23-1190

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ACLR, LLC,

Appellant,

v.

UNITED STATES,

Appellee.

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

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

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February 6, 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 Elizabeth J. Cappiello 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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STATEMENT OF AMICUS CURIAE

The Coalition for Government Procurement (the "Coalition") is a non-profit national trade association of Federal government contractors. Coalition members include small, medium, and large business concerns, and collectively account for a significant percentage of the sales generated through the GSA Multiple Award Schedules program and of the commercial products and commercial services (collectively "commercial item") solutions purchased annually by the United States Government.[1] For more than 40 years, the Coalition has brought together public and private sector procurement leaders to work towards the mutual goal of common-sense acquisition.

One of the issues in this appeal is whether the U.S. Court of Federal Claims ("COFC") properly interpreted the term "standard record keeping system" in 48 C.F.R. § 52.212-4(*l*) ("FAR 52.212-4(*l*)"). FAR 52.212-4 sets forth the standard set of "Contract Terms and Conditions" for "Commercial Products and Commercial Services" contracts with the federal government. Contracts held by many Coalition members are subject to this same set of terms and conditions, and will therefore be impacted by the decision on this issue.

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[1] Until December 6, 2021, the term "commercial item" as defined in the Federal Acquisition Regulation ("FAR") included both commercial products and commercial services. On that date, the FAR was amended to replace the single term "commercial item" with the terms "commercial products" and "commercial services." *See* 86 Fed. Reg. 61,017; FAR 2.101.

On behalf of our membership and in support of our mission statement, the Coalition respectfully submits this brief in support of the Appellant, ACLR, LLC, on the issue of whether COFC erred by imposing an interpretation of "standard record keeping system" that was inconsistent with the plain language of FAR 52.212-4*(l)* and the governing regulatory scheme.

Counsel for *amicus curiae* conferred with counsel for the Appellant and Appellee regarding the filing of this amicus brief. Appellant consented to the filing, and Appellee stated it does not oppose the filing.

Pursuant to the Court's rules, 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.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 29(a)(8), the Coalition intends to file a subsequent motion for leave to participate in oral argument regarding the "standard record keeping system" issue. Given the Coalition's status as a leading trade association for the commercial item contractors that may be impacted by the Court's decision on this issue, we believe the Court would benefit from the

Coalition's participation in oral argument. Moreover, Appellant's counsel will have a number of other issues to address at oral argument, while counsel for the Coalition would address only the "standard record keeping system" issue.

ARGUMENT

Almost thirty years ago, Congress enacted the Federal Acquisition Streamlining Act of 1994, Public Law No. 103-355, 108 Stat. 3243 (1994) ("FASA" or "the Act"), to require federal agencies to acquire commercial items to meet their needs "to the maximum extent practicable." 10 U.S.C. § 3453(b) (current codification of FASA § 8104); 41 U.S.C. § 3307(c) (current codification of FASA § 8203); *see also CGI Fed. Inc. v. United States*, 779 F.3d 1346, 1352 (Fed. Cir. 2015). The Act remains substantively unchanged from the time when it was passed into law. Thus, for nearly three decades, Congress has recognized the benefits—indeed, the need—for the federal government to leverage the research and innovation of the private sector and streamline its access to the competitive, commercial marketplace. In turn, the Executive Branch has promulgated regulations to implement the purpose and provisions of FASA in federal procurements for commercial products and services which, in fiscal year 2022 alone, totaled almost $240 billion.[2]

[2] *See* System for Award Management, Total Actions by NAICS for FY22 (last visited Feb. 4, 2023) (stating "commercial procedures dollars" for FY22 to be $238,931,207,911.34). This report was accessed through SAM.gov's Data Bank,

This case involves one of the regulations governing commercial item acquisition—FAR 52.212-4(*l*)—which is the standard termination-for-convenience provision included in commercial item contracts. In the proceedings below, COFC misinterpreted this provision to allow the court to assess the qualitative adequacy of ACLR's "standard record keeping system."[3] This legal conclusion, which this Court reviews *de novo*, was in error, and so the COFC's November 2, 2022 decision on this issue should be reversed.

