IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Adam Steele, Brittany Montrois, and Joseph Henchman, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. United States of America, *Defendant*.	Case No. 14-cv-01523-RCL

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM NON-PARTY ACCENTURE FEDERAL SERVICES, LLC

AFS mischaracterizes Plaintiffs' allegations and subpoena in order to argue that the information sought is not relevant. It belatedly supplies an estimate of the "potential review set" (not the actual review set) in support of its otherwise unsupported burden argument, and it fails to provide any basis for the argument that FAR's "price negotiation rules" apply outside the negotiation and procurement context. Plaintiffs' motion should be granted.

I. The information sought by the subpoena is relevant, and cannot be obtained from any other source.

AFS's argument that Plaintiffs' subpoena seeks irrelevant information depends on a mischaracterization of Plaintiffs' complaint and their requests. First, AFS wrongly describes Plaintiffs' complaint as "mak[ing] no allegations whatsoever about the fee charged by AFS to PTIN preparers." ECF No. 103 (the "MTC Opp'n") at 12; *see also id.* at 9, 11, 14, 15, 18. AFS's $14.25 and $13 fees were included within the overall $64.25 and $63 fees return preparers

were required to pay to obtain or renew a PTIN. The complaint challenges the entire fee return preparers were required to pay including the portion paid to AFS. The second sentence of the complaint alleges, "the IRS began requiring all tax return preparers to pay an initial $64.25 fee to obtain a preparer tax identification number (or PTIN) and an annual $63 renewal fee thereafter." Am. Class Action Compl. 1 (Aug. 7, 2015), ECF No. 41; *see also id.* ¶ 19 ("In late 2010, the IRS began charging an initial registration fee of $64.25 to every tax return preparer . . . and charged an annual renewal fee of $63.");¶ 29 ("Yet the IRS continues to require tax return preparers to pay the same initial and annual ***PTIN fees of $64.25 and $63***.") (emphasis added); ¶ 45 ("The plaintiffs are also entitled to the return or refund of all PTIN fees illegally exacted, or otherwise unlawfully charged."); ¶ 50 (similar); ¶ 49 (seeking "judgment declaring that the fees charged for the issuance and renewal of a PTIN are excessive"). Relevance must be construed in reference to Plaintiffs' allegations themselves, not a third party's self-serving misinterpretation of those allegations.

Second, AFS unilaterally narrows Plaintiffs' requests by describing the information sought as "cost or pricing data" throughout its brief and defining that term to include only data compiled prior to entry of the contract as the FAR does. MTC Opp'n 7 (quoting FAR definition of "[c]ost or pricing data"). The phrase "cost or pricing data" is a defined term in the FAR, but appears nowhere in Plaintiffs' subpoena. Plaintiffs informed AFS during one of several telephonic meet-and-confers that where the subpoena seeks information about AFS's "cost" or its "pricing," those terms are used as a layperson would understand them, not as the FAR defines them. But by applying the FAR definition, which is limited to *pre*-contract data, AFS is able to

claim that it never compiled the data sought.[1] AFS does not say—and never has—whether it generated data about its cost, pricing, or profits *after* entering the contract. To deny the existence of such information would be to assert that a multibillion dollar business has virtually no financial information about a multi-year, multimillion dollar contract. That cannot be.

Looking to the actual language of Plaintiffs' complaint and subpoena—rather than AFS's self-serving alterations of the complaint and subpoena—the information sought is relevant for three reasons. *First*, AFS performed work under the AFS Contract that extends beyond "generating and maintaining a database of PTINs," *see* MTC 2, 8–9, and is squarely prohibited by *Loving v. I.R.S.*, 742 F.3d 1013 (D.C. Cir. 2014). *See also* Resp. No. 13, U.S.' Resps. to Pls.' 1st Set of Reqs. for Admis. (Nov. 6, 2015) (admitting "Accenture has fulfilled its obligations under TIRNO-10C-00022") (attached as Ex. A). How much of the $14.25 (or $13 or $17 depending on the year and whether it was a renewal or initial application) portion of the PTIN fee is associated with each of AFS's obligations under the AFS Contract is relevant—indeed, central—to Plaintiffs' claims.

For example, AFS was required to "develop and maintain a system capable of recording self-certification of continuing education reported by paid tax return preparers." ECF No. 101-2 at FOIA_000032; *see also* ECF No. 101-8 at FOIA_000073-74 ("The Vendor will provide the following CE [Continuing Education] system capabilities . . . ."). That work was prohibited by

[1] That the FAR defines "cost and pricing data" to include only pre-contract data that would be reasonably expected "to affect ***price negotiations*** significantly" further supports Plaintiffs' argument that the FAR governs only the negotiation and procurement process, not disputes unrelated to procurement nine years after entry of the contract.

