IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, ET AL., Plaintiffs, v. **UNITED STATES OF AMERICA**, Defendant.	)	**Civil Action No. 1:14-cv-01523-RCL**

NONPARTY ACCENTURE FEDERAL SERVICES, LLC'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

On October 1, 2019, Plaintiffs filed a Motion to Compel the Production of Documents, Dkt. No. 101 ("Motion" or "Mot."), against Nonparty Accenture Federal Services, LLC ("AFS") seeking the production of a massive amount of highly sensitive and proprietary internal AFS data that has no relevance to the litigation before this Court. The litigation, No. 14-cv-1523 (the "Action"), is a dispute between the United States Government ("United States," "IRS," or "Defendant") and a putative class of Plaintiffs that consists of paid tax-return preparers ("Plaintiffs") related to preparer tax identification numbers ("PTINs"). Although AFS is not a party to the Action, Plaintiffs' Motion asks this Court to enforce a subpoena against AFS issued pursuant to Rule 45 of the Federal Rules of Civil Procedure (the "Subpoena"). The Subpoena contains twenty-three requests for information that are vastly overbroad, irrelevant, and/or otherwise obtainable from the IRS. Thus, pursuant to Local Rule 7(b), AFS submits this Memorandum in Opposition to Plaintiffs' Motion.

As set forth in detail below, Plaintiffs' Subpoena Requests are impermissible for three reasons:

- ***First***, Plaintiffs' Requests encompass overly broad and completely irrelevant categories of documents;
- ***Second***, Plaintiffs' Requests would impose an undue burden on Nonparty AFS, and in many cases seek documents more readily obtained from the Defendant; and
- ***Third***, Plaintiffs seek categories of highly sensitive, non-public cost or pricing information that, in addition to being irrelevant and unduly burdensome, are protected from disclosure under statutes and regulations that prohibit even the Government from requesting and obtaining such information, much less the Plaintiffs in the Action.

Plaintiffs have failed to meet their burden to establish that the documents requested of Nonparty AFS are relevant, and that the Requests are not unduly burdensome. Accordingly, Plaintiffs' Motion must be denied.

BACKGROUND

As set forth within the First Amended Complaint, filed on August 7, 2015, Dkt. No. 41 (the "Amended Complaint"), the Action involves a putative class of PTIN preparers' claims that the IRS fee collected for PTINs was, at least in part, improper and impermissible. *See* 1st Am. Compl. at ¶¶ 39-50.

Nonparty AFS is the prime contractor on Contract No. TIRNO-10C-00022, a competitively awarded, commercial-item contract between AFS and the IRS (the "AFS Contract," or "TIRNO Contract"). The IRS selected AFS from among several bidders as the most attractive bid and overall best value to the United States. Because the AFS Contract is for commercial items, *see* Mot. Ex. 2 at FOIA_000053 (incorporating by reference FAR § 52.212-4, Commercial Items), the Government was prohibited from obtaining certified cost or pricing data

from AFS to determine the reasonableness of the price to be paid to AFS under the contract for AFS' services. *See*, *e.g.*, 41 U.S.C. Chapter 35 (prohibiting certified cost or pricing data for the acquisition of commercial items and for contracts awarded based on adequate price competition respectively); 10 U.S.C. § 2306a(b)(1)(A)(i) (same); FAR § 15.403-1(b)(1), (3) (same). Because the TIRNO Contract was competitively awarded, the contract price was *per se* reasonable. *See* FAR § 15.404-1(b)(2)(1) (describing comparison of proposed prices received in response to a solicitation as the preferred price analysis technique,[1] and noting that adequate price competition usually establishes a fair and reasonable price).

The purpose of the TIRNO Contract procurement was to "establish[] and maintain[] a system for on-line registration and renewal, user fee collection, and issuance of a unique identifying number for all paid tax return preparers. . . ." Mot. Ex. 2 at FOIA_000032. Pursuant to the TIRNO Contract, the successful bidder would be paid for its work under the contract through the collection of registration and renewal fees. The TIRNO Contract states the following in relevant part:

> 1.0 Pricing. The vendor assumes the responsibility for the [Return Preparer Registration] Program on a no-cost basis to the government. The vendor will not be reimbursed by the federal government for fees, costs, or any other charge or expense. The vendor is expected to cover its cost and any profit by charging reasonable registration and renewal fees. A government user fee will be added via contract modification to cover the IRS's costs of administering the RPR program. The vendor will collect this fee and remit it to the IRS in its entirety.

Mot. Ex. 2 at FOIA_000039; FOIA_000048, § 2.20 (same); *see* FOIA_000058, § 5.0 ("The Government is not obligated to pay any fees, costs, or any other charge or expense in connection with this contract and/or contractor's performance. The contractor is authorized to collect a fee

[1] Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. *See* FAR § 15.404-1(b)(1).

from preparers that register and renew their registration to cover its costs and any profits by charging a reasonable registration and renewal fee. In consideration, the contractor will be the sole provider of the [IRS] Return Preparer Registration."). Thus, the AFS Contract did not delineate specific prices for specific tasks or work scope, nor did it apportion the registration and renewal fees for specific tasks under the contract. Rather, in exchange for performance of the Contract's Statement of Work and satisfaction of all contract requirements, AFS was authorized to collect and retain registration and renewal fees. These fees (*i.e.*, the contract prices) were deemed fair and reasonable by the United States based on adequate price competition, *see* FAR § 15.404-1(b)(2)(i), and, according to the IRS, AFS "has fulfilled its obligations" under the AFS Contract. Mot. Ex. 5 at 14 (Defendant's Response to Interrogatory No. 13). The permissibility of AFS' fee to cover its "cost and any profit" is not in dispute in the Action.

Additionally, the AFS Contract required AFS to collect and remit to the IRS, a "Government User Fee." Mot. Ex. 2 at FOIA_000039 § 1.0; FOIA_000048, § 2.21 ("The government is required to recoup all costs associated with the administration of the RPR Program in a user fee. The vendor shall collect this fee from the applicants and remit to the IRS daily through Pay.gov the previous day's collection of user fees."); Mot. Ex. 8 at FOIA_000079, § 3.3 ("The Vendor will collect fees daily and remit the previous days' government portion of cleared payments to the IRS daily through Pay.gov."). AFS has no visibility into, or control over, the breakdown of the "Government User Fee" that was to be used to "cover the IRS's costs of administering the RPR program." Mot. Ex. 2 at FOIA_000039; FOIA_000048 § 2.20.

Shortly after filing the Amended Complaint, on August 26, 2015, Plaintiffs served a nonparty subpoena for the production of documents on AFS. *See generally* Mot. at Ex. 1, Subpoena. Plaintiffs had not received discovery from the Defendant before issuing the Subpoena

to AFS, and even now, has only received "informal and limited discovery from the United States." Mot. at 3. Nevertheless, Plaintiffs seek—from Nonparty AFS—data and documents from AFS to "answer questions" that can be answered by the Defendant in this Action, including documents representing a wide-ranging foray into AFS' non-public confidential and proprietary information. *See* Mot. at 3-4; *see also* Mot. Ex. 1 at 2.

