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IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

ORACLE AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE UNITED STATES,	)	
	)	No. 18-1880C
Defendant,	)	(Senior Judge Bruggink)
	)	
and	)	
	)	
AMAZON WEB SERVICES, INC.,	)	
	)	
Defendant-Intervenor.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPLETE AND SUPPLEMENT THE ADMINISTRATIVE RECORD AND CONDUCT DISCOVERY

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January 11, 2019

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DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPLETE AND SUPPLEMENT THE ADMINISTRATIVE RECORD AND CONDUCT DISCOVERY

Pursuant to the Court's January 3, 2019, amended scheduling order, the Government respectfully responds to the motion of plaintiff, Oracle America, Inc. (Oracle), to add documents to the administrative record and conduct discovery. Oracle's motion should be denied because it has not demonstrated that the administrative record is incomplete or that supplementation is necessary for effective judicial review. Rather, Oracle seeks to engage in a broad fishing expedition primarily to find support for its claim that the solicitation at issue is tainted by alleged conflicts of interest involving two former Department of Defense (DoD) employees and defendant-intervenor, Amazon Web Services, Inc. (Amazon).

The primary flaw in Oracle's motion is that it misunderstands the nature of Administrative Procedure Act (APA) review and the scope of the administrative record. The administrative record in a bid protest should generally include the documentation developed and

considered in making the decisions at issue in the litigation. Oracle does not assert that the documents it seeks to "complete" the administrative record were actually considered in making the decisions at issue. Rather, it seeks to add broad categories of documents to the administrative record simply because they are in the agency's possession and Oracle believes they are relevant to its claims. The additional documents Oracle seeks would not "complete" the administrative record, but rather, would constitute "supplementation" of the administrative record.

Perhaps recognizing this, Oracle alternatively seeks to supplement the administrative record with these broad categories of documents. Oracle erroneously argues that the documents are necessary for effective judicial review primarily because they allegedly should have been considered by the contracting officer in her pre-solicitation investigation of whether potential conflicts of interest regarding former DoD employees Anthony DeMartino and Deap Ubhi impacted the integrity of the procurement. Oracle also seeks to supplement the administrative record with depositions and document discovery from DeMartino and Ubhi. Oracle is effectively requesting that the Court conduct an improper *de novo* review into whether DeMartino and Ubhi's involvement had negatively impacted the integrity of the procurement, rather than review the rationality of the contracting officer's no impact determinations. If the Court determines that the contracting officer's investigation was inadequate under the circumstances, then the Court should remand to the agency for further investigation, not conduct its own investigation.

In this case, however, no remand is necessary because the contracting officer's investigation was adequate, and her no impact determinations were rational. The Federal Acquisition Regulation (FAR) does not require an exhaustive investigation of every potential conflict of interest, and, in fact, it discourages "unnecessary delays, burdensome information

requirements, and excessive documentation." FAR § 9.504(d). Here, the contracting officer conducted a reasonable investigation under the circumstances.

Before joining DoD in January 2017, where he served as Deputy Chief of Staff to the Secretary of Defense and Chief of Staff to the Deputy Secretary of Defense, Mr. DeMartino worked for a company that provided consulting services to Amazon. The contracting officer determined that this potential conflict did not negatively impact the integrity of the JEDI procurement because Mr. DeMartino's involvement in the procurement was perfunctory and ministerial in nature. His involvement was essentially limited to acting as a liaison for the Secretary and Deputy Secretary, and he did not participate in drafting the solicitation or acquisition strategy documents. The contracting officer was aware that Mr. DeMartino's involvement was limited, and she had no need to conduct an exhaustive investigation to confirm his role. The administrative record, already broadened by Government Accountability Office (GAO) proceedings, supports the contracting officer's determination.

Mr. Ubhi was employed by Amazon in January 2016, before he joined DoD as a Digital Services Expert in August 2016. Mr. Ubhi was initially involved in the JEDI procurement, but recused himself on October 31, 2017, after he learned that a company he owned expected to engage in partnership discussions with Amazon, Inc. Mr. Ubhi's involvement was early in the procurement process, before the agency had received any responses to its request for information (RFI), had issued warfighting requirements through the Joint Requirements Oversight Council, had drafted the bulk of its acquisition strategy documents, had drafted and issued two draft solicitations, and had made its final decisions with regard to the solicitation terms challenged by Oracle. The contracting officer rationally concluded that Mr. Ubhi complied with his ethical obligations regarding his participation in the procurement, and that, in any event, his early

participation in the procurement did not and could not negatively affect the integrity of the procurement going forward. No further investigation was necessary prior to the receipt of proposals. Now that Amazon has submitted a proposal, the contracting officer is considering whether Amazon's re-hiring of Mr. Ubhi in November 2017 created an OCI that cannot be avoided, mitigated, or neutralized. No decision has been made yet, so Oracle's allegations that Mr. Ubhi's access to non-public JEDI-related information creates an OCI are premature.

