

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' MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
FROM NON-PARTY ACCENTURE FEDERAL SERVICES, LLC**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... 2

INTRODUCTION..... 1

I. IRS enters into a contract with AFS to “administer the [PTIN] application and renewal process.” ..... 2

II. Plaintiffs seek discovery from AFS about its costs, revenues, profits, and work done to “administer the [PTIN] registration and renewal process.” ..... 3

ARGUMENT..... 6

III. Documents showing actual and projected costs and work done by AFS for the Return Preparer Office and PTIN registration and renewal program are relevant..... 7

IV. Plaintiffs’ focused subpoena requests are not disproportional nor unduly burdensome..... 10

V. The FAR does not shield AFS’s cost and pricing information from discovery in this case..... 11

    A. The FAR regulates negotiation of federal acquisitions and does not limit discovery. 11

    B. The FAR does not apply to the AFS Contract because it is a no-cost contract. .... 13

CONCLUSION..... 14

**TABLE OF AUTHORITIES**

**CASES**

*Advanced Aerospace Technologies, Inc. v. United States*,  
 129 Fed. Cl. 525 (Fed. Cl. 2016) ..... 12

*Aydin Corp. (West) v. Widnall*,  
 61 F.3d 1571 (Fed. Cir. 1995)..... 12

*BuzzFeed, Inc. v. U.S. Department of Justice*,  
 318 F. Supp. 3d 347 (D.D.C. 2018).....6, 7

*Capital Cities Communications, Inc. v. Federal Communications Commission*,  
 554 F.2d 1135 (D.C. Cir. 1976) ..... 7

*Fidelity & Casualty Co. of New York*,  
 B-281281, 1999 WL 22661 (Comp. Gen. Jan. 21, 1999) ..... 13

*Gouse v. District of Columbia*,  
 359 F. Supp. 3d 51 (D.D.C. 2019)..... 7

*Government Services Corp. v. United States*,  
 131 Fed. Cl. 409 (Fed. Cl. 2017) ..... 13

*LCPtracker, Inc.*,  
 B-410752.3, 2015 WL 5522053 (Comp. Gen. Sept. 3, 2015) ..... 13

*Linder v. Department of Defense*,  
 133 F.3d 17 (D.C. Cir. 1998)..... 6

*Loving v. Internal Revenue Service*,  
 742 F.3d 1013 (D.C. Cir. 2014) ..... 8

*Montrois v. United States*,  
 916 F.3d 1056 (D.C. Cir. 2019) .....4, 7, 8

*M-R-S Manufacturing Co. v. United States*,  
 492 F.2d 835 (Ct. Cl. 1974) ..... 12

*National Cable Television Ass’n v. Federal Communications Commission*,  
 554 F.2d 1094 (D.C. Cir. 1976) ..... 7

*North Carolina Right to Life, Inc. v. Leake*,  
 231 F.R.D. 49 (D.D.C. 2005)..... 7

*Thong v. Andre Chreky Salon*,  
 No. 06-1807 (RCL)(AK), 2008 WL 11391659 (D.D.C. Oct. 10, 2008)..... 6

*United States ex rel. Sanders v. Allison Engine Co.*,  
 364 F. Supp. 2d 699 (S.D. Ohio 2003)..... 12

*Watts v. Securities & Exchange Commission*,  
 482 F.3d 501 (D.C. Cir. 2007) ..... 7

**RULES**

Fed. R. Civ. P. 26(b)(1) .....6, 10

*User Fees Relating to Enrollment and Preparer Tax Identification Numbers,*  
75 Fed. Reg. 60,316 (Sept. 30, 2010) ..... 1, 3

**REGULATIONS**

48 C.F.R. § 1.104 ..... 13

48 C.F.R. § 15.000..... 11

48 C.F.R. § 15.403-1 ..... 12

48 C.F.R. § 15.403-4 ..... 12

48 C.F.R. § 16.101(b)..... 13

48 C.F.R. § 2.101 ..... 13

## INTRODUCTION

Starting on September 30, 2010, all paid tax-return preparers were required to obtain a Preparer Tax Identification Number (“PTIN”) from the IRS. The IRS charged tax-return preparers a fee of \$64.25 for the initial PTIN application, and \$63 for every annual PTIN renewal. Those initial application and renewal fees included a \$14.25 fee and a \$13 fee, respectively, paid directly to Accenture Federal Services, LLC (“AFS” or “Accenture”), the “vendor” identified in the final PTIN fee rule as “administer[ing] the application and renewal process.” *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 60,316 at 60,319 (Sept. 30, 2010) (final rule) (“PTIN Fee Rule”).