Pursuant to Federal Rule of Civil Procedure 45, AFS responded to Plaintiffs' Subpoena on September 9, 2015, by serving responses and objections to each request. *See* Mot. at 4. In December 2015, discovery was stayed until a decision on dispositive motions was reached. *See id*. On July 10, 2017, this Court determined that "all fees defendant has charged to [Plaintiffs] members to issue or renew a PTIN under 26 C.F.R.§ 300.13, including those paid to the third-party vendor are hereby declared unlawful;" and "that the defendant is permanently enjoined from charging PTIN fees. . . ." *Steele v. United States*, No. 1:14-CV-01523-RCL, 2017 WL 3621747, at *1 (D.D.C. July 10, 2017), *vacated and remanded sub nom. Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019), *cert. denied*, No. 18-1493, 2019 WL 4921409 (U.S. Oct. 7, 2019). Defendant then appealed to the United States Court of Appeals for the District of Columbia Circuit.

On March 1, 2019, the D.C. Circuit remanded this matter to this Court for "further proceedings, including an assessment of whether the amount of the PTIN unreasonably exceeds the ***costs to the IRS*** to issue and maintain PTINs." *Montrois v. United States*, 916 F.3d 1056, 1058 (D.C. Cir. 2019)[2]; *see also* Mot. at 4. Shortly after, counsel for Plaintiffs contacted counsel for AFS to discuss AFS' responses to the Subpoena in light of the remand. *See* Mot. at 4.

[2] All emphases herein are added unless otherwise noted.

After several discussions among counsel for AFS and Plaintiffs, on June 24, 2019, AFS served First Amended Responses and Objections to Plaintiffs' Subpoena in an effort to comply with the amendments to Federal Rule of Civil Procedure 26 that took effect on December 1, 2015.[3] *See generally* Mot. Ex. 7. As evidenced by the Amended Responses and Objections, AFS objected to the Requests, including to their extremely overbroad and unduly burdensome nature. *E.g.*, Mot. Ex. 7 at General Objection Nos. 6, 9-10, and 17. For example, *all but one* of the Requests seeks "All documents. . ." related to a broad swathe of internal and proprietary AFS information. Mot. Ex. 1 at 11-13. For example, Request No. 9 seeks, "All documents showing any profit or loss of Accenture related to the work described in Requests 1, 3, and 4[,]" and Request No. 15 similarly demands, "All documents relating to the cost, or an estimate of the cost, to Accenture to issue a PTIN." Mot. Ex. 1 at 12-13.[4] Both of those Requests contain vague and undefined accounting terms without any hint of what Plaintiffs truly seek. Both Requests also include the extraordinarily broad defined term "Accenture," which Plaintiffs defined as follows: "'Accenture' refers to Accenture Federal Services, LLC, Accenture National Security Services, LLC, and any predecessor, successor, subsidiary, division, or affiliate thereof." Mot. Ex. 1 at 1. Plaintiffs' definition could encompass hundreds, if not thousands, of employees who

[3] This Court has previously stated that Rule 26 "was amended in 2015 to emphasize the need for proportionality in discovery and to 'encourage judges to be more aggressive in identifying and discouraging discovery overuse.'" *Prasad v. George Washington Univ.*, 323 F.R.D. 88, 91 (D.D.C. 2017) (quoting Fed. R. Civ. P. 26(b)(1) Advisory Committee's Note to the 2015 Amendment).

[4] Plaintiffs have conceded that "All documents…." is unduly burdensome and have agreed to limit certain Requests to "Documents sufficient to show. . . ." *See* Mot. at 5 n.3. However, that is a distinction without a difference. Following the same example using Request Nos. 9 and 15, it is impossible for AFS to know what Plaintiffs consider "documents sufficient to show" the undefined "profit or loss" related to any PTIN work, or to Plaintiffs' divine vague references to "the cost, or an estimate of the cost" to issue a PTIN. *See id*.

are not even employed by AFS, particularly if it includes any "affiliate" or "division" of AFS.[5] Similarly, Plaintiffs' definition of the terms "refer," "relate," "referring," or "relating" is exceedingly broad:

> "Refer" or "relate" or "referring" or "relating" means all documents which explicitly or implicitly, in whole or in part, were received in conjunction with, were generated as a result of, or discuss, the subject matter of the request, including, but not limited to, all documents which reflect, record, memorialize, discuss, describe, compare, consider, concern, constitute, embody, evaluate, analyze, review, underlie, report on, comment on, impinge upon, or impact the subject matter of the request.

Mot. Ex. 1 at 5. No fewer than seventeen of Plaintiffs' twenty-three Requests seek "All documents relating to. . . ." Mot. Ex. 1 at 11-13 (Request Nos. 1-4, 10-19, 21-23).

AFS further objected to Request Nos. 1-13, 15-20,[6] and 23 based upon the determination of *per se* reasonableness pursuant to FAR § 15.403-1. The FAR defines "cost or pricing data" as follows:

> "Cost or pricing data" (10 U.S.C. 2306a(h)(1) and 41 U.S.C. chapter 35) means all facts that, as of the date of price agreement,. . .prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are

[5] Plaintiffs did concede during a Meet and Confer on September 24, 2019 that Plaintiffs are only interested in records from the entities that performed any services under the TIRNO Contract. But, even if the definition of "Accenture" is limited to AFS, as Plaintiffs concede, that could still encompass *thousands of employees*, *see* Mot. at 10, which is still vastly overbroad and unduly burdensome.

[6] During a Meet and Confer on July 18, 2019, counsel for Plaintiffs stated that Plaintiffs also seek confidential cost or pricing data in response to Request No. 21, which seeks, "All documents relating to the one-year renewal period for PTINs and the decision not to use a three-year renewal period for PTINs." Mot. Ex. 1 at 13. To the extent that Plaintiffs' Request demands confidential and highly proprietary cost or pricing data, which was unclear from the plain language of the Request, AFS will not produce such data in response to Request No. 21.

> more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.

FAR § 2.101 – Definitions. "Cost or pricing data" includes AFS' non-public and highly sensitive cost information, revenue statements, profit information, and other non-public data that, if revealed, could provide a competitor with a competitive advantage. AFS also objected to Plaintiffs' Requests to the extent that the Requests seek highly proprietary business information or trade secrets that have no relevance to Plaintiffs' claims against the United States, and which again, could provide a competitive advantage to AFS' competitors if disclosed. Mot. Ex. 7 at Responses to Request Nos. 1-13, 15-20, 23.

On July 5, 2019, counsel for Plaintiffs sent a letter to counsel for AFS confirming Plaintiffs' disagreements with AFS' Amended Responses and Objections.[7] That letter focused on two categories of AFS' Responses and Objections: (1) documents withheld based upon the FAR-based and statutory frameworks that govern AFS' Contract with the IRS; and (2) AFS' objections to the unduly burdensome and extraordinarily broad Requests. Plaintiffs proposed another meet and confer to discuss the objections and asked AFS to confirm whether it would continue to withhold documents and data pursuant to its objections.