Prior to its issuance, the solicitation in this case was reviewed extensively by the contracting officer, DoD technical experts, DoD's Defense Procurement and Acquisition Policy section (DPAP), numerous other components of DoD, and the cloud computing industry. The idea that Mr. DeMartino or Mr. Ubhi could have steered the JEDI requirement away from DoD's actual needs and toward Amazon during their limited involvement in the procurement is illogical.

The United States Court of Appeals for the Federal Circuit has made clear that supplementation of the administrative record in bid protests should ordinarily be limited. Oracle has provided no justification, consistent with APA review, for the extensive supplementation and discovery that it seeks. Accordingly, Oracle's motion should be denied.

STATEMENT OF THE ISSUES

1. Whether the additional documents Oracle seeks to add to the administrative record, which were not developed or considered in making the decisions at issue, are necessary to complete the administrative record.

2. Whether the documents and depositions Oracle seeks to add to the administrative record are necessary for effective judicial review under the APA standard.

STATEMENT OF THE CASE

I. Nature Of The Case

Oracle is challenging: 1) DoD's decision to issue a solicitation for enterprise-level commercial cloud services as a single-award, rather than multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract; 2) three evaluation criteria in the solicitation; and 3) the contracting officer's pre-solicitation evaluation of potential conflicts of interest with regard to two former DoD employees. *See* Compl. 49-96.

II. Statement Of Facts

A. DoD Cloud Computing

To maintain its military advantage, DoD needs "an extensible and secure cloud environment that spans the homeland to the global tactical edge, as well as the ability to rapidly access computing and storage capacity to address warfighting challenges at the speed of relevance." AR 607.[1] A "cloud" is a collection of hardware and software that allows easy scaling of information technology infrastructure through virtualization of physical hardware, *e.g.*, servers. *Id.* at 327.

DoD currently lacks a "coordinated enterprise-level approach to cloud infrastructure and platforms," which "prevents warfighters and leaders from making critical data-driven decisions at 'mission speed', negatively affecting outcomes." *Id.* at 607. DoD's fragmented and largely on-premises computing and storage solutions compromise the warfighter's "ability to rapidly

[1] "AR __" refers to the administrative record we filed on January 10, 2018. In the record itself, the pages are bates stamped "COFC AR __" to distinguish from the GAO agency report numbering.

access, manipulate, and analyze data at the homefront and tactical edge." *Id.*[2] "Most importantly, current environments are not optimized to support large, cross domain analysis using advanced capabilities such as machine learning and artificial intelligence to meet current, and future warfighting needs and requirements." *Id.* at 607.

B. JEDI Initiative

In August 2017, the Defense Innovation Board, along with former Secretary of Defense, James Mattis, visited technology companies in Seattle, Washington, and Palo Alto, California. *See id.* at 686, 5955. This trip reflected that technologies in areas like data infrastructure and management, cybersecurity, and machine learning are changing the character of war, commercial companies are pioneering technologies in these areas, and the pace of innovation is extremely rapid. *Id.* at 5955.

Accordingly, on September 13, 2017, the Deputy Secretary of Defense, Patrick Shanahan, directed "aggressive steps to establish a culture of experimentation, adaptation, and risk-taking; to ensure we are employing emerging technologies to meet warfighter needs; and to increase speed and agility in technology development and procurement." *Id.* More specifically, he directed that DoD take steps to accelerate the adoption of cloud computing technologies. *Id.* He directed the establishment of a Cloud Executive Steering Group (CESG) to devise and oversee the execution of a strategy of adopting cloud computing, focusing on commercial solutions. *Id.* He also directed the use of a "tailored acquisition process to acquire a modem enterprise cloud services solution that can support unclassified, secret, and top secret information," *i.e.*, the JEDI procurement. *Id.* at 5956.

[2] "Tactical edge means environments covering the full range of military operations," and they are "often austere and connectivity deprived[.]" *Id.* at 458.