Loving. *See id.* at 1013. What portion of the $14.25 fee was intended to cover the CE-related work that AFS was required to perform? $1.00? $2.36? $5.00? On remand, this Court is to determine "whether the *amount* of the PTIN fee impermissibly encompasses functions falling outside the IRS's statutory authority." *Montrois v. United States*, 916 F.3d 1056, 1068 (D.C. Cir. 2019) The IRS should refund any amounts intended to pay for work other than "generating and maintaining a database," including amounts used for CE-related activities.

Second, the only work for which the IRS can charge a user fee is "issu[ing] and maintain[ing] PTINs." *Id.* at 1058. Discovery from AFS is necessary to determine if AFS was doing everything necessary to "issue and maintain PTINs." If it was, the entirety of the $50 portion of the PTIN fee charged by the IRS should be refunded.

Third, the IOAA requires that user fees "bear a reasonable relationship to the ***cost*** of the services rendered." *Capital Cities Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 554 F.2d 1135, 1138 (D.C. Cir. 1976) (emphasis added). AFS concedes that its portion of the fee was "intended to cover all of AFS' costs of performance and ***any profit***." MTC Opp'n 13 (emphasis added). Discovery is necessary to determine how much profit AFS made. Profit made by AFS in relation to its costs is relevant to the question of whether the PTIN fee paid by return preparers bore a "reasonable relationship to the cost" of "issu[ing] and maintain[ing] PTINs."

II. AFS has failed to specify how the subpoena is disproportional to the needs of the case.

AFS's burden argument focuses on the "non-public, competitively sensitive" nature of the information sought, but AFS has not articulated how nine-year-old pricing- and cost-related information is competitively sensitive, or why such information would not be adequately

protected by the proposed protective order that it negotiated and to which it agreed.[2] The proposed protective order, ECF No. 102-1, provides for both a "CONFIDENTIAL" designation and a "HIGHLY CONFIDENTIAL" designation. The latter designation may be used for information that a producing party believes in good faith is (1) "trade secret or confidential research, development, or commercial information," and (2) "relates to highly sensitive technical or financial information (such as cost or pricing data, or profit information)."[3] *Id.* ¶ 3(ii). Any information designated as "HIGHLY CONFIDENTIAL," including pricing, profit, or cost information, may not be provided to individuals who are "involved in competitive decision-making for or on behalf of any party to the litigation or any other firm that might gain a competitive advantage from access to the material designated as "HIGHLY CONFIDENTIAL." *Id.* ¶¶ 9(i)(a), (iv)(a), (vi)(c), 11; *see also id.* at 13 (Ex. B). Not only will such information not be publicly disclosed as in the FOIA context, but access among the parties and involved third parties is also limited. No competitive harm will occur if AFS produces the information under the proposed protective order, and AFS's baseless claims of competitive harm provide no basis for withholding the information.

[2] AFS argues that "[n]umerous clauses in the AFS Contract prevent the disclosure of certain information," MTC Opp'n 19 n.9, but Plaintiffs' subpoena seeks information uniquely in AFS's control, not data and information that belongs to the government and can be produced by the government.

[3] AFS contends that an order compelling production "would ripple throughout the government contracting industry, essentially crippling competition." MTC Opp'n 15. This argument ignores that protective orders, such as the one AFS helped to draft here, *see* ECF No. 102-1, are routinely used in litigation to protect competitively sensitive information.

For the first time in its opposition, AFS attempts to quantify its burden in complying with the subpoena. *See* MTC Opp'n 17. This is too little, too late. Plaintiffs and AFS have had at least a half-dozen telephonic meet-and-confers regarding the subpoena. Not once did AFS describe its burden in complying, or attempt in any way to narrow the scope of the requests. After Plaintiffs narrowed Requests 5, 6, 9, 10, 12, 13, 14, 17, 19, 21, and 23, *see* MTC 5 n. 3, following the letters exchanged between the parties in July, *see* AFS Exs. 1, 2, AFS made no further burden objections during any meet-and-confer, and collected and searched documents from "numerous custodians," MTC Opp'n 17. But now, AFS contends that the requests are unduly burdensome, dismissing Plaintiffs' narrowing of the requests, *see* MTC 5 n.3, as meaningless.

First, AFS argues that Plaintiffs' narrowing of the requests, from "[a]ll documents relating to" to "[d]ocuments sufficient to show," is "a distinction without a difference." MTC Opp'n 6 n.4. This is the first time that AFS has made this objection, despite having several meet-and-confers regarding the subpoena. The narrowed requests significantly reduce the universe of responsive documents. For example, the narrowed Request 10 now seeks, "Documents sufficient to show the costs incurred by Accenture in fulfillment of its responsibilities under TIRNO-10C-00022," rather than "All documents relating to costs incurred by Accenture" as the original request sought. *See, e.g.*, MTC 5 n.3, MTC Opp'n 6 n.4. The narrowed request may be satisfied with cost data. The original request sought not just the cost data, but also emails and memos relating to the cost data, and even detailed supporting documentation such as pay stubs for employees working on the contract. This is a significant reduction in the scope of the request.