Plaintiffs served a Rule 45 subpoena for production of documents on AFS in 2015 before this case was stayed for summary-judgment and appeal proceedings. See Subpoena directed to AFS to Produce Documents, Information, or Objects or to Permit Inspection of Premises in Civil Action (Aug. 26, 2015), attached as Ex. 1. AFS still refuses to produce responsive, relevant documents showing its costs, revenues, and profits in “administer[ing] the [PTIN] application and renewal process.” It also refuses to produce responsive, relevant documents describing the work done and the technological systems “to administer the [PTIN] application and renewal process.” Plaintiffs and AFS have met and conferred several times in compliance with Local Rule 7(m), and this motion is opposed. Plaintiffs respectfully request that the Court compel AFS to comply with the subpoena and produce the requested documents.

**I. IRS enters into a contract with AFS to “administer the [PTIN] application and renewal process.”**

On April 30, 2010, the IRS entered into a contract with AFS<sup>1</sup> to govern AFS’s work in administering the PTIN registration and renewal process (the “AFS Contract,” attached as Exhibit 2). On November 17, 2011, the IRS entered into a Blanket Purchase Agreement with AFS for the purchase of “IT and telecom systems development” and “computer systems design services” related to “Return Preparer Registration” (“AFS BPA”). The AFS Contract included, in part, the following “Requirement[s]”:

This will require establishing and maintaining a system for on-line registration and renewal, user fee collection, and issuance of a unique identifying number for all paid tax return preparers (hereafter, “preparers”[])

The vendor will be required to develop and maintain a system capable of recording self-certification of continuing education reported by paid tax return preparers and will include capabilities to receive and electronically record test results from third party test administrator(s).

The system will include interface (with IRS and other systems) and notice issuance functionality as well as data capture and report generation capabilities.

Customer service activities will be provided in support of the aforementioned activities.

Ex. 2 at FOIA\_000032 (Section I – Statement of Work, Return Preparer Registration).<sup>2</sup> The AFS Contract was a “no-cost” contract, which meant that “[t]he vendor assume[d] the responsibility for the RPR Program on a no-cost basis to the government. The vendor will not be reimbursed

---

<sup>1</sup> At the time, AFS was operating as “Accenture National Security Services, LLC” (ANSS). ANSS subsequently changed its name, and now operates as AFS.

<sup>2</sup> For ease of reference, Plaintiffs have bates-stamped the copy of the AFS Contract they obtained through FOIA.

by the federal government for fees, costs, or any other charge or expense. The vendor [wa]s expected to cover its cost and any profit by charging reasonable registration and renewal fees.” *Id.* at FOIA\_000038, FOIA\_000039, FOIA\_000048; *see also id.* at FOIA\_000058 (similar). Even though Accenture’s fee was not set by the IRS, it was “reviewed and approved by the IRS,” PTIN Fee Rule at 60,319, and PTIN applicants were required to pay the fee before obtaining or renewing a PTIN.

According to informal and limited discovery from the United States, the IRS paid for several “fixed price” modifications to the AFS Contract and for the AFS BPA with PTIN fees received by the IRS. *See, e.g.,* Total PTIN Costs, at USA000020 (projecting IRS payments to Accenture of \$750,000 in FY 2014, \$6,478,779 in FY 2015, and \$2,328,500 in FY 2016) (attached as Ex. 3); Resp. 26, U.S.’ Resps. to Pls.’ 2nd Set of Reqs. for Admis. (Dec. 9, 2015) (“The United States . . . denies that appropriations funding covers costs associated with providing a special benefit for which the IRS charges a user fee.”) (attached as Ex. 4).