In the JEDI procurement, DoD is seeking commercial infrastructure as a service (IaaS) and platform as a service (PaaS) offerings to support DoD business and mission operations. *Id.* at 607. IaaS provides the equivalent of "bare metal" servers and networking, and a virtualization layer allows one physical server to support many smaller, logical servers. *Id.* at 327. PaaS provides software on an IaaS solution that allows users to replicate, scale, and secure applications and data. *Id.* DoD is not seeking software as a service (SaaS) offerings, meaning that it is not seeking commercial-off-the-shelf software applications that are hosted and completely managed by a cloud service provider. *See id.*

C. Initial Stage Of Procurement And Deap Ubhi's Participation

Oracle's allegations in this protest focus largely upon the participation of Deap Ubhi. *See, e.g.*, Compl. 83-91. Mr. Ubhi was an employee of the Defense Digital Service (DDS) from August 2016 to November 2017, until he resigned to work for Amazon. *See* AR 686, 5254. Mr. Ubhi had previously been employed by Amazon until January 2016. *Id.* Mr. Ubhi was cleared to work on the JEDI procurement by DoD counsel because his employment with Amazon ended more than one year before the procurement began. *See* AR 3049.[3] He was involved in the initial stage of the JEDI procurement, until October 31, 2017, when he recused himself because he expected that a company he owned would engage in partnership discussions with Amazon's parent company. *Id.* at 2777.

Mr. Ubhi was one of several technical experts assisting in the JEDI cloud effort. *See id.* at 5628. He participated in early meetings with cloud providers and "cloud focus sessions" with groups such as the military services and industry thought leaders. *See, e.g.*, *id.* at 368, 390, 3110, 5463. Mr. Ubhi also helped draft DoD's October 30, 2017, RFI, which sought information from

[3] A key to #dod-cloud-friend identifiers for Slack messages is located at AR 2901.

industry related to the initiative to accelerate enterprise cloud adoption. *See id.* at 5735, 5935-38. Additionally, he drafted a table of contents for DoD's business case analysis, which was later re-written by someone else once the drafting of the main part of the document began. *See id.* at 5442-43, 5615-16. Mr. Ubhi further participated in the drafting of a "problem statement," *see id.* at 3031, the final version of which was ultimately incorporated into the business case analysis, totaling less than one page. *Id.* at 402-03.

While he was participating in the JEDI procurement, Mr. Ubhi (and others) advocated for a single-award IDIQ contract, rather than multiple-award contract, *see id.* at 5742, but the decision to use a single-award strategy was not made until well after his recusal. *See id.* at 318-20, 455-67 (July 2018 single award decision documents); *see also id.* at 5987 (February 2018 public statement that "the CESG is still in the analysis and fact finding phase of this process to determine how many contracts will best meet DoD's needs."), 4352 (November 10, 2017, internal DoD e-mail stating that the Deputy Secretary of Defense is "[o]pen to the first cloud contract being single source OR multiple source" and tasked the JEDI cloud team to "layout all options and recommendations[.]").[4]

D. RFI Responses, Adoption Of Warfighting Requirements, And Draft Solicitations

After Mr. Ubhi's recusal, the bulk of the procurement activity began. For example, in November 2017, DoD received 64 responses to its RFI from a variety of entities. *See id.* at 368,

[4] Oracle attached a document to its motion (Exhibit B), which purports to be approved for public release on November 6, 2017, and suggests that the JEDI acquisition strategy will include a "[s]ingle-award [IDIQ] contract using full and open competitive procedures[.]" Regardless of what this leaked, "draft" document may imply, it is apparent from the record that no single-award decision was made by that date. *E.g.*, AR 4352, 5987.

861-943, 959-2776. DoD began drafting its market research report after receiving the RFI responses, in late November or early December 2017. *Id.* at 5404, 5570.

On December 22, 2017, the Joint Requirements Oversight Council, led by General Paul Selva, Vice Chairman of the Joint Chiefs of Staff, established the Defense Cloud Warfighting Requirements. *Id.* at 321-35. The Council recognized that "efforts for accelerating to the cloud are critical in creating a global, resilient, and secure information environment that enables warfighting and mission command, resulting in improved agility, greater lethality, and improved decision-making at all levels." *Id.* at 321.

DoD began drafting its business case analysis, in earnest, in approximately November 2017. *See id.* at 5406-07. DoD began drafting its acquisition strategy document no earlier than December 2017. *Id.* at 5407. And DoD did not begin drafting the solicitation until 2018. *See id.* at 5405, 5570-71.

