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

REPLY BRIEF OF THE COALITION FOR GOVERNMENT PROCUREMENT AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

MILLER & CHEVALIER CHARTERED

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June 12, 2023

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29 and 47.4, counsel for *amicus curiae* the Coalition for Government Procurement certifies the following:

1. The full names of every party or *amicus* represented by me are:

The Coalition for Common Sense in Government Procurement (dba The Coalition for Government Procurement)

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

The party named in the caption is the real party in interest.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for any of the parties or *amicus* now represented by me in trial court or agency or are expected to appear in this Court are:

Jason N. Workmaster, Alejandro L. Sarria, and Connor W. Farrell of Miller & Chevalier Chartered, and Elizabeth J. Cappiello (formerly of Miller & Chevalier Chartered)

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

None

6. There is no information to report under Fed. R. App. P. 26.1(b) (Organizational Victims in Criminal Cases) or under Fed. R. App. P. 26.1(c) (Bankruptcy Cases).

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The Coalition for Government Procurement (the "Coalition") in its opening brief demonstrated that the November 2, 2022 decision of the U.S. Court of Federal Claims ("COFC") granting summary judgment for the Government must be reversed because it was based upon an improper interpretation of the FAR provisions governing commercial item terminations for convenience, FAR 52.212-4(*l*) and FAR 12.403.[1] As the Coalition explained: (1) under the plain language of the FAR, a terminated commercial item contractor is not limited to using its "standard record keeping system" to demonstrate its "reasonable charges" in order to recover—consistent with well-established caselaw on this very issue as well as on the use of estimates in settling terminations for convenience (Coalition Br. at 9 (citing *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,244 and *Nicon, Inc. v. United States*, 331 F.3d 878, 886 (Fed. Cir. 2003)); and (2) the plain meaning of the phrase "standard record keeping system," by its terms, does not open the door to Government or judicial imposition of qualitative requirements for a contractor's bookkeeping (*id.* at 7).

In opposition, the Government: (1) suggests, without explanation, that the Court should simply ignore the clear language of FAR 12.403, which provides only that a contractor "may" rely on its "standard record keeping system" to

[1] Herein, as in the Coalition's opening brief, the term "commercial item" includes both "commercial products" and "commercial services," as those terms are defined in the Federal Acquisition Regulation ("FAR").

demonstrate its "reasonable charges" (Gov't Br. at 62)—and does not even address the caselaw supporting a terminated contractor's use of estimates (which may or may not be records that come from a contractor's "standard record keeping system"); (2) asserts, without citing any authority, that the phrase "standard record keeping system," in and of itself, somehow imposes an obligation on commercial item contractors to contemporaneously track costs (including labor hours) attributable to a particular contract in a manner that the Government and/or a tribunal finds satisfactory after-the-fact (*id*. at 50–51, 58–61); and (3) contends that the Coalition's argument regarding the proper interpretation of the phrase "standard record keeping system" has somehow been waived, even though that issue was at the heart of the COFC decision on appeal here (*id.* at 58–59). All three of these arguments fail.[2]

I. UNDER THE PLAIN LANGUAGE OF THE FAR, A COMMERCIAL ITEM CONTRACTOR IS NOT LIMITED TO USING DATA ONLY FROM ITS "STANDARD RECORD KEEPING SYSTEM" TO DEMONSTRATE ITS "REASONABLE CHARGES"

FAR 12.403 unambiguously provides that a terminated commercial item contractor is entitled to recover "[a]ny charges the contractor can demonstrate

[2] The Coalition notes: (1) no party's counsel authored this amicus brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this amicus brief; and (3) no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this amicus brief.

directly resulted from the termination" and "***may***" (not shall) use its "standard record keeping system" in demonstrating those charges. FAR 12.403(d) (emphasis added). Meanwhile, contrary to the Government's assertion otherwise (*see* Gov't Br. at 62), FAR 52.212-4(*l*) does not state whether a contractor "may" or "shall" use its "standard record keeping system"—but simply refers to the contractor "using its standard record keeping system."