I. COFC'S INTERPRETATION OF FAR 52.212-4(*l*) IS CONTRARY TO THE PLAIN LANGUAGE OF THE PROVISION ITSELF

ACLR held a Schedule contract with the U.S. General Services Administration ("GSA"), which included FAR 52.212-4 and under which the Centers for Medicare & Medicaid Services ("CMS") issued the task order at issue in this case.[4] One of the key terms in FAR 52.212-4 appears at subsection (*l*), which establishes the government's right to terminate a commercial-item contract

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using the "Total Actions by NAICS" report with a date range of 10/1/2021-9/30/2022.

[3] The Coalition recognizes there are other issues involved in the appeal but addresses only the "standard record keeping system" issue.

[4] The GSA Schedule "is a long-term governmentwide contract with commercial companies that provide access to millions of commercial products and services at fair and reasonable prices to the government." *See* U.S. GSA, About GSA Schedule, https://www.gsa.gov/buy-through-us/purchasing-programs/gsa-multiple-award-schedule/about-gsa-schedule.

for convenience and allows the terminated contractor to recover a percentage of the contract price for work it performed, as well as "reasonable charges" resulting from the termination. Specifically, FAR 52.212-4(*l*) states in relevant part:

> [T]he Contractor shall be paid . . . 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 Government any right to audit the Contractor's records.

FAR 52.212-4(*l*).

In its November 2, 2022 opinion, COFC found that ACLR was not entitled to recover under FAR 52.212-4(*l*)—not because ACLR had failed to meet its evidentiary burden to demonstrate the reasonableness of its charges—but because ACLR's record keeping system was somehow not "standard" or "system[atic]" enough. COFC reached this conclusion based solely on dictionary definitions of the words "standard" and "system." *See* Appx4–7. In so doing, COFC adopted and applied an interpretation of FAR 52.212-4(*l*) under which it qualitatively assessed the adequacy of ACLR's record keeping system.[5] This interpretation

[5] There is no suggestion in COFC's opinion, and *amicus curiae* is aware of no evidence, that the data upon which ACLR relied below were not generated by the accounting system it uses as a matter of course in operating its business. Indeed, on this point, COFC "assume[d] that plaintiff's evidence involves records of some kind, and that those records have been kept." Appx5.

should be set aside because it is contrary to the plain language of the provision itself, contrary to fundamental principles of regulatory construction. *See Glycine & More, Inc. v. United States*, 880 F.3d 1335, 1344 (Fed. Cir. 2018*)* ("We examine the regulation's language to ascertain its plain meaning.").

COFC ignored entirely the language in FAR 52.212-4(*l*) which states that, when the government terminates a commercial-item contract for convenience, the contractor "shall not" be required to comply with the cost accounting standards ("CAS") or contract cost principles (set forth in FAR Part 31), and is not required to undergo an audit.[6] These significant limitations, of course, are highly relevant to determining the meaning of the phrase "standard record keeping system"—and they clearly undermine COFC's interpretation. Instead, they support the conclusion that the phrase "standard record keeping system" does not allow for review of the qualitative adequacy of a contractor's system.

The CAS, when applicable, establish substantive standards that a contractor's accounting system must satisfy. *See Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1365 (Fed. Cir. 2003) ("The CAS comprise a set of rules . . . that

[6] Rather, COFC ended its quotation of FAR 52.212-4(*l*) with ". . . have resulted from the termination." *See* Appx4. The very next two sentences set forth the prohibition on any requirement to comply with CAS or the FAR cost principles, or to be subject to audit.

regulate the accounting practices of government contractors.").[7] Similarly, the FAR Part 31 cost principles require that costs must comply with "[s]tandards promulgated by the CAS Board, if applicable, [and/or] generally accepted accounting principles and practices appropriate to the circumstances." FAR 31.201-2(a)(3). Thus, by expressly stating that CAS and the FAR Part 31 cost principles "shall not" apply in a commercial-item termination-for-convenience, and that a contactor is not subject to audit in such circumstances, FAR 52.212-4(*l*) makes clear that the qualitative adequacy of a contractor's record keeping system is not subject to challenge. Rather, the only relevant question is whether ***the data*** generated from that system and other sources are sufficient to carry a terminated contractor's evidentiary burden to demonstrate its "reasonable charges."