In March 2018, DoD held an industry day and issued a draft solicitation. *See id.* at 5995. The draft solicitation included an intent to award a single contract and include "Gate Criteria," *i.e.*, pass/fail criteria that offerors must pass to proceed to the rest of the evaluation. *Id.* at 6091-93. The announcement of the draft solicitation noted that "[w]hile industry is reviewing this draft, the Department will continue to assess its overall requirement." *Id.* at 5995. DoD issued a second draft solicitation in April 2018, along with answers to more than 1,000 questions in response to the first draft solicitation. *See id.* at 6144, 6362-442. The second draft solicitation generated hundreds more questions, which were answered when the JEDI solicitation was released in July 2018. *Id.* at 6762, 6791-823. Prior to the solicitation release, solicitation terms were reviewed in detail by the DoD's Defense Procurement and Acquisition Policy group, as well other components of DoD. *See id.* at 6472-83, 6690-716, 8702-37.

E. Final Single-Award Justifications

On July 17, 2018, the contracting officer signed a memorandum for file explaining the rationale for using a single-award IDIQ contract for the JEDI requirement. *Id.* at 455-67. The contracting officer determined that there were three reasons why a single-award contract was required, pursuant to FAR § 16.504(c)(1)(ii)(B). AR 457-64.

First, based on her knowledge of the market, the contracting officer determined that more favorable terms and conditions, including pricing, will be provided if a single award is made. *Id.* at 457-59. The contracting officer recognized that multiple-award IDIQ contracts are often more advantageous to the Government because they can provide more favorable pricing at the task order level through competition. *Id.* at 464. She also recognized that a benefit of multiple-award contracts is that different vendors would offer different technical solutions to all of DoD. *See id.* at 459. But she found that, for the JEDI contract, more favorable pricing terms would be achieved under a single-award contract because of the large investment needed to provide the classified and tactical edge offerings. *See id.* at 457-59. Under a multiple-award scenario, contractors may be unwilling to compete for classified and tactical edge task orders, particularly small-value orders, absent the expectation that they can recoup their investment through all task orders of this nature. See *id.* at 458.

Second, the contracting officer determined that the expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards. *Id.* at 459-61. The contracting officer explained in detail the extensive costs of administering multiple contracts, and the delays they would create, and determined this outweighed the benefits of multiple-award contracts. *See id.* at 459-61, 465-67.

Third, and most importantly, the contracting officer determined that multiple awards would not be in the best interests of the Government because they would: a) create seams between clouds that increase security risks; b) frustrate DoD's attempts to consolidate and pool data so data analytics capabilities can maximize benefits to the warfighting mission; and c) exponentially increase the technical complexity required to realize the benefits of cloud technology. *Id.* at 461-64. DDS deputy director, Tim Van Name, also signed the memorandum, attesting to the facts in the technical complexity section. *Id.* at 464.

On July 19, 2018, Ellen Lord, Under Secretary of Defense for Acquisition and Sustainment, issued a determination and findings, pursuant to 10 U.S.C. § 2403a(d)(3), to award the JEDI contract to a single source, based upon her finding that the contract will provide for only firm-fixed price task orders for services for which prices are established in the contract for specific tasks performed. *Id.* at 318-20.

F. Contracting Officer's No Impact Determination

On July 23, 2018, the contracting officer analyzed whether the actions of five current or former DoD employees, with financial or other ties to Amazon, had any negative impact on the integrity of the JEDI procurement. AR 683-87. The contracting officer determined that none of the five individuals, including Anthony DeMartino and Deap Ubhi, had negatively impacted the integrity of the procurement. *Id.*

While at DoD, Mr. DeMartino worked as Deputy Chief of Staff for the Secretary of Defense and as Chief of Staff for the Deputy Secretary of Defense. *Id.* at 5231-32. He resigned from DoD effective July 6, 2018, and was not appointed to be a Special Government Employee. App. 8.[5] Prior to joining DoD in January 2017, Mr. DeMartino worked as a consultant for

[5] "App. __" refers to the appendix attached to this brief.