Under longstanding principles of regulatory interpretation, as the Coalition has noted (*see* Coalition Br. at 8), FAR 52.212-4(*l*) and FAR 12.403 must be read "holistic[ally]," so that as little of the language as possible is rendered "superfluous." *Hanser v. McDonough*, 56 F.4th 967, 970 (Fed. Cir. 2022) (citations omitted). And the only reasonable way of reading the two provisions together is to find that, while a terminated commercial item contractor "may" use data from its "standard record keeping system" to demonstrate its "reasonable charges," it also may rely on evidence from outside that system.

This conclusion is consistent with: (1) the holding of the Armed Services Board of Contract Appeals ("ASBCA") in *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832, that a terminated commercial item contractor may rely on evidence that does not constitute a "contractor record" and therefore does not come from the

contractor's "standard record keeping system;"[3] (2) the regulatory history of the FAR provisions at issue here which, as the concurrence in *SWR* explained in detail, support a broad interpretation of the universe of evidence on which a terminated commercial item contractor may rely; and (3) this Court's recognition in *Nicon*, 331. F.3d at 886, that, even in the context of terminations-for-convenience of ***non-commercial*** contracts, "[t]he FAR [] provides that '[i]n appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement.'" *See* Coalition Br. at 9. In its opposition, the Government did not address this holding of *SWR* or the regulatory history discussed in the *SWR* concurrence, and it did not even mention *Nicon*. It has thus "effectively conceded" that *SWR*, the relevant regulatory history, and this Court's precedent on the use of estimates support reversal here. *See Cardsoft, (assignment for the Benefit of Creditors), LLC v. VeriFone, Inc.*, 807 F.3d 1346, 1353 (Fed. Cir. 2015) (failure to respond to argument in briefing on appeal "waived" the argument).

[3] This Court gives "careful consideration and great respect to the [] legal interpretations [of the ASBCA] in light of the Board's considerable experience in the field of government contracts." *Raytheon Co. v. United States*, 747 F.3d 1341, 1352 (Fed. Cir. 2014) (citation omitted).

II. THE FAR DOES NOT ALLOW FOR THE AFTER-THE-FACT IMPOSITION OF A REQUIREMENT FOR A COMMERCIAL ITEM CONTRACTOR TO TRACK COSTS BY CONTRACT, OR ELSE FORFEIT ALL RECOVERY IN A TERMINATION FOR CONVENIENCE

Without support, the Government asserts that the mere phrase "standard record keeping system" requires a commercial item contractor to contemporaneously track the costs (including labor hours) attributable to a particular contract—or be barred from ***any*** recovery in the event of a termination for convenience—and that such a system is subject to subsequent review by the Government during the termination process and to judicial review in the event of a dispute and litigation. *See* Gov't Br. at 50–51, 58–61. The Government's failure to cite any support for this remarkable proposition is not surprising, of course, because there is none. Rather, the Government is attempting to create out of a whole cloth an entirely new obligation for commercial item contractors, contrary to the plain language of the FAR.

In this regard, as the Coalition has already pointed out (*see* Coalition Br. at 7–8), the "standard record keeping system" to which FAR 52.212-4(*l*) and FAR 12.403 refer is the ***contractor's*** actual system (i.e., "***its*** standard record keeping system")—not some theoretical system that complies with an unstated standard for tracking costs at an unspecified level of granularity, imposed *post hoc* by the Government or a reviewing tribunal following the termination-for-convenience of

a commercial item contract. Indeed, to interpret the phrase "its standard record keeping system" as allowing the Government or a tribunal to impose an after-the-fact requirement to track particular costs on a contract-level basis—so that the use of estimates is *per se* forbidden—would be to give the phrase specific meaning entirely (and unreasonably) at odds with the general nature of the terms "standard," "record keeping," and "system." This is particularly so, given that both FAR 52.212-4(*l*) and FAR 12.403 expressly provide that a terminated commercial item contractor is not subject to the accounting requirements established by the Cost Accounting Standards ("CAS") or the FAR Part 31 cost principles, or to an audit.[4]

Section 252.242-7006 of the Defense Federal Acquisition Regulation Supplement ("DFARS") also makes clear that, when the Government wants to impose an obligation to track costs by contract, it knows how to do so. In this regard, DFARS 252.242-7006 expressly states, in pertinent part: "The Contractor's accounting system shall provide for—[i]dentification and