Significantly, the Plaintiffs' July 5 letter commenced a new fishing expedition. After nearly four years of litigation in a case in which AFS is not a party, Plaintiffs asserted that they would now be seeking extensive discovery on the "***AFS fee***" charged to the IRS, as distinguished from the "***IRS fee***." That is a significant change of direction. *Compare* Am. Compl. ¶¶ 44-45 ("The plaintiffs are entitled to a judgment declaring that Treasury and ***the IRS lack legal***

[7] A true and correct copy of the correspondence from counsel for Plaintiffs to counsel for AFS is included as Exhibit 1 to this Memorandum.

authority to charge a fee for issuance or renewal of a PTIN under 31 U.S.C. § 9701, or any other statute." "The plaintiffs are also entitled to the return or refund of all PTIN fees illegally exacted, or otherwise unlawfully charged, plus reasonable interest.") *with* Ex. 1 at 2 ("Plaintiffs are seeking information from AFS in order to determine the various components of the ***AFS fee*** and which of those components are impermissible"). Notwithstanding Plaintiffs' curious desire to obtain substantial non-public information regarding AFS' business, the focus of Plaintiffs' Amended Complaint is the permissibility of the ***IRS PTIN fee*** and the ***authority of the United States***, neither of which has anything to do with AFS, or the internal financial components of AFS' fee (*i.e.*, the price paid to AFS for performance of its contract).

On July 13, 2019, counsel for AFS responded to Plaintiffs and again explained AFS' position that it would not produce its non-public, confidential, and highly proprietary cost or pricing data in response to Plaintiffs' Subpoena, because Plaintiffs are not entitled to that information in a civil litigation or any other context.[8]

After several additional discussions with Plaintiffs' counsel, including on July 18, 2019, September 24, 2019, and September 27, 2019, Plaintiffs filed the instant Motion on October 1, 2019.

ARGUMENT

I. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 26, where "good cause exists," courts have broad discretion to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:. . .requiring that

[8] A true and correct copy of the correspondence from counsel for AFS to counsel for Plaintiffs is included as Exhibit 2 to this Memorandum.

a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way[.]" Fed. R. Civ. P. 26(c)(1)(g).

Federal Rule of Civil Procedure 45 requires that a court must modify or quash a subpoena that "subjects a person to undue burden." Fed. R. Civ. P. 45(d). "In balancing the interests served by demanding compliance, courts should consider relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed." *Dell Inc. v. DeCosta*, 233 F. Supp. 3d 1, 3 (D.D.C. 2017) (internal quotation marks and citations omitted). Courts have determined that an entity's status as a nonparty is a factor that weighs against disclosure. *See Dig. Assurance Certification, LLC v. Pendolino*, No. 6:17-CV-72-ORL-41TBS, 2017 WL 4342316, at *9 (M.D. Fla. Sept. 29, 2017).

"[I]t is improper under Rule 45 to subject non-parties to undue expense. . ." and district courts have discretion to limit discovery to prevent undue burden on third parties even if the requested discovery is strictly within the limits of Rules 26 and 45. *Millennium TGA, Inc. v. Comcast Cable Commc'ns LLC*, 286 F.R.D. 8, 11 (D.D.C. 2012). When making a determination under the "undue burden standard" district courts must be "sensitive to the costs imposed on third parties." *Watts v. S.E.C.*, 482 F.3d 501, 509 (D.C. Cir. 2007).

II. PLAINTIFFS' REQUESTS ARE NOT RELEVANT TO THE ISSUES OF THE UNDERLYING LITIGATION BETWEEN PLAINTIFFS AND THE UNITED STATES, TO WHICH AFS IS NOT A PARTY

Federal Rule of Civil Procedure 26 "vests the trial judge with broad discretion to tailor discovery narrowly and dictate the sequence of discovery." *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 82-83 (D.D.C. 2018). When determining whether to compel disclosure during discovery, a district court "first must consider whether the discovery sought is relevant to a party's claim or defense in the underlying litigation. . . ."

BuzzFeed, Inc. v. U.S. Dep't of Justice, 318 F. Supp. 3d 347, 356 (D.D.C. 2018). Federal Rule of Civil Procedure 26 requires that a subpoena's requests be "proportional to the needs of the case," Fed. R. Civ. P. 26(b)(1), and, generally, "discovery that is too far removed from allegations in the operative Complaint is disallowed." *Prasad v. George Washington Univ.*, 323 F.R.D. 88, 91 (D.D.C. 2017) (internal quotation marks omitted).

"Where a relevance objection has been raised, the moving party seeking to compel discovery 'must demonstrate that the information sought to be compelled is discoverable.'" *Breiterman v. United States Capitol Police*, 324 F.R.D. 24, 30 (D.D.C. 2018) (quoting *Meijer, Inc. v. Warner Chilcott Holdings Co., III*, 245 F.R.D. 26, 30 (D.D.C. 2007)). "Courts test relevance by looking at the law and facts of the case, not simply the expressed desires of a party to see certain information." *United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 36-37 (D.D.C. 2012) (Lamberth, C. J.). Although relevance can be construed broadly, courts "should not endorse 'fishing expeditions,' discovery abuse and inordinate expense involved in overbroad and far-ranging discovery requests." *Id*. at 37. Indeed, courts "should tailor discovery 'to the issues involved in the particular case.'" *Id*.

A. Plaintiffs Have Argued No Legitimate Basis To Conclude That AFS' Confidential Cost or Pricing Data is Relevant To the Action Against the United States

The non-public, competitively-sensitive cost or pricing data sought by Plaintiffs is not relevant to Plaintiffs' claims against the United States. The operative complaint in the case, which is the Amended Complaint filed on August 7, 2015, Dkt. No. 41, does not name AFS as a party, *see generally* 1st Am. Compl., and counsel for the Plaintiffs has represented multiple times that Plaintiffs do not seek to join AFS as a party and that this litigation is not against AFS. The Amended Complaint contains no allegations that *AFS* charged an impermissible fee. The Amended Complaint similarly contains no allegations that *AFS* charged an unreasonable fee. In

fact, Plaintiffs make no allegations whatsoever about the fee charged by AFS to PTIN preparers, and seek only to identify portions of the *IRS fee* that they allege are impermissible. That is not information that AFS has, and no internal AFS cost or pricing data will provide Plaintiffs the answers they seek about the discrete breakdown of cost elements that comprise the *IRS fee* to PTIN preparers.

In their Motion, Plaintiffs argue that AFS' non-public highly proprietary and sensitive cost or pricing data is relevant to its litigation against the United States because it seeks answers to various questions for its litigation against the United States, including:

- "If Accenture was generating PTINs and maintaining the database of PTINs, what was the *IRS* charging $50 for, and how does that $50 'bear a relationship to the cost of' 'generating and maintain a database of PTINs'?" (Mot. at 8).
- "What portion of the $14.25 and $13 fees paid for Accenture [*sic*] to generate and maintain a database of PTINs (the only permissible 'remaining PTIN-related functions')?" (Mot. at 9).
- "And what portion paid for the non-PTIN-related work, including the tasks listed above, that, after *Loving*, fell outside 'the narrowed scope of remaining PTIN-related functions'?" (*Id*.).
- "What portion of the user fees *received by the IRS* and used to pay AFS were for work outside 'the narrowed scope of remaining PTIN-related functions'?" (*Id*.).