Amazon. *See* AR 685. With regard to the JEDI procurement, the contracting officer found that Mr. DeMartino had effectively acted as a liaison for the Secretary and Deputy Secretary, scheduling and attending meetings and recording minutes, but had no input or involvement in drafting the solicitation or acquisition strategy documents. *See id.* Accordingly, the contracting officer determined that Mr. DeMartino's involvement in the JEDI procurement was "ministerial and perfunctory in nature" and his involvement did not negatively impact the integrity of the JEDI procurement. *Id.*

With regard to Mr. Ubhi, the contracting officer determined that no restrictions attached to his participation in the JEDI procurement due to his employment with Amazon ending in January 2016 and that Mr. Ubhi had promptly recused himself from the procurement, on October 31, 2017, once Amazon had expressed an interest in purchasing his company. *See id.* at 686-87. The contracting officer also determined that Mr. Ubhi's participation was limited to market research activities. *Id.* at 687. Accordingly, she determined that his involvement in the procurement did not negatively impact the integrity of the JEDI procurement. *See id.*

Prior to solicitation issuance, the contracting officer did not analyze whether Amazon's re-hiring of Mr. Ubhi in November 2017 created an OCI because Amazon had not yet submitted a proposal, so the contracting officer considered that inquiry to be premature. *See id.* at 5021. Now that Amazon has submitted a proposal, the contracting officer is considering whether Amazon's re-hiring Mr. Ubhi creates an OCI that cannot be avoided, mitigated, or neutralized. App. 2.

G. JEDI Solicitation

On July 26, 2018, pursuant to FAR § 12.603, DoD issued a synopsis/solicitation for the JEDI cloud contract (JEDI solicitation). AR 1. Ms. Lord approved the release of the solicitation.

Id. at 363-64. Besides the single-award term, the other terms challenged by Oracle are three particular evaluation criteria, Sub-factors 1.1, 1.2, and 1.6. *See* Compl. 66-83. These are three of the seven Gate Criteria, or pass/fail criteria that offerors must meet in order to proceed to the rest of the evaluation. *See* AR 805-07.

Under Sub-factor 1.1, Elastic Usage, the "Government will evaluate whether the proposal clearly demonstrates that the addition of DoD unclassified usage will not represent a majority of all unclassified usage," in accordance with specific requirements in the solicitation. *Id.* at 806. Under Sub-factor 1.2, High Availability and Failover, the "Government will evaluate whether the proposal clearly demonstrates that [Cloud Commercial Offering] data centers are sufficiently dispersed and can continue supporting the same level of DoD usage in the case of catastrophic data center loss," in accordance with specific requirements in the solicitation. *Id.* And, under Sub-factor 1.6, the "Government will evaluate whether the proposal, including videos, clearly demonstrates that the [Commercial Cloud Offering] includes an easy to use marketplace for both Offeror native and third-party services that meets all" of the specific requirements set forth in another section of the solicitation. *Id.* at 807.

Prior to the solicitation release, in a detailed nine-page memorandum to file, Mr. Van Name specifically justified the use of each of the Gate Criteria in the solicitation, including those challenged by Oracle, as necessary and reflecting DoD's minimum requirements. *Id.* at 944-52. Mr. Van Name also completed a memorandum to file justifying a subsequent amendment to Sub-factor 1.2. *Id.* at 955-56.

H. Oracle GAO Protest

In August 2018, Oracle filed a GAO protest challenging the terms of the JEDI solicitation. *See id.* at 4442. In its filings with the GAO, Oracle largely raised the same issues it

raises here, challenging the single-award determination, evaluation Sub-factors 1.1, 1.2, and 1.6, and the contracting officer's analysis of DeMartino and Ubhi's impact on the procurement. *See* AR 5909-18. In November 2018, the GAO denied Oracle's protest in full. AR 5900-18.

The GAO determined that Ms. Lord correctly found that the JEDI contract will provide for only firm-fixed price task orders for services for which prices are established in the contract for specific tasks performed, so the solicitation does not violate 10 U.S.C. §2304a(d)(3) or FAR § 16.504(c)(1)(ii)(D). AR 5909-11. The GAO rejected Oracle's interpretation of these authorities, explaining that, if Oracle were correct, agencies would be unable to modify single-award IDIQ contracts justified based on the firm-fixed price exception. *See id.* at 5910. The GAO also determined that each of the contracting officer's justifications for a single-award contract were reasonable and that the "contemporaneous agency record contains significant documentation supporting the agency's national security concerns associated with a multiple-award solution[.]" *Id.* at 5912. And the GAO rejected Oracle's argument that proceeding with a single-award procurement would violate a reporting requirement in the recently-enacted Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 (Public Law 115-245). *Id.* at 5912-13.