**II. Plaintiffs seek discovery from AFS about its costs, revenues, profits, and work done to “administer the [PTIN] registration and renewal process.”**

On August 26, 2015, Plaintiffs served the subpoena at issue on AFS. Generally, the subpoena seeks information about AFS’s costs, revenues, profits, and the work done by AFS in performing the AFS Contract and AFS BPA. According to the IRS, “information regarding the basis for Accenture’s pricing” and information relating to “actions performed by Accenture necessary to perform its contractual obligations” “is exclusively in the possession, custody, or control of Accenture.” *See* Answer 4 (actions performed) & Answer 15 (pricing), U.S.’ Answers to Pls.’ 1st Set of Interrogos. (Nov. 16, 2015) (attached as Ex. 5); *see also* Resp. No. 20, U.S.’

Resps. to Pls.’ First Set of Reqs. for Produc. of Docs. (Nov. 6, 2015) (“[T]he Return Preparer Office does not track any . . . Accenture employee’s . . . time according to the category ‘relating to the issuance or renewal of PTINs.’”) (attached as Ex. 6). The United States also claims to lack “reasonably available records showing the total amount of the \$14.25 and \$13 fees because they are received by [Accenture] and not by the Internal Revenue Service.” Ex. 6 at 4; *see also* Ex. 5 at p. 5 (“The United States also objects to the extent that this interrogatory seeks information exclusively in the possession, custody, or control of Accenture, including, but not limited to, ‘all amounts retained by Accenture.’”).

AFS responded and objected on September 9, 2015. In December 2015, the Court modified the scheduling order to allow for dispositive motions on Count I (whether the PTIN fee was unlawful). ECF No. 52. In conjunction with that modification, the parties agreed to an informal stay of discovery until after a ruling on those dispositive motions and any appeals.

On March 1, 2019, the D.C. Circuit vacated this Court’s judgment and remanded “for further proceedings, including an assessment for 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). Plaintiffs contacted AFS on March 11, 2019 to notify them of the D.C. Circuit’s order and to discuss AFS’s response to the subpoena. On June 24, 2019, after multiple meet-and-confers and email exchanges, AFS served amended objections and responses. *See* Non-Party Accenture Fed. Servs. LLC’s 1st Am. Objs. & Resps. to Pls.’ Rule 45 Subpoena (attached at Ex. 7). Plaintiffs have had several meet-and-confers with AFS since receiving those



objections and responses. They have reached agreement on several issues,<sup>3</sup> but AFS continues to refuse to produce documents responsive to most of Plaintiffs' Requests. The Plaintiffs' Requests at issue seek documents that fall into the following general categories:

- AFS's billing and payment records for work done in connection with PTIN registrations and renewals or otherwise for the Return Preparer Office (Ex. 7 at Req. Nos. 1, 2, 3, 4);
- Revenues received by AFS for work done in connection with PTIN registrations and renewals or otherwise for the Return Preparer Office (*id.* at Req. Nos. 8, 11, 12);
- Time spent by AFS employees on work done or in connection with PTIN registrations and renewals or otherwise for the Return Preparer Office, including job responsibilities of those individuals (*id.* at Req. Nos. 5, 6, 16, 18, 19);
- Costs associated with work done by AFS in connection with PTIN registrations and renewals or otherwise for the Return Preparer Office (*id.* at Req. Nos. 7, 10, 15, 17);
- AFS's profits and losses resulting from work done in connection with PTIN registrations and renewals or otherwise for the Return Preparer Office (*id.* at Req. No. 9); and
- AFS's projections of PTIN fees and costs (*id.* at Req. Nos. 13, 15, 23).

In response to each of the Requests identified above, AFS continues to refuse to produce “cost and pricing information,” asserting that it “is under no obligation to produce such cost and pricing information pursuant to Federal Acquisition Regulation [(“FAR”)] § 15.403-1.” *Id.* at Resps. 1-13, 15-19, 23. It has further objected to the production of what it claims are “internal financial records and cost-related documents that constitute proprietary information and/or trade

---

<sup>3</sup> Plaintiffs have agreed to limit the scope of requests seeking “[a]ll documents relating to . . .” or “[a]ll documents showing” to “documents sufficient to show.” This change affects Requests 5, 6, 9, 10, 12, 13, 14, 17, 19, 21, and 23.

secrets and have no relevance to Plaintiffs' case against the United States . . . ." *Id.* In the event the Court determines that FAR § 15.403-1 does not shield from discovery the documents sought in Request Numbers 1-13, 15-19, 23, then the Joint Proposed Protective Order, which the parties expect to file imminently and which AFS agreed to after months of protracted negotiations, should address any concerns about claims of confidentiality.