Indeed, as ACLR notes in its brief, the key phrase in FAR 52.212-4(*l*) is "***its*** [*i.e.*, the contractor's] standard record keeping system"—which can only mean that the contractor is free to use its own system to generate data in support of its claimed charges, ***not*** that the system itself is subject to a qualitative judicial assessment based on uncontextualized dictionary definitions. *See* ACLR Br. at 49. This straightforward reading of FAR 52.212-4(*l*) also is in keeping with the location of the phrase "to the satisfaction of the Government" within the provision

[7] The CAS do not apply to contracts for the acquisition of commercial items. *See* 48 C.F.R. § 9903.201-1(b)(6).

The relevant language here is: "reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system." Notably, the phrase "to the satisfaction of the Government" comes immediately after "reasonable charges the Contractor can demonstrate," but before "using its standard record keeping system." The only reasonable reading of this full phrase is that, while the contractor's "reasonable charges" must be demonstrated "to the satisfaction of the Government," there is no such "satisfaction of the Government" requirement for the contractor's "standard record keeping system."

II. COFC'S INTERPRETATION OF FAR 52.212-4(*l*) IS ALSO CONTRARY TO THE PLAIN LANGUAGE OF THE REGULATORY SCHEME AS A WHOLE

COFC's interpretation of FAR 52.212-4(*l*) also improperly failed to take into account the regulatory scheme established by FAR Part 12 pursuant to FASA. *See Hanser v. McDonough*, 56 F.4th 967, 970 (Fed. Cir. 2022) ("Regulatory interpretation, like statutory interpretation, 'is a holistic endeavor that requires consideration of a [regulatory] scheme in its entirety.'") (quoting *Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000)). Specifically, COFC did not address FAR 12.403, which establishes "guidance" for commercial-item terminations for convenience. *See* FAR 12.401 (providing that "[t]his subpart" provides "[g]uidance on the administration of contracts for commercial products or commercial services"). FAR 12.403(d) reiterates the FAR 52.212-4(*l*) requirement

that the contractor in such a termination is to be paid "[a]ny charges the contractor can demonstrate directly resulted from the termination," but it goes on to make clear that, in making such a demonstration, the contractor is not required to use its "standard record keeping system." Rather, the contractor "may" do so to support its claimed charges. FAR 12.403(d).

Consistent with the plain language of FAR 12.403(d), the Armed Services Board of Contract Appeals ("ASBCA") has held that the evidence upon which a contractor may rely in a commercial-item termination-for-convenience is not limited to data generated by its "standard record keeping system." In this regard, the ASBCA has stated: "In resolving this appeal, we examine and rely on, among other things, emails sent by the government, invoices generated by lessors, and bills of lading obtained by FES, none of which constitutes a 'contractor record.'" *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,244.[8] Thus, even if the estimates upon which ACLR has relied could somehow be characterized as not coming from ACLR's "standard record keeping system," that would not bar ACLR's recovery, contrary to COFC's apparent belief otherwise. *See* Appx6–7.[9]

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[8] In his concurrence/dissent in *SWR*, Judge Melnick explained in detail how the relevant regulatory history supports an expansive interpretation of the universe of evidence upon which a contractor may rely in seeking recovery of its "reasonable charges" under FAR 52.212-4(*l*). *Id*. at 175,237–241.

[9] In this regard, this Court has recognized that, even in the context of terminations-for-convenience of ***non-commercial*** contracts (to which the FAR Part

CONCLUSION

The government has long recognized that it is in its best interests to minimize the compliance burden on its commercial item contractors, so as to maximize the government's access to the commercial item marketplace. As explained above, COFC's November 2, 2022 decision was contrary to this fundamental goal, as well as the plain language of the governing regulations implemented pursuant to FASA. As a consequence, a ruling here affirming COFC's decision would improperly increase commercial item contractors' cost of doing business with the government, which could have a far-reaching—and chilling—effect on the willingness of such contractors to sell their products and services to the government.

31 cost principles do apply), "[t]he FAR [] provides that '[i]n appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement.'" *Nicon, Inc. v. United States*, 331 F.3d 878, 886 (Fed. Cir. 2003) (quoting FAR 49.201(c)).

For these reasons, as explained in detail above, this Court should reverse the November 2, 2022 decision of the U.S. Court of Federal Claims.

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