Second, AFS argues that Plaintiffs' narrowing of the requests to "records from the entities that performed any services under the TIRNO Contract" is insufficient because AFS employs thousands of people. MTC Opp'n 7 n.5. This is ridiculous on its face. Just because AFS employs thousands of people does not mean that thousands of people have relevant documents, nor does it mean that AFS will have to interview thousands of people to locate the relevant documents. In fact, it has already identified the custodians with relevant documents. *Id.* at 17.

Finally, AFS claims that the "potential review set" for requests 1 through 4 is 70,000 documents. *Id.* at 17. This is not the "final" review set, and AFS does not explain why the 70,000 documents is only a "potential" review set. It does not explain—nor has it ever—what search strings or "complex analytics" it is using, including whether the search strings were designed to capture documents within the broader scope of the original requests or the narrowed scope of the revised requests. AFS also does not explain whether the review set has even been globally de-duplicated. It does not explain what burden, if any, the remaining requests impose. Indeed, it is quite possible that most or all of the documents responsive to the remaining requests have already been collected as responsive to requests 1 through 4. AFS has not established that the requests impose an undue burden on AFS, or that they are disproportionate to the needs of the case. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489 (PLF/JMF/AK), 2010 WL 11613859, at *3 (D.D.C. Sept. 9, 2010) (compelling production when responding party did not provide affidavit documenting burden).

III. FAR does not "prohibit" the production of documents showing AFS's costs, revenues, profits, and work done under the AFS Contract.

AFS contends that Plaintiffs "misinterpret[]" the FAR, MTC Opp'n 22, but its own arguments support Plaintiffs' interpretation that FAR § 15.403-1, which it has asserted as its basis for withholding, only applies in the procurement and negotiation setting, *not* to litigation unrelated to the bid process or performance of the contract, *see* MTC Opp'n at 26–28 ("Congress has decreed the IRS was not permitted to receive [cost or pricing data] ***during price negotiations***. Price negotiations necessarily occur before contract award . . . . It is these ***price negotiation*** rules that form the basis of AFS' objections."); *see also id.* at 28 ("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***.") (emphasis added)). This litigation (which is unrelated to the negotiation or performance of the AFS Contract) is not the "negotiated acquisition process," and is governed by the Federal Rules of Civil Procedure, not the FAR.

In support of its argument that the FAR applies to the no-cost AFS Contract, AFS cites to three cases involving "non-appropriated funds" (NAF). *See id.* at 28–29. Not one involves a no-cost contract. *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137, involved a contract between a contractor and a non-appropriated fund" instrumentality (a "NAFI," in this case the Air Force Services Agency (AFSA)). The AFSA, was a party to the contract and was responsible for payment under the contract. In this case, third-party return preparers were responsible for payment under the AFS Contract, not the IRS. Neither of the other two cases cited involves a no-cost contract. Instead, one involves a contract made in support of foreign

military sales, *Lockheed Martin Tactical Aircraft Sys.*, ASBCA No. 49530, 00-1 BCA ¶ 30,852, and the other involves a contract in support of a NATO cooperative project, *Allied-Signal Aerospace Co.*, ASBCA No. 46890, 95-1 BCA ¶ 27,462. Section 201.104 of the Defense Federal Acquisition Regulation Supplement (DFARS) provides that "[t]he FAR and the Defense Federal Acquisition Regulation Supplement (DFARS) also apply to purchases and contracts by DoD contracting activities made in support of foreign military sales or North Atlantic Treaty Organization cooperative projects without regard to the nature or sources of funds obligated." AFS cites no authority in which a court held that the FAR applied to a no-cost contract.

IV. FOIA does not apply.

FOIA has no relevance to the current discovery dispute, and does not provide a "layer of protection" to AFS's documents. MTC Opp'n 31. "The FOIA disclosure regime . . . is distinct from civil discovery. Different considerations determine the outcome of efforts to obtain disclosure: relevance, need, and applicable privileges—bounded by the district court's exercise of discretion—in the discovery regime, statutory exceptions reflecting a congressional balancing of interests in FOIA." *Stonehill v. I.R.S.*, 558 F.3d 534, 538 (D.C. Cir. 2009) (citations omitted); *see also Lardner v. U.S. Dep't of Justice*, No. Civ.A.03-0180(JDB), 2005 WL 758267, at *6 (D.D.C. Mar. 31, 2005) ("These principles create a divide between the rules of FOIA and civil discovery. There will be many cases in which a document should be withheld under Exemption 5 of FOIA because it falls 'within the ambit' of a privilege, but the document nonetheless would be discoverable in certain circumstances in civil litigation."). FOIA does not exempt the information sought from disclosure in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2019, I caused to be electronically filed Plaintiffs' Reply in Support of Their Motion to Compel Production of Documents From Non-party Accenture Federal Services, LLC ("AFS") through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties and to AFS by operation of the Court's electronic filing system.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ William H. Narwold
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