### ARGUMENT

In moving to compel compliance with a Rule 45 subpoena, the requesting party must show that the discovery sought is relevant to any party's claim or defenses. *See BuzzFeed, Inc. v. U.S. Dep't of Justice*, 318 F. Supp. 3d 347, 356 (D.D.C. 2018) (citing Fed. R. Civ. P. 26(b)(1)). Next, the party opposing discovery sought under Rule 45 subpoena bears the burden of establishing with specificity that the discovery sought is either unduly burdensome or privileged. That burden can only be satisfied with a specific showing; generalized claims of burden will not suffice. *Linder v. Dep't of Def.*, 133 F.3d 17, 24 (D.C. Cir. 1998) (holding district court abused its discretion in refusing to modify subpoena without "evidence from the [third party] describing the precise nature of its burden"); *see also Thong v. Andre Chreky Salon*, No. 06-1807 (RCL)(AK), 2008 WL 11391659, at \*1, 3 (D.D.C. Oct. 10, 2008) (noting "objecting party must make a specific, detailed showing of how the discovery request is burdensome"). In order to determine whether a subpoena imposes an "undue burden," a court should consider a number of factors, including:

- (1) whether the discovery sought is "unreasonably cumulative or duplicative";
- (2) whether the discovery sought "can be obtained from some other source that is more convenient, less burdensome, or less expensive"; and
- (3) 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*, 318 F. Supp. 3d at 358; *see also Watts v. Sec. & Exch. Comm’n*, 482 F.3d 501, 509 (D.C. Cir. 2007). A subpoena also subjects a nonparty to “undue burden” when it requires the disclosure of information that is “not properly discoverable,” even if the actual burden of production is slight, *Gouse v. District of Columbia*, 359 F. Supp. 3d 51, 56 (D.D.C. 2019). Although courts should be “generally sensitive to the costs imposed on third parties,” *Watts*, 482 F.3d at 509, “quashing a subpoena goes against courts’ general preference for a broad scope of discovery,” *N.C. Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) (Lamberth, J.).

**III. Documents showing actual and projected costs and work done by AFS for the Return Preparer Office and PTIN registration and renewal program are relevant.**

The class of PTIN-holders challenges the reasonableness of the user fee the IRS required for initial registration and renewal, including the portion received by the IRS and the part retained by Accenture. User fees assessed under the Independent Offices Appropriations Act (“IOAA”) must “bear a reasonable relationship to the cost of the services rendered to identifiable recipients.” *Capital Cities Commc’ns, Inc. v. Fed. Commc’ns Comm’n*, 554 F.2d 1135, 1138 (D.C. Cir. 1976); *see also Nat’l Cable Television Ass’n v. Fed. Commc’ns Comm’n*, 554 F.2d 1094, 1108 (D.C. Cir. 1976) (“To be valid, a fee need only bear a reasonable relationship to the cost of the services rendered by the agency.”).

The D.C. Circuit held that the PTIN fee was permissible because the IRS provides “the service of providing tax-return preparers a PTIN,” but cautioned that “the agency’s PTIN-related services are now confined to generating and maintaining a database of PTINs.” *Montrois*, 916 F.3d at 1063. “To the extent the tax-return preparers believe that the amount of the PTIN fee is

out of step with the narrowed scope of remaining PTIN-related functions,” the Court continued, they could press the question of the “reasonableness of the fee . . . in the proceedings on remand.” *Id.*

Under the AFS Contract, Accenture generated PTINs and maintained a database of PTINs, which the *Montrois* court clarified are the only permissible PTIN-related services following *Loving v. I.R.S.*, 742 F.3d 1013 (D.C. Cir. 2014). 916 F.3d at 1063; *see also* Ex. 2 at FOIA\_000032 (AFS will “[i]ssue a Preparer Tax Identification Number (PTIN) . . . to be issued in the following format PNNNNNNNN (PTIN to start with the letter ‘P’ designating it as a PTIN, then 8 numerical digits). PTINs and applicant data obtained at time of application and any data updated after assignment of a PTIN shall be maintained by [AFS].”). If Accenture was generating PTINs and maintaining a database of PTINs, what was the IRS charging \$50 for, and how does that \$50 “bear a reasonable relationship to the cost of” “generating and maintaining a database of PTINs”? The information sought by Plaintiffs’ subpoena is directly relevant to those questions.