But, those questions are clearly only able to be answered by the Defendant in the litigation, the United States. None of AFS' non-public highly proprietary and sensitive cost or pricing data that Plaintiffs seek to compel from AFS will provide any insight whatsoever into what portion of the *IRS'* $50 fee bears a relationship to the cost of generating and maintaining a PTIN database. *See* Mot. at 8. Nor will AFS' non-public cost or pricing data provide any of the answers that Plaintiffs claim to seek related to a breakdown of the "user fees received by the IRS." Mot. at 9.

Moreover, AFS has no visibility into the fees received by the IRS or how the IRS chooses to subdivide those fees (if at all) to pay its costs related to PTINs. Those answers can only be

provided by the Defendant, which means that Plaintiffs' attempts to assign some modicum of relevance of AFS' cost or pricing data to its litigation *against the United States* must fail.

Plaintiffs assert without evidence that AFS "was doing more than generating and maintaining PTINs[,]" Mot. at 8, and supposedly AFS' non-public highly confidential cost or pricing data are relevant to determining the breakdown of the IRS fee for that purported work. Plaintiffs are wrong. The argument Plaintiffs make, *i.e.*, that AFS' price build up (assuming there was one) is somehow relevant to the IRS' internal breakdown of *the IRS' cost* pursuant to the TIRNO Contract, misunderstands the fundamental difference between an agency's *cost* and a contractor's proposed *price*.

In a fixed-price contract, like the TIRNO Contract at issue here, the agency's ultimate cost of performance is the price paid to the contractor. Fixed-price contracts have inherent risks for both the agency and the contractor; if the costs to perform under the contract are significantly higher than anticipated, the contractor will likely lose money, but if the costs to perform are lower than anticipated, the contractor will likely recognize a larger profit. Yet, the individual costs that the contractor must ultimately expend to perform the work are irrelevant to the agency. The agency pays its agreed-upon price and expects the contract work to be performed. Whether the contractor makes money or loses money, based on its own actual cost experience, has no impact on the contract price, or what the agency is required to pay to the contractor. But that is precisely the information Plaintiffs' Motion seeks here from AFS, which is not at issue in the Action.

As described above, the AFS Contract provides that in exchange for the work to be performed under the Contract, AFS is authorized to collect registration and renewal fees from preparers, which are intended to cover all of AFS' costs of performance and any profit. *See* Mot.

Ex. 2 at FOIA_000058, § 5.0. Thus, as a threshold matter, the IRS is not paying AFS anything to perform the work required under the AFS Contract and, therefore, information from AFS regarding its own costs of performance are irrelevant to whether "the amount of the PTIN unreasonably exceeds the costs to the IRS to issue and maintain PTINs." Mot. at 4. Indeed, the only relevant costs to Plaintiffs' litigation against the United States ***are the costs incurred by the United States***. Even if the IRS collected the fees and paid AFS its portion for the services AFS rendered, the "cost to the IRS" is the price charged by AFS. What it, in turn, costs AFS to perform the services is, therefore, not relevant. The Plaintiffs know what AFS was paid, *i.e.*, the cost to the IRS, and the work performed by AFS is described in the AFS Contract, which the IRS has said it will produce. *See* Mot. Ex. 6 at 5-6 (Defendant's Response to Document Request No. 3). Thus, nothing more is required of AFS for the Plaintiffs to determine whether the amount of the IRS fee unreasonably exceeds the costs to the IRS. The breakdown of AFS' costs to specific aspects or elements of its contract performance (which was not priced in that manner) is simply not relevant to Plaintiffs' litigation because, at bottom, Plaintiffs are challenging the portions of ***the IRS' cost*** that the ***IRS*** allegedly assigned to the various tasks under the contract. These are facts not known to AFS, and will not be revealed by the disclosure of AFS' non-public and highly sensitive proprietary cost or pricing data.

Plaintiffs' Subpoena and this Motion to Compel are clumsy attempts to obtain competitive information from a third party that has nothing to do with the underlying allegations in the operative complaint. As this Court previously held, just because a party wants certain information to be disclosed in discovery does not mean that it is entitled to the disclosure of that data. *See United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 36-37 (D.D.C. 2012) (Lamberth, C. J.). That is precisely the situation here: without legal justification, Plaintiffs

want to review a wide swathe of AFS' non-public proprietary information just in case there is something potentially relevant contained in it. However, they have provided no rational basis to permit this Court to determine that the information is, in fact, relevant, *i.e.*, the threshold issue in any motion to compel, to Plaintiffs' lawsuit against the United States, or to determine what portion of the ***IRS' fee*** may have been used for more than "generating and maintaining PTINs."

B. Plaintiffs' Motion Amounts To An Impermissible "Fishing Expedition" Into AFS' Non-Public, Confidential and Proprietary Cost or Pricing Data that are Not Relevant to the Action

Plaintiffs' Subpoena requests are precisely the type of "fishing expedition" that Rules 26 and 45 prohibit. To compel AFS to disclose irrelevant data in response to Plaintiffs' wide-ranging and extremely broad requests would effectively convert this Court into an investigative body that would permit competitors and others to delve into highly confidential and proprietary competitive information of a nonparty in the context of civil litigation. As discussed below at Section IV.A.-B., *infra* at 21-30, Plaintiffs are not entitled to receive AFS' highly confidential, competitively-sensitive, and proprietary cost or pricing data. To permit Plaintiffs' access to this data would be contrary to the statutory framework and implementing regulations that govern AFS' Contract with the Government. Plaintiffs' argument appears to be that, because Plaintiffs filed a lawsuit against the Government related to a contract that was competitively awarded to Nonparty AFS, Plaintiffs are now entitled to unfettered access to all of AFS' highly confidential and competitively-sensitive cost or pricing data related to the award of that contract pursuant to Rule 45. That cannot be the case. To set a precedent like the one Plaintiffs argue in their Motion would ripple throughout the government contracting industry, essentially crippling competition. In effect, an unsuccessful and unhappy bidder could file a protest challenging a contract award, lose that protest, and then turn around and file a civil case against the Government, issue a nonparty subpoena under Rule 45, and gain access to the successful bidder's extremely sensitive

competitive information. This Court should not permit Plaintiffs to use the Court as an investigative body simply because they would like access to data that AFS has no obligation to disclose, and that Plaintiffs have failed to demonstrate is relevant to the Action.

III. PLAINTIFFS' REQUESTS ARE EXTREMELY OVERBROAD AND UNDULY BURDENSOME AND AFS SHOULD NOT BE COMPELLED TO PRODUCE DOCUMENTS AND DATA IN RESPONSE

"Discovery, like all matters of procedure, has ultimate and necessary boundaries." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351-52 (1978) (internal citations omitted). Even if this Court determines that Plaintiffs' Subpoena Requests for confidential cost or pricing data are relevant, which they are not, this Court must substantially limit what AFS is required to produce based upon the plain language of Rule 45, which requires the Court to quash or modify a subpoena that subjects a nonparty to "undue burden." Fed. R. Civ. P. 45(d) ("the court for the district where compliance is required must enforce this duty [to avoid imposing undue burden or expense]. . . .").