[4] Moreover, even CAS and the FAR cost principles do not expressly establish a general requirement to track costs (such as labor) at the contract level. Indeed, the keeping of "detailed time records" that show "job/account numbers" is given merely as an "[i]llustration" of a "practice" in accordance with the requirements of CAS 418 regarding the allocation of direct and indirect costs. *See* 48 C.F.R. § 9904.418-60(a). And the FAR cost principles provide only that a contractor "is responsible for . . . maintaining records . . . adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles . . . ." FAR 31.201-2(d). In any event, even if CAS and the FAR cost principles did require granular tracking of costs at the contract level, a terminated commercial item contractor is exempt from those requirements.

accumulation of direct costs ***by contract***." DFARS 252.242-7006(c) (emphasis added). There is thus no basis to read the phrase "standard record keeping system" as imposing such an obligation.

III. THE COALITION'S ARGUMENT REGARDING THE PROPER INTERPRETATION OF THE PHRASE "STANDARD RECORD KEEPING SYSTEM" WAS NOT WAIVED

The Government also contends that the Court should not consider the Coalition's argument that the phrase "standard record keeping system" does not open the door to a qualitative assessment of a terminated commercial item contractor's accounting, because that argument has somehow been waived. *See* Gov't Br. at 58–59. This assertion is baseless. The issue of the proper interpretation of the phrase "standard record keeping system," and the extent to which it permits the Government or a reviewing tribunal to assess the adequacy of a contractor's bookkeeping, was clearly argued before COFC as it is at the core of the court's November 2, 2022 decision. *See ACLR, LLC v. United States*, 162 Fed. Cl. 610 (2022). ACLR also raised this issue in its opening brief in this Court. *See* ACLR Br. at 46–56.

Nor is there any basis for the Government's assertion that the Coalition has argued that the amount of claimed costs in a commercial item termination-for-convenience is nonjusticiable. *See* Gov't Br. at 58–59. The Coalition has made no such argument. Rather, the Coalition has argued only that, under the plain

meaning of the phrase "standard record keeping system," a reviewing court's analysis is limited to determining whether the data in question originated from the system the contractor uses as a matter of standard practice, to the extent the contractor relies on data from that system—and not whether the system itself satisfies some judicially created test of adequacy. Such a role, contrary to the Government's assertion otherwise, in no way negates the court's role as the ultimate "weigher of evidence" on the issue of whether a terminated commercial item contractor has demonstrated its reasonable charges. *See* Gov't Br. at 61.[5] Indeed, it is the Government here that is seeking to improperly short-circuit the termination process by avoiding the ultimate issue: does the contractor's evidence (whether it came from its "standard record keeping system" or not) support, by a preponderance of the evidence, the conclusion that the contractor has demonstrated its "reasonable charges."[6]

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[5] The interpretation of FAR 52.212-4(*l*) advanced by the Coalition also does not improperly read the phrase "to the satisfaction of the Government" out of the provision, as the Government contends. *See* Gov't Br. at 61–62. Rather, as the Coalition explained in its opening brief, the language and location of that phrase establish that the contractor must demonstrate ***its reasonable charges*** to the satisfaction of the Government—not that it must establish the standard-ness and systematic-ness of its recordkeeping system to the satisfaction of the Government. *See* Coalition Br. at 7–8.

[6] In resolving this question, of course, COFC will not be on its own to "sort it out," contrary to the Government's suggestion otherwise. *See* Gov't Br. at 57. And it is exactly backwards for the Government to argue that the mere

CONCLUSION

For these reasons, and those set forth in the Coalition's opening brief, this Court should reverse the November 2, 2022 decision of the U.S. Court of Federal Claims.

June 12, 2023

Respectfully submitted,

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extensiveness of the exhibits that ACLR filed with COFC should be used to find that ACLR is not entitled to any recovery. *See id.*

CERTIFICATE OF COMPLIANCE

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules, to the extent they apply, because it has been prepared using a proportionally-spaced typeface and includes 2,031 words.

/s/ Jason N. Workmaster
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