Moreover, the GAO rejected Oracle's challenges to the three Gate Criteria, stating that DoD had "clearly articulated a reasonable basis for the Sub-factor 1.2 gate criteria prior to award," finding "nothing unreasonable in the agency's explanation" for Sub-factor 1.6, and finding "no merit" to Oracle's challenge to Sub-factor 1.1. *See id.* at 5913-16.

Additionally, the GAO rejected Oracle's challenge to the contracting officer's no impact determination, stating that the "agency has presented multiple bases--including, but not limited to, the agency's concerns regarding national security--that reasonably support all of the

challenged requirements." *Id.* at 5917. Accordingly, even if the GAO had concluded that either Mr. DeMartino or Mr. Ubhi "meaningfully participated in the agency's determinations regarding the [solicitation] requirements," which it did not, "it would be improper for [the GAO] to recommend that the agency proceed with the JEDI Cloud procurement in a manner that is inconsistent with meeting its actual needs." *Id.* at 5918. Finally, the GAO declined to consider Oracle's allegation that the contracting officer improperly failed to address Amazon's re-hiring of Mr. Ubhi in her pre-solicitation no impact determination, effectively agreeing with DoD that the allegation was premature. *See id.*[6]

ARGUMENT

I. The Additional Documents Oracle Seeks To Add To The Administrative Record Do Not "Complete" The Administrative Record Because They Were Not Developed Or Considered In Making The Decisions At Issue

Oracle's request to "complete" the administrative record with additional documents should be denied because Oracle has not even alleged, let alone demonstrated, that the documents were developed and considered in making the decisions at issue.[7]

By statute, bid protests in this Court are subject to the APA standard of review. 28 U.S.C. § 1491(b)(4). Accordingly, review is based upon an administrative record, *see* 5 U.S.C. § 706, which generally includes "all the material that was developed and considered by the agency in making its decision." *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 342 (1997); *see also, e.g.*, *Software Eng'g Servs., Corp. v. United States*, 85 Fed. Cl. 547, 552-53

[6] International Business Machines Corporation also submitted a pre-award protest to the GAO, but that protest was dismissed in light of Oracle's complaint in this case.

[7] One exception is Exhibit B to Oracle's motion. Because this document was created by DoD, is publicly available, and mentions the single-award strategy, we have included it in the administrative record at Tab 92.

(2009). These documents do not typically include drafts, other internal deliberations, and informal notes. *See, e.g.*, *Lyon Shipyard, Inc. v. United States*, 113 Fed. Cl. 347, 353 n.4 (2013) (stating that where the procurement did not include the "concrete step of individual evaluations," individual evaluator notes are "more akin to drafts" and need not be included in the administrative record) (citation omitted); *Joint Venture of Comint Sys. Corp. v. United States*, 100 Fed. Cl. 159, 169 (2011) ("internal deliberative materials . . . are generally excluded from the record."); *Gulf Gp. Inc. v. United States*, 61 Fed. Cl. 338, 347 (2004) (explaining that the Court had not granted discovery of "draft documents and internal communications."); *Madison Cnty. Bldg. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 622 F.2d 393, 395 n.3 (8th Cir. 1980) ("Although [internal staff memoranda and recommendations] may have been used by an agency in reaching a decision, they may be excluded from the record because of concerns over proper agency functioning."); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008) ("A complete administrative record . . . does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege."); *cf. Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1339 (Fed. Cir. 2001) (permitting supplementation of the administrative record with a deposition of a contracting officer, while making clear that it was not "ordering a deposition into the contracting officer's mental process, that is, the thought process by which he made his decision" because "[s]uch inquiries are inappropriate."). Additionally, documents filed with the GAO are also included in the administrative record where, as here, there has been a decision on the merits. *See, e.g.*, 31 U.S.C. § 3556; *Cubic*, 37 Fed. Cl. at 343-44.

Courts have recognized that an agency is entitled to a "strong presumption of regularity" in designating its administrative record, absent clear evidence to the contrary. *E.g.*, *Safari Club*

Int'l v. Jewell, No. CV-16-00094-TUC-JGZ, 2016 WL 7785452, at *2 (D. Ariz. Jul. 7, 2016); *Georgia Aquarium, Inc. v. Pritzker*, 134 F. Supp. 3d 1374, 1377 (N.D. Ga. 2014) (citation omitted); *Bimini Superfast Ops. LLC v. Winkowski*, 994 F. Supp. 2d 103, 105 (D.D.C. 2014) (citation omitted); *Great Am. Ins. Co. v. United States*, No. 12 C 9718, 2013 WL 4506929, at *4 (N.D. Ill. Aug. 23, 2013) (citation omitted); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993).