As an initial matter, the Court must determine whether Plaintiffs' document requests for AFS' cost or pricing data cause an undue burden on AFS. There are two principles that guide a court's analysis in making this determination. *BuzzFeed, Inc. v. U.S. Dep't of Justice*, 318 F. Supp. 3d 347, 356 (D.D.C. 2018) (citing *Watts v. S.E.C.*, 482 F.3d 501, 509 (D.C. Cir. 2007)); *see* Fed. R. Civ. P. 45(d)(3)(A). ***First***, "[t]he Rule 45 'undue burden' standard requires district courts supervising discovery to be generally sensitive to the costs imposed on third parties." *Id.*; *see also* Fed. R. Civ. P. 45(c)(2)(B) (any court order to compel compliance with document subpoena "shall protect any person who is not a party or an officer of a party from significant expense" of compliance). ***Second***, "Rule 26(b) requires district courts in all discovery matters 'to consider a number of factors potentially relevant to the question of undue burden,' including:

- whether the discovery sought is 'unreasonably cumulative or duplicative';
- whether the discovery sought 'can be obtained from some other source that is more convenient, less burdensome, or less expensive'; and
- whether the discovery sought is 'proportional to the needs of the case,' taking into account 'the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.'"

BuzzFeed, Inc., 318 F. Supp. 3d at 358. This Court, in considering Plaintiffs' Motion, "has the discretion to limit discovery to prevent undue expense to third parties, even if the discovery sought is within the permissible scope" of the Federal Rules of Civil Procedure. *In re Denture Cream Prod. Liab. Litig.*, 292 F.R.D. 120, 123-24 (D.D.C. 2013).

Plaintiffs' Subpoena to AFS contains *twenty-three* document requests, and seeks documents relating to numerous overly-broad topics, such as "financial information" for the last ***ten*** years. Mot. Ex. 1 at 11 (seeking discovery from January 1, 2009 until the "present"). This encompasses over a decade of records and data, and AFS' document collection thus far has resulted in a very large swathe of information with over ***700,000 documents*** from numerous custodians. This is overly burdensome for a nonparty. AFS is currently working to sort, review, and produce documents in response to Subpoena Request Nos. 1-4, which requests contract documents and communications between AFS and the IRS, *see* Mot. Ex. 1. These are the highest priority Requests as identified by counsel for Plaintiffs. But, even with unique string searches and the application of complex analytics, the potential review set for only those four Requests still remains approximately ***70,000*** documents based on the breadth of Plaintiffs' Requests.

Moreover, many of Plaintiffs' Subpoena Requests seek documents and/or data that: (1) are unreasonably cumulative and duplicative; (2) are available from the Defendant in the

Action; and (3) would place an undue burden on AFS that outweighs any potential limited benefit to Plaintiffs. Specifically, the documents requested in twenty of the twenty-three Subpoena Requests are duplicative and cumulative. *See* Mot. Ex. 1 at Request Nos. 1-13, 15-20, 23. Plaintiffs not only requested the same documents from Defendant, *see generally* Mot. Ex. 6, but they have already received at least some of this discovery from the Defendant. *See* Mot. at 3. Further, during the negotiation of the Proposed Stipulated Protective Order in this matter, Dkt. No. 102-1, AFS and Defendant—via a telephone call with counsel for Plaintiffs on September 26, 2019—discussed how Defendant will protect and produce AFS confidential and highly confidential data and documents, including the contract documents Plaintiffs are requesting from Nonparty AFS. Thus, contrary to Plaintiffs' assertion, *see* Mot. at 10, Defendant has already agreed to produce at least some of the documents that Plaintiffs also seek from AFS. There is no reason why Plaintiffs also need that very data from Nonparty AFS.

Indeed, as AFS already explained to Plaintiffs in its June 24, 2019 Amended Objections and Responses to Plaintiffs' Subpoena, *see* Mot. Ex. 7, the only relevant documents that would be responsive to ***eighteen of the twenty-three*** Subpoena Requests are in the possession of the IRS, *i.e.*, the Defendant in this matter, and only ***five*** Requests are not (Request Nos. 5-6, 14, 21-22). Any documents and communications ***relevant to this Action*** produced in response to these eighteen requests by AFS will also be produced by the IRS, as Defendant, and IRS has already informed Plaintiffs that it ***will produce*** documents in response to those ***same requests***. *See* Mot. Ex. 6. For example, Request No. 1 to AFS and Request No. 3 to the IRS contain nearly identical language and will result in duplicative productions of the only relevant documents by both AFS and the IRS.

Plaintiffs' Request No. 1 to AFS	Plaintiffs' Request No. 3 to IRS
1. All documents relating to Contract TIRNO-10C-00022 with the IRS, Including but not limited to, the Contract itself, communications with the IRS about TIRNO-10C-00022, your proposal, performance measurements, evaluations, and billing and payment records.	3. All documents relating to Contract TIRNO-10C-00022 with Accenture and any amendments thereto, including but not limited to, the Contract itself, Accenture's proposal(s), evaluations, and billing and payment records.

Compare Mot. Ex. 1 at 11 *with* Mot. Ex. 6 at 5. The IRS did not refuse produce documents in response to Plaintiffs' Request No. 3. In fact, the IRS has not refused to produce documents or data to any of Plaintiffs requests to the IRS that mirror Plaintiffs' Requests to AFS. There is no reason why Nonparty AFS should also be required to undertake the burden and expense to produce the same documents or be compelled to produce its highly sensitive internal cost or pricing data.

Likewise, under the terms of its Contract and by statute and regulation, AFS is prohibited from disclosing or producing any TIRNO Contract "data collected by the vendor" without express permission from the Defendant, because these documents are ***property of the Defendant***.[9] *See* Mot. Ex. 2 at FOIA_000041, § 1.6. Accordingly, AFS would not only have to review all documents potentially responsive to these eighteen duplicative and burdensome Requests, but AFS would also have to provide them to the IRS for its review and consent for disclosure *before* AFS could produce any documents even though IRS will also produce the

[9] Numerous clauses in the AFS Contract prevent the disclosure of certain information. These clauses include: §1.1 (Confidentiality of Information), IRSAP 1052.224-9000 (Disclosure of Information – Safeguards), FAR § 52.224-1, FAR § 52.224-2; § 1.2 (Privacy Act Provisions); § 1.3 (Privacy Act Violations); §1.6 (Ownership of Data); § 1.7 (Protection Against Misconduct); § 1.10 (Unauthorized Inspection/Disclosure); § 2.1 (IRSAP 1052.224-9000(d) (Disclosure of "Sensitive but Unclassified" Information Safeguards)); § 2.2 (IRSAP 1052.224-9001(a) (Disclosure of Information -- Criminal/Civil Sanctions)); § 2.11 (Safeguarding/Protecting Sensitive Personally Identifiable Information). Notably, under § 2.1 of the AFS Contract, AFS is obligated to obtain "prior written approval of the IRS" before disclosing "[a]ny Treasury information" that the IRS considers "Sensitive but Unclassified."

relevant documents. Sticking with this example, it is absurd that a nonparty subpoena recipient should be required to sift through its files and find "[a]ll documents. . .including but not limited to. . .communications with the IRS," (Request No. 1) when the IRS itself is the actual Defendant, and would have any such communications in its possession. Therefore, it is far "more convenient, less burdensome, [and] less expensive" for Plaintiffs to pursue these documents from Defendant, and not Nonparty AFS. *See BuzzFeed, Inc.*, 318 F. Supp. 3d at 358.