Even Accenture, whose portion of the fee in 2010 was \$14.25 or \$13 (and curiously increased in 2015 to \$17 after *Loving*), was doing more than generating and maintaining PTINs. The AFS Contract with the IRS, signed on April 30, 2010 and modified on July 22, 2010 (modification attached as Exhibit 8), required AFS to build a system with the functionality to:

- “support ‘a tax compliance check’ . . . verifying that return preparers have no outstanding obligations on their personal or business federal tax returns,” Ex. 8 at FOIA\_000072;
- “check to see if additional C[ontinuing]E[ducation] or test requirements are necessary,” *id.*;

- “enable impacted preparers to enter, save and view completed CE courses and related information . . . and self-certify completion of required education,” *id.* at FOIA\_000073;
- “automatically tally CE credit hours and compare against renewal requirements,” *id.*;
- “maintain an electronic searchable database of IRS-authorized CE providers,” *id.* at FOIA\_000074;
- generate notices “to provide preparers with updates regarding their outstanding CE requirements,” *id.*;
- create an “[i]nterface” with the “test administrator(s)” so that they can “transmit test results to [AFS] for association with the preparer’s PTIN account,” *id.*;
- “systemically invalidate PTINs when testing requirements are not met, including appropriate notification with appeal rights to preparers and the IRS,” *id.*; and
- “maintain an electronic searchable database of IRS-authorized test administrators,” *id.*

AFS also was required to “[d]evelop a service delivery program [to] address preparer questions related to registration, renewal, testing, and CE processes and timelines, and online application/account management, as well as complete activities such as checking the status of their registration or renewal.” Ex. 8 at FOIA\_000077. What portion of the \$14.25 and \$13 fees paid for Accenture to generate and maintain a database of PTINs (the only permissible “remaining PTIN-related functions”)? 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”? 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”? Plaintiffs’ subpoena seeks information to answer those questions.

**IV. Plaintiffs' focused subpoena requests are not disproportional nor unduly burdensome.**

The proportionality inquiry examines “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.” Fed. R. Civ. P. 26(b)(1).

Plaintiffs’ subpoena seeks only information that cannot be obtained from any other source. Plaintiffs sought much of the information through discovery on the United States, but according to the United States’ responses and objections to that discovery the information is “exclusively in the possession, custody, or control of Accenture.” *See supra* pp. 3-4. AFS has over 9,000 employees and net revenues in fiscal year 2018 of over \$2 billion. *See* Federal Career, Accenture Federal Services, <https://www.accenture.com/us-en/careers/federal-professionals> (last visited Sept. 21, 2019) (“Join Accenture Federal Services, a wholly owned subsidiary of Accenture . . . . Join more than 9,000 dedicated colleagues and change makers that are inspired by innovation.”) (pages from AFS recruiting website attached as Ex. 9); Accenture PLC, Annual Report, at 3 (Form 10-K) (Oct. 24, 2018) (“Our work with clients in the U.S. federal government is delivered through Accenture Federal Services, a U.S. company and a wholly owned subsidiary of Accenture LLP, and represented approximately 34% of our Health & Public Service operating group’s net revenues in fiscal 2018) (excerpts attached as Ex. 10); *id.* at 34 (table showing fiscal year 2018 net revenues of \$6,688,000,000 for “Health & Public Service” operating group). Responding to Plaintiffs’ focused requests for highly relevant information will not be unduly burdensome for such a large company, nor does AFS argue that it will be. The

discovery sought is not cumulative or duplicative, and cannot be obtained from another source that is more convenient, less burdensome, or less expensive.

This class action involves more than 1,500,000 individuals and a challenge to hundreds of millions of dollars of unlawfully collected PTIN fees, including tens of millions of dollars paid to Accenture for work that appears to be at least partially outside the “narrowed scope of remaining PTIN-related functions” following *Loving*. The size and importance of the litigation, and the centrality of the discovery sought to the claims and defenses in the litigation weigh in favor of compelling compliance with the subpoena.