In alleging that the administrative record is incomplete, a plaintiff "cannot merely assert that other relevant documents were before the [decision-making body] but were not adequately considered. . . . Instead, plaintiff 'must identify reasonable, non-speculative grounds for its belief that the documents were *considered* by the agency and not included in the record.'" *Sara Lee Corp. v. American Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008) (citations omitted) (emphasis added); *see also, e.g.*, *Safari Club*, 2016 WL 7785452, at *2 ("A court should . . . be cautious against permitting the admission of 'any relevant document contained in the agency's filing cabinet.'") (citation omitted).

Here, Oracle has not alleged, let alone demonstrated, that the documents it seeks to add to the administrative record were actually considered by DoD in making the decisions to issue the solicitation for a single-award IDIQ contract, include the three challenged Gate Criteria in the solicitation, or find that DeMartino and Ubhi's potential conflicts of interest did not impact the integrity of the procurement. Rather, Oracle primarily argues that the documents should have been included in the administrative record because "DoD should have considered [them] in making the decisions challenged by Oracle." Pl. Mot. 27-28.[8] As demonstrated above, however,

[8] "Pl. Mot. __" refers to Oracle's memorandum in support of its motion to complete and supplement the administrative record and conduct discovery, filed on December 28, 2018.

the administrative record should include documents that were actually considered by the agency, not documents that arguably should have been considered, but were not.

As an example of the flaws in Oracle's requests, Oracle seeks proposals that were submitted by offerors well after the decisions at issue were made. *See* Pl. Mot. 25. Oracle erroneously attempts to justify its request on the basis of paragraph 22 of Appendix C of this Court's Rules. *Id.* at 28. Paragraph 22 lists documents that the administrative record "may include, as appropriate[.]" Accordingly, it does not mandate the inclusion of any documents (much less post-decisional documents) in the administrative record. *See Allied Tech. Gp., Inc. v. United States*, 92 Fed. Cl. 226, 230 (2010). As demonstrated above, it is not generally "appropriate" to include documents in the administrative record if they were not developed or considered by the agency in making the decisions at issue or filed with the GAO.

As another example, Oracle seeks informal notes and e-mails related to CESG meetings to provide "insight into the decisionmaking process for those challenged decisions," *i.e.*, the single-award determination and the challenged gate criteria. Pl. Mot. 29. But the Court does not ordinarily review an agency's "decisionmaking process"; rather, it reviews the stated reasoning for the decisions at issue, *see, e.g.*, *Impresa*, 238 F.3d at 1339; *Tafas*, 530 F. Supp. 2d at 794, which, in this case, is set forth at length in the administrative record. AR 318-20, 455-67, 944-52, 955-56. If administrative records contained the deliberative decision-making process of agencies, it would chill frank discussion and reduce the quality of agency decision making, rendering agency proceedings "useless to both the agency and to the courts." *Tafas*, 530 F. Supp. 2d at 794 (quoting *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (*en banc*)).

Accordingly, Oracle has not demonstrated that the documents it seeks are properly a part of the administrative record and, thus, its motion to "complete" the administrative record should be denied.

II. Supplementation Of The Administrative Record Is Not Appropriate Here Because Oracle Has Not Demonstrated That The Documents And Depositions It Seeks Are Necessary For Effective Judicial Review, Consistent With The APA

There are several reasons why Oracle's request for discovery/supplementation should be denied.

First, Oracle is effectively and impermissibly seeking *de novo* review of the contracting officer's discretionary determination that the involvement of DeMartino and Ubhi in the JEDI procurement did not negatively impact the integrity of the procurement. This is not a case where the plaintiff is alleging that a particular procurement decision was tainted by unexplored bad faith, which may sometimes require supplementation. Rather the contracting officer here investigated the roles of DeMartino and Ubhi in the procurement and made a specific determination that their ties to Amazon and limited involvement did not negatively impact the integrity of the procurement. The Court may review whether the contracting officer conducted a reasonable investigation and reached a rational conclusion based upon that investigation, and the administrative record is sufficient for that review. But the Court may not conduct its own investigation into the alleged bias of DeMartino and Ubhi and its alleged impact on the JEDI solicitation. With its supplementation requests, this is effectively what Oracle is asking the Court to do.