Furthermore, to require AFS to disclose its highly sensitive cost or pricing data opens AFS, *a nonparty to the Action*, to the substantial risk that its "secret sauce," *i.e.*, its competitive advantage, will be disclosed for no good reason. Generally, the term "secret sauce" in the business context means "a competitive advantage, arising from years of experience, proprietary insights, research and development, etc." *SPBS, Inc. v. Mobley*, No. 4:18-CV-00391, 2018 WL 4185522, at *5 (E.D. Tex. Aug. 31, 2018). Courts have recognized that the types of data that Plaintiffs seek, *e.g.*, cost data (Req. No. 7), profit and loss data (Req. No. 9), cost estimates (Req. No. 15), and projections of PTIN fees and costs (Req. No. 23), are "clearly trade secrets/proprietary information." *E.g.*, *Radiant Glob. Logistics, Inc. v. Furstenau*, 368 F. Supp. 3d 1112, 1126-1127 (E.D. Mich. 2019) (finding that "P&L, budgetary information, customer analysis. . .revenue, profitability, [and] cost," "are clearly trade secrets/proprietary information."). That type of "secret sauce" data is precisely what the Plaintiffs seek. To require Nonparty AFS to disclose highly sensitive data could cause significant competitive injury.

For these reasons, the burden placed on AFS to produce these documents grossly outweighs any benefit to Plaintiffs and is not proportional to the needs of the case. In sum, subjecting AFS to Plaintiffs' fishing expedition, where counsel for Plaintiffs have no idea what they are looking for and are just hoping that they might find something useful to their case from

AFS, places an undue burden and expense on AFS that is outweighed by any minimal benefit to Plaintiffs.

IV. THERE IS NO REASON TO COMPEL BURDENSOME PRODUCTION OF COST OR PRICING DATA BECAUSE AFS' PRICES ARE *PER SE* REASONABLE UNDER THE RELEVANT STATUTES AND THE FAR

Plaintiffs cite to no case where any court has ever compelled a Government contractor to produce its non-public, sensitive cost or pricing data. Indeed, as Plaintiffs have acknowledged, neither party is aware of any case, at any tribunal, where such information has ever been sought or successfully compelled from a contractor, *see* Ex. 2 at 3, let alone from a *nonparty* contractor.

In this case, the Plaintiffs' own acknowledged objectives obviate the need to break new ground. The end-goal of the Motion is purportedly to determine whether AFS' portion of the user fee, (*i.e.*, price) was "reasonable." *See* Mot. at 7.[10] This inquiry has already been answered by Congress. AFS' prices are *per se* reasonable because they were subject to "adequate price competition," and AFS' prices are also *per se* reasonable because AFS is providing "commercial" services. In 1962, Congress struck the proper balance for when a contractor's price should be considered *per se* reasonable, and these rules have been followed for over half a century. Specifically, Congress "prohibit[ed]" the Government from demanding any proprietary cost or pricing data on contracts like the TIRNO Contract, because having been subjected to competition, the prices are *per se* reasonable (as opposed to sole-source contracts, where the Government has a legitimate right to obtain such proprietary information in the interest of safeguarding taxpayer funds). AFS' price proposal for the TIRNO Contract was *per se* reasonable because it was subject to "price competition" from other contractors and based on

[10] To the extent that this Motion seeks information about whether *IRS'* portion of the user fee was reasonable, that information should be properly sought from the IRS, the party-opponent, and not Nonparty AFS.

"commercial" pricing. Either of these two bases independently renders AFS' prices *per se* reasonable. *See*, *e.g.*, 10 U.S.C. § 2306a(b)(1)(A)(i), (B); 41 U.S.C. § 3503(a)(1)(A), (2); FAR § 15.403-1(c)(1), (3); *accord* FAR § 15.404-1(b)(2)(i) ("Normally adequate price competition establishes a fair and reasonable price."). Plaintiffs provide no compelling rationale for why this Court should deviate from these well-settled rules, entertain such an unprecedented, burdensome demand, and compel AFS to produce its cost or pricing data.

In the absence of precedent to support its Motion, Plaintiffs assert two arguments based on a misinterpretation of the FAR. These arguments are addressed below.

A. AFS' Objection to the Disclosure of its Highly Sensitive and Proprietary Cost or Pricing Data Is Supported By the Longstanding Statutory and Regulatory Framework Underlying the TIRNO Contract

Requiring contractors to gather and disclose cost or pricing data is onerous, and the information itself is highly proprietary. Congress determined that this information should not be demanded lightly; rather, it should only be obtained where the Government has no other recourse to determine what a reasonable price may be. For example, a Government procurement for computers or cleaning services, should, through competition, yield a fair and reasonable price because the prices for such goods and services were subject to market competition and are standard commercial items/services. However, when procuring a $200 million next-generation military vehicle manufactured ***by only one source***, the Government may have no basis of price comparison, and the Government is at an unfair bargaining position to determine whether $200 million per vehicle is "reasonable." It is in this latter situation, only, that Congress requires contractors to turn over highly proprietary cost or pricing data so that the Government can gain visibility into specific elements of cost and profit to determine whether the ultimate cost to the Government is fair and reasonable.

In 1962, Congress passed the "Truth in Negotiations Act," which ***prohibited*** the Government from obtaining cost or pricing data in precisely this situation—*i.e.*, where the prices were subjected to competition from other contractors or were commercial prices—and thus are *per se* reasonable. *See* 10 U.S.C. § 2306a (codifying Pub. L. No. 87-653 (Sept. 10, 1962) (applicable to Defense Agencies)); 41 U.S.C. § 3503 (applicable to Civilian agencies); *see* FAR § 15.403-1 (implementing the statutes as requiring a "prohibition on obtaining" cost or pricing data); FAR § 15.404-1(b)(2)(i) ("Normally adequate price competition establishes a fair and reasonable price.").

Both the civilian and defense versions of the statute use the mandatory language "shall not" to prohibit the Government from requiring contractors to turn over this information. 10 U.S.C. § 2306a(b); 41 U.S.C. § 3503(a). The FAR implements these two laws. The FAR, consistent with the statutes, made the mandatory prohibition of the statutory language even clearer and more express, with FAR § 15.403-1 entitled, "***Prohibition on obtaining*** certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. Chapter 35).

Under the statutes and implementing regulations, AFS' price proposal for the TIRNO Contract (*i.e.*, the registration and renewal fees) is *per se* reasonable and triggered the prohibition for two independent reasons. AFS' price proposal was (1) "based on. . .adequate competition that results in at least two or more. . .competing bids"; and (2) "for the acquisition of a commercial item[.]"[11] 10 U.S.C. § 2306a(b)(1)(A)(i), (B); *accord* 41 U.S.C. § 3503(a)(1)(A), (2).

[11] "Commercial services" are included within the definition of "commercial items." FAR § 2.101 (defining "[c]ommercial items" to include "[s]ervices of a type offered and sold competitively in substantial quantities in the commercial marketplace" as well as "other services").