**V. The FAR does not shield AFS’s cost and pricing information from discovery in this case.**

**A. The FAR regulates negotiation of federal acquisitions and does not limit discovery.**

AFS relies on the FAR, specifically, FAR part 15, as a basis for withholding responsive documents, Ex. 7 at Resp. Nos. 1-13, 15-19, 23, but the FAR does not apply here. The FAR was system was created to provide uniformity to the procurement laws applying to executive branch agencies. See Kate M. Manuel et al., Cong. Research Serv., *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions* (R42826 Feb. 3, 2015). FAR part 15, titled “Contracting by Negotiation,” “prescribes policies and procedures governing competitive and noncompetitive negotiated acquisitions,” 48 C.F.R. § 15.000, and was designed to “ensure that the Government, when contracting by negotiation, receives the best value, while ensuring the fair treatment of offerors,” *Federal Acquisition Regulation; Part 15 Rewrite; Contracting by Negotiation and Competitive Range Determination*, 62 Fed. Reg. 51,224 at 51,224 (Sept. 30,

1997) (codified at 48 C.F.R. pt. 15). FAR subsections 15.403-1, 15.403-4<sup>4</sup> specify a **contracting officer's** ability to obtain certified cost or pricing data during negotiations. See 48 C.F.R.

§§ 15.403-1, -4. Under subsections 15.403-1(b) and 15.403-4 of the FAR, “contracting officer[s]” may only obtain “certified cost or pricing data” under certain circumstances. The scope of these subsections is limited to the negotiations process, and neither provision contemplates a situation where a private litigant in litigation unrelated to the bid process or performance of the contract seeks pricing and cost information through a Rule 45 subpoena. Using the regulations as a basis for withholding discovery—as AFS attempts to do here—would far exceed their intended scope.

The AFS Contract incorporates by reference certain provisions of the FAR, but not the disclosure provisions of § 15.403. See Ex. 2 at FOIA\_000053-60. Indeed, it would make little sense for provisions controlling the disclosure of information during the **negotiation** process to be incorporated by reference in the final agreed-upon contract. Because the disclosure provisions were not incorporated by reference, they do not apply here. See *Aydin Corp. (W.) v. Widnall*, 61 F.3d 1571, 1577-78 (Fed. Cir. 1995) (finding error in reliance on FAR provisions that had not been expressly or impliedly incorporated into contract); *Advanced Aerospace Techs., Inc. v. United States*, 129 Fed. Cl. 525, 534 (Fed. Cl. 2016) (declining to apply a specific provision of

---

<sup>4</sup> The FAR implements the Truth in Negotiations Act (“TINA”). *United States ex rel. Sanders v. Allison Engine Co.*, 364 F. Supp. 2d 699, 704 (S.D. Ohio 2003) (“TINA is implemented through various federal acquisition regulations called ‘FARs.’”). Like the FAR, TINA, on which AFS indirectly relies, also governs the process of negotiating acquisitions. *M-R-S Mfg. Co. v. United States*, 492 F.2d 835, 842 (Ct. Cl. 1974) (“[T]he purpose of [TINA] was to avoid excessive contract costs that result from a contractor having in his possession accurate, complete, and current information when the Government does not possess the same data.”). TINA provides no distinct basis for AFS’s objections, and if the FAR does not provide a basis for withholding the documents, then neither does TINA.



FAR that was not incorporated by reference into contract at issue); *LCPTracker, Inc.*, B-410752.3, 2015 WL 5522053, at \*5 (Comp. Gen. Sept. 3, 2015) (deciding only specific FAR provisions expressly incorporated into no-cost contract are binding on awardee because no-cost contracts generally not subject to FAR).

**B. The FAR does not apply to the AFS Contract because it is a no-cost contract.**

Even if the FAR (specifically the disclosure provisions at subsections 15.403-1 and 15.403-4) extends beyond the acquisition-negotiation process and is found to apply to unrelated civil litigation, the FAR does not apply to the AFS Contract. The AFS Contract is a no-cost contract, meaning that it does not involve the use of funds appropriated by Congress, and the FAR “applies to . . . acquisitions,” 48 C.F.R. § 1.104, which are defined as “the acquiring by contract with *appropriated funds* of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease,”<sup>5</sup> 48 C.F.R. § 2.101 (emphasis added). If the contract does not obligate appropriated funds, the FAR does not apply. *See, e.g., Gov’t Servs. Corp. v. United States*, 131 Fed. Cl. 409, 427 (Fed. Cl. 2017) (“[T]he FAR did not apply since it only applies to contracts that involve the spending of appropriated funds. A ‘no-cost’ contract . . . does not involve the spending of appropriated funds.” (citations omitted)). This is true even if the government somehow benefits from a contract without spending appropriated funds. *Fid. & Cas. Co. of N.Y.*, B-281281, 1999 WL 22661, at \*2 (Comp. Gen. Jan. 21, 1999) (“The mere fact that a contract confers a benefit on the government, does not furnish a basis for finding that there

