9. This assertion lacks merit. ACLR's contract expressly included FAR 52.212-4(l), *see* Appx4624, Appx1174 (¶ 1), which is the termination for convenience clause that "governs plaintiff's damages claim." Appx4; *see also Krygoski*, 97 F.3d at 1540, 1545. Any suggestion by the Coalition that ACLR did not have to meet this express requirement, or that the trial court should have overlooked the "standard record keeping system" requirement in the FAR and ACLR's contract lacks merit.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the judgment of dismissal.

Respectfully submitted,

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CERTIFICATE OF FILING

I hereby certify that on the 22nd day of May, 2023, a copy of the foregoing "BRIEF FOR DEFENDANT-APPELLEE" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Joseph A. Pixley

CERTIFICATE OF COMPLIANCE

I certify this brief: (1) complies with the type volume limitation of Federal Circuit Rule 32(a): (2) contains 13,999 words, excluding the portions of this brief exempted from the type volume limitation by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b); (3) complies with typeface requirements of Federal Rule of Appellate Procedure 32(a)(5); (4) complies with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6); and (5) has been prepared in a proportionally spaced typeface, 14 point Times New Roman font, using Microsoft Word.

/s/ Joseph A. Pixley