First, AFS' prices are *per se* reasonable because they were subject to "adequate price competition." *See* 10 U.S.C. § 2306a(b)(1)(A)(i); 41 U.S.C. § 3503(a)(1)(A). The FAR implements the statutory prohibition, above, by defining *per se* reasonable prices as follows: "A price is based on adequate price competition if – (i) Two or more responsible offerors, competing independently, submit priced offers. . . ." FAR § 15.403-1(c)(1)(i). The regulation explains that this cost or pricing data is not required because "[n]ormally adequate price competition ***establishes a fair and reasonable price***." *Id*. § 15.404-1(b)(2)(i). The FAR then sets forth a "prohibition on obtaining" cost data, *id*. § 15.403-1 (title), for contracts that are subject to "adequate price competition" as defined therein, *id*. § 15.403-1(b)(1).

This is precisely the type of *per se* reasonable pricing information that Plaintiffs seek to compel in this Motion. The TIRNO Contract was competitively awarded by the IRS. The competition involved multiple bidders who tried to win by having the most attractive price. The IRS selected AFS as the most attractive bid and overall best value. Under the FAR and statutory framework, AFS' TIRNO Contract price is *per se* reasonable, which resolves the entire point of this Motion and avoids anti-competitive, unnecessarily onerous, and expensive production. AFS submitted no cost or pricing data to the Government, never compiled it, and thus, should not be compelled to produce it here. Congress has made clear that there is no requirement for AFS to compile this proprietary cost data and provide it to the Government, or anyone else, and Plaintiffs have provided no coherent rationale for why this Court should deviate from this established practice.

Second, AFS' prices are *per se* reasonable because they are for "commercial" services.[12] 10 U.S.C. § 2306a(b)(1)(B); 41 U.S.C. § 3503(a)(2). Under the statutes and FAR § 15.403-1(b)(3), the same "prohibition on obtaining" a contractor's cost or pricing data attaches to all acquisitions "[w]hen a commercial item [or service] is being acquired. . . ." FAR § 15.403-1(b)(3); *see also* 41 U.S.C. § 3503(a)(2); 10 U.S.C. § 2306a(b)(1)(B). This is because all commercial items/services, as the name indicates, are considered commercially available to the public (in contrast to, *e.g.*, sole-source defense technology), and these commercial prices are market-driven and market-tested (like computers or cars).

Here, the TIRNO Contract was solicited and awarded as a FAR Part 12 "commercial item" contract. The TIRNO Contract contains the requisite commercial item clause (FAR § 52.212-4, "Contract Terms and Conditions – Commercial Items"), which memorializes and implements all such commercial item acquisitions. *See* Mot. Ex. 2 at FOIA_000053, § 3.0. Accordingly, for this additional basis, AFS submitted no cost or pricing data to the Government, never compiled it, and thus, should not be compelled to compile and produce it now as a nonparty in this litigation.

B. Plaintiffs' Two FAR-Based Arguments Are Inapposite

As explained above, Plaintiffs' Motion fails to set forth either a single case citation or a persuasive explanation for *why* Plaintiffs need a nonparty's propriety cost or pricing data. Rather, Plaintiffs made the following two unavailing arguments: (1) the "prohibition" provisions of FAR § 15.403 do not apply to AFS' data because FAR § 15.403 was not incorporated into the TIRNO *Contract*; and (2) the FAR provisions in the TIRNO Contract should be legally

[12] *See* FAR § 2.101 (definition of commercial items includes commercial services).

disregarded because, allegedly, the Government has no right to include FAR clauses in contracts that do not use "appropriated funds" as a form of payment. Both arguments miss the mark.

1. FAR § 15.403-1 Is Never Included in Contracts—It Governs Price Negotiations, *i.e.*, When Cost Data Cannot Be Obtained Before Contract Award Because Prices Are *Per Se* Reasonable

Plaintiffs' Motion argues that the "prohibition" provisions of FAR § 15.403 do not apply to AFS' price proposal because FAR § 15.403 was not incorporated into the TIRNO *Contract*. *See* Mot. at 11-13. That argument is inapposite.

Plaintiffs are correct that the TIRNO Contract did not incorporate FAR § 15.403, but this gets Plaintiffs nowhere. AFS has never alleged that there is a ***contractual*** prohibition that impedes AFS from turning over its *own* cost or pricing data. Rather, AFS has objected to turning over this sensitive information that Congress had decreed the IRS was not permitted to receive ***during price negotiations***. Price negotiations necessarily occur before contract award. FAR § 15.403-1 and the statutes govern price negotiations, not contract performance, so they are never found in contracts. Plaintiffs' Motion concedes as much, acknowledging that FAR Part 15 "prescribes policies and procedures ***governing*** competitive [*e.g.*, TIRNO] and noncompetitive [*i.e.*, sole source] ***negotiated acquisitions***." Mot. at 11. It is these ***price negotiation*** rules that form the basis of AFS' objections. AFS should not be forced to disclose its sensitive cost or pricing data to Plaintiffs for a litigated analysis of price "reasonableness" when the statutory and regulatory regime governing price negotiations makes clear that the prices are already deemed *per se* reasonable.

Plaintiffs' allegation about a lack of express incorporation of FAR § 15.403 makes no sense and is misplaced. FAR § 15.403 and other FAR "provisions" (FAR Parts 1 through 51) are regulations that are *never* incorporated in contracts because they are not "clauses." The "clauses" that go into contracts are found in ***FAR Part 52***. *See*, *e.g.*, FAR § 52.000, *Scope of*

part ("This part [52] . . . sets forth the solicitation provisions and *contract clauses* prescribed by this regulation."); *see also* Mot. Ex. 2 at FOIA_000053-59, § 3.0. In contrast, FAR provisions provide regulatory requirements for agencies to abide by when soliciting, negotiating, and awarding contracts. These provisions at times specify *which* FAR Part 52 "clauses" should be included in the resulting contract, but provisions such as FAR § 15.403 are not themselves included, nor should they be. *See*, *e.g.*, *Space Gateway Support, LLC*, ASBCA No. 55608, 13 BCA ¶ 35,232 (rejecting similar allegation to Plaintiffs' here that a FAR Part 45 regulation was not binding because it was "not expressly incorporated into" the contract, and explaining that "FAR 45.302-3 is not a standard contract clause prescribed for inclusion in or incorporation into a government contract. . .Rather, FAR 45.302-3 is a federal procurement regulation setting forth the authority of [Contracting Officers]. . .").

For example, *if* the TIRNO acquisition had not been for commercial services or awarded without price competition, then there would be no prohibition and AFS *would have* been required to disclose cost or pricing data to the IRS to support the reasonableness of its proposed prices (*i.e.*, the registration and renewal fees). If that had occurred, then FAR § 15.408(b) would have directed the agency to insert a contract "clause" (FAR § 52.215-10) that would have given the IRS certain contractual rights *vis-à-vis* the cost or pricing data. That contract "clause," FAR § 52.215-10, states in its preamble, "As prescribed in 15.408(b), insert the following clause. . . ." The takeaway is that the FAR § 15 provision would never, itself, be inserted into any contract, nor should it be, despite Plaintiffs' apparent misunderstanding.