---

<sup>5</sup> The FAR specifies the “two broad categories” that may be used in acquisitions (“fixed price contracts and cost-reimbursement contracts”). 48 C.F.R. § 16.101(b). Neither category includes no-cost contracts.

was an obligation or expenditure of appropriated funds.”). Thus, the AFS Contract is not an “acquisition” and the FAR does not apply.

The FAR also does not apply to the BPA or any fixed-price modifications to the AFS Contract because they were not paid for with appropriated funds.

A 2013 PTIN Cost Model showing “Total PTIN Costs” projects millions of dollars in payments by the IRS to AFS to be paid from PTIN-fee revenue, not from appropriations. See Ex. 3; *see also* RPO User Fee Collections & Expenses (FY 2011-2014) table at FOIA\_000024 (including the AFS Contract under “User Fees Operating Expenses”) (attached as Ex. 11); Ex. 4 at p. 2 (admitting that Treasury has used appropriations funding “to cover the cost of creation of and internet publication of some federal tax forms and instructions,” but denying that “appropriations funding covers costs associated with providing a special benefit for which the IRS charges a user fee”). The fixed-price modifications to the AFS Contract and the AFS BPA are not subject to the disclosure provisions of the FAR because they were paid for with user fees, not appropriated funds.

### CONCLUSION

AFS has not established that Plaintiffs’ subpoena seeking discovery of AFS’s costs, revenues, profits, and work done under the AFS Contract imposes an undue burden on AFS. The subpoena seeks information that is central to Plaintiffs’ claims and the government’s defenses, is not available from any other source, and cannot be withheld under the FAR. The Court should compel compliance with the subpoena.

Respectfully submitted,

/s/ William H. Narwold

---

MOTLEY RICE LLC

William H. Narwold  
bnarwold@motleyrice.com  
DC Bar No. 502352  
One Corporate Center  
20 Church Street, 17th Floor  
Hartford, CT 06103  
Telephone: (860) 882-1676  
Facsimile: (860) 882-1682

Meghan S.B. Oliver  
moliver@motleyrice.com  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29464  
Telephone: (843) 216-9000  
Facsimile: (843) 216-9450

GUPTA WESSLER PLLC

Deepak Gupta  
deepak@guptawessler.com  
Jonathan E. Taylor  
jon@guptawessler.com  
1900 L St., NW  
Washington, DC 20009  
Telephone: (202) 888-1741  
Facsimile: (202) 888-7792

CAPLIN & DRYSDALE, CHARTERED

Christopher S. Rizek  
crizek@capdale.com  
One Thomas Circle, NW, Suite 1100  
Washington, DC 20005  
Telephone: (202) 862-8852  
Facsimile: (202) 429-3301

LAW OFFICE OF ALLEN BUCKLEY LLC

Allen Buckley  
ab@allenbuckleylaw.com  
2727 Paces Ferry Road, Suite 750  
Atlanta, GA 30339  
Telephone: (678) 981-4689  
Facsimile: (678) 981-4689

October 1, 2019

*Counsel for Plaintiffs Adam Steele, Brittany  
Montrois, Joseph Henchman, and the Class*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 1, 2019, I caused to be electronically filed this Statement of Points and Authorities in Support of Plaintiffs' Motion to Compel Production of Documents through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

I also hereby certify that on October 1, 2019, I caused to be served this Statement of Points of Authorities in Support of Plaintiffs' Motion to Compel Production of Documents on non-party Accenture Federal Services, LLC ("AFS") by email to Stephen McBrady (SMcBrady@crowell.com), Counsel for AFS. Mr. McBrady has confirmed in writing that he is authorized to accept service by email on behalf of AFS.

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

*/s/ William H. Narwold*

William H. Narwold