Because FAR § 15.403 is not a "clause" in contracts but, rather, a regulation governing when agencies can demand cost data and when they cannot (because prices are *per se* reasonable), Plaintiffs' first "argument" is devoid of legal significance. As noted above,

Plaintiffs' Motion concedes that the statutes and FAR § 15.403-1 "***govern[]*** competitive and noncompetitive negotiated acquisitions." Mot. at 11. And, there is no dispute that the pertinent statutes prohibiting the agencies from obtaining cost data, as implemented by § 15.403-1, likewise govern the negotiated acquisition process. *See* 10 U.S.C. § 2306a & 41 U.S.C. § 3503; *see also, e.g.*, *Space Gateway Support, LLC*, ASBCA No. 55608, 13 BCA ¶ 35,232 (rejecting similar argument to Plaintiffs' here that the lack of express incorporation of a FAR § 45 provision in the contract rendered the regulatory regime inapplicable: "SGS alternatively asserts that NASA cannot rely upon FAR 45.302-3(c) as a bar to the payment. . .because the regulation is not expressly incorporated into or included in the parties' contract." "[]SGS and all other contractors seeking government contracts are ***deemed to have been on notice of the FAR prohibitions*** [in FAR § 45.302-3(c)].").

As such, under the applicable rules, AFS should not be forced to disclose its sensitive cost or pricing data when the statutory and regulatory regime governing price negotiations makes clear that the prices are already deemed *per se* reasonable.

2. <u>If the Government Elects to Use the FAR In Non-Appropriated Fund Contracts, Then the FAR Framework Governs</u>

Plaintiffs' Motion asserts that the FAR framework governing the TIRNO award should be legally disregarded because, supposedly, the Government has no right to use the FAR on contracts that do not use "appropriated funds" as a form of payment. Mot. at 13-14.

Assuming, *arguendo*, that Plaintiffs' characterization of the TIRNO Contract as 100% non-appropriated is even correct, this argument is belied by case law; the FAR framework governs any contract where the Government chooses to use the FAR, such as the TIRNO Contract and other contracts using non-appropriated funds. *See*, *e.g.*, *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137 (where Air Force included FAR clauses in contract

using non-appropriated funds, contractor was obligated to comply with FAR clauses that had been incorporated); *Allied-Signal Aerospace Co*., ASBCA No. 46890, 95-1 BCA ¶ 27,462 (FAR clauses inserted into non-appropriated foreign military sale contract were binding and enforceable because "the ***FAR and DFARS apply*** to purchases and contracts of DOD activities made in support of foreign military sales or NATO cooperative projects '***without regard to the nature or sources of funds obligated***'"); *Lockheed Martin Tactical Aircraft Sys*., ASBCA No. 49530, 00-1 BCA ¶ 30,852 (all FAR clauses in non-appropriated contract were binding and enforceable).

While the case quotations in Plaintiffs' Motion may appear relevant at first glance, upon close inspection each is easily distinguishable. Foremost, in each case cited by Plaintiffs the Government had ***not*** included FAR clauses in the contract. Later, in litigation, the contractor alleged that the FAR framework *ought* to apply to the contract, even though the FAR had not been used. The courts rejected *that* argument. The courts refused to incorporate FAR clauses in a non-appropriated contract *where the agency had chosen not to include FAR clauses*. These cases did ***not*** categorically hold that the "FAR does not apply" to contracts where the Government *does* include FAR clauses.

For example, Plaintiffs cite *Government Services Corp. v. United States*, 131 Fed. Cl. 409 (Fed. Cl. 2017). Mot. at 13. In that case, the Government posted a solicitation, but then, outside of the solicitation process, exchanged emails with a prospective contractor regarding deliveries of gas to airports. *Gov't Servs. Corp.*, 131 Fed. Cl. at 426. The Government sent a short email with a "counteroffer," which the contractor "accepted" by email. *Id*. Neither email contained FAR clauses. *Id*. at 426-27. Subsequently, in litigation, the contractor alleged that no contract had ever been formed because the informal email exchanges were not binding. *Id*. at 426. The

court disagreed, and held that those two emails constituted a no-cost "contract" for gas deliveries. *Id*. As it relates to the instant Motion, the court refused to apply a FAR framework because the email exchanges did not include any FAR clauses, and FAR clauses do not apply to "no-cost" contracts by operation of law. *Id*. at 427. Nothing in *Government Services Corp.* held that where the Government *chooses* to use a FAR framework, as IRS did with the TIRNO Contract, then those FAR provisions should be legally disregarded and rendered meaningless. *See id.*

Plaintiffs also cite *Fidelity and Casualty Co. of New York*., B-281281, Jan. 21, 1999, 99-1 CPD ¶ 16, a case that dealt with the same issue. The agency included FAR clauses in the solicitation, but the *agency later chose* to "delete[]" certain FAR clauses. *Id*. at *1. Bidders protested the agency's deletion and asked the tribunal to insert those clauses back into the contract. *Id*. at *2. The Government Accountability Office disagreed, citing the fact that it was a no-cost provision and the FAR clauses were thus not required to be inserted and the agency was within its rights to delete the clauses. *Id*. Nothing in this decision stands for the proposition that, where the agency chooses to use FAR framework to govern a non-appropriated acquisition, that those FAR clauses and provisions become legally inoperative. *See id*.

As such, Plaintiffs' two cases are legally distinguishable because, here, IRS *chose* to make the FAR apply. If the Government chooses to use the FAR, then the FAR governs, even in non-appropriated fund contracts. *See*, *e.g.*, *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137; *Allied-Signal Aerospace Co*., ASBCA No. 46890, 95-1 BCA ¶ 27,462; *Lockheed Martin Tactical Aircraft Sys*., ASBCA No. 49530, 00-1 BCA ¶ 30,852.

Even if, *arguendo*, this Court were to hold that the FAR did not apply, AFS' basic objection and rationale remain: the longstanding statutory and regulatory framework makes

sense, is fair, and should be followed here. Plaintiffs failed to set forth any compelling justification to depart from this longstanding and reasonable framework.

C. FOIA Provides an Additional Basis to Shield Disclosure of AFS' Highly Sensitive Internal Cost or Pricing Information

Even if the Government had demanded AFS to provide cost or pricing data related to the PTIN proposal, which did not occur, the confidentiality of that type data is still protected from disclosure, including to private parties in litigation, under the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552(b)(4) (stating that FOIA disclosure does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential."). Courts regularly deny the disclosure of precisely the type of information that Plaintiffs seek in the Subpoena. In fact, on the same day that AFS served its Amended Responses and Objections to the Subpoena, June 24, 2019, the United States Supreme Court again confirmed that as long as commercial or financial information is customarily and actually treated as private by its owner*, even when it is provided to the Government*, it is exempt from disclosure pursuant to the definition of "confidential" in FOIA Exemption 4. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366, 204 L. Ed. 2d 742 (2019). Thus, Supreme Court precedent regarding the interpretation and use of FOIA provides yet another layer of protection of AFS' confidential cost or pricing data from disclosure.

CONCLUSION

For all of these reasons, Nonparty AFS respectfully requests that the Court deny Plaintiffs' Motion to Compel the Production of Documents.

Dated: October 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October 2019, I electronically filed the foregoing Nonparty Accenture Federal Services, LLC's Memorandum in Opposition to Plaintiffs' Motion to Compel the Production of Documents using the Court's NextGen CM/ECF system, which caused service on all counsel of record.

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