Second, even if this were a more typical bad faith protest, Oracle has not presented the hard facts necessary to demonstrate that either Mr. DeMartino or Mr. Ubhi were motivated to attempt to steer the contract to Amazon or that they had the means to do so in their limited roles.

Mr. DeMartino's involvement in the procurement was limited to acting as a liaison between JEDI procurement officials and the Secretary and Deputy Secretary of Defense. Mr. DeMartino conveyed the decisions by others to DoD leadership, he did not make or influence those decisions. And Mr. Ubhi recused himself from the procurement before the agency had even received responses to its RFI, and well before other agency officials made the decisions that are being challenged. The decisions to utilize a single-award approach and establish the Gate Criteria at issue were contemporaneously documented in the administrative record, after both DeMartino and Ubhi had left DoD, by DoD officials whose integrity Oracle has not even attempted to impugn. The contracting officer's investigation was reasonable under the circumstances and consistent with the FAR.

Third, even if some limited supplementation were appropriate, Oracle does not seek limited supplementation. Rather, it seeks to go on a fishing expedition that, if granted in full, would likely delay this case for months. Much of the documentation Oracle seeks is already in the administrative record, and what is not in the administrative record is unnecessary for effective judicial review.

A. Standard For Supplementation Of The Administrative Record

In *Axiom Resource Management, Inc. v. United States*, the Federal Circuit held that, in bid protest cases before this Court, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 564 F.3d 1374, 1379 (Fed. Cir. 2009) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing

court." *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1331 (Fed. Cir. 2018) (quoting *Axiom*, 564 F.3d at 1379).

"The purpose of limiting judicial review to the record actually before the agency is to guard against courts using new evidence to 'convert the arbitrary and capricious standard into effectively de novo review.'" *Id.* (quoting *Axiom*, 564 F.3d at 1380). "Therefore, 'supplementation of the record should be limited to cases in which the omission of extra-record evidence precludes effective judicial review,'" and "[j]udicial review is 'effective' if it is consistent with the APA." *Id.* (citation omitted).

Prior to supplementing the administrative record, the Court is "required to explain why the evidence omitted from the record frustrated judicial review as to the ultimate question of whether [the agency action] was arbitrary and capricious." *Id.* at 1332. Otherwise, it is "an abuse of discretion to supplement the administrative record" or to "rely[] on the supplemental evidence to reach [a] decision." *Id.* at 1328, 1332; *accord Axiom*, 564 F.3d at 1380 ("[T]he trial court abused its discretion in this case" by failing "to make the required threshold determination of whether additional evidence was necessary."). In *AgustaWestland*, the Federal Circuit stated that the trial court's "conclusory statements that it could not conduct effective judicial review without the supplemented material" were "insufficient under *Axiom*." 880 F.3d at 1332.

B. Standard Of Review For Conflict Of Interest Determinations

In its complaint, Oracle alleges that DeMartino and Ubhi had personal conflicts of interest that negatively impacted the integrity of the procurement in violation of FAR § 3.101-1, and Oracle also suggests that Amazon has an OCI as a result of hiring Mr. Ubhi, which the contracting officer failed to address. *See* Compl. 83-96. FAR § 3.101-1 sets forth aspirational goals such as "Government business shall be conducted in a manner above reproach" and the

"general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships," but does not describe particular conflicts of interest. Accordingly, this Court and the GAO have looked to the OCI rules in FAR Subpart 9.5 for guidance when reviewing personal conflict of interest allegations under FAR § 3.101-1. *See, e.g.*, *JWK Int'l Corp. v. United States*, 52 Fed. Cl. 650, 655 n.10 (2002) (noting the GAO's conclusion that "in determining whether an agency has reasonably met its obligations to avoid conflicts under FAR § 3.101–1, FAR subpart 9.5 is instructive in that it establishes whether similar situations involving contractor organizations would require avoidance, neutralization or mitigation."), *aff'd*, 56 F. App'x 474 (Fed. Cir. 2013) (quoting *Battelle Memorial Institute*, 98-1 CPD ¶ 107, 1998 WL 165898, at *4 (Comp. Gen. 1998)).

Contracting officers have "broad discretion" in fulfilling their obligations under FAR § 3.101-1 to protect the integrity of the procurement system and avoid the appearance of impropriety. *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 217 (2011); *cf. Axiom*, 564 F.3d at 1382 ("the FAR recognizes that the identification of OCIs and the evaluation of mitigation proposals are fact specific inquiries that require the exercise of considerable discretion."); FAR § 3.104-7 ("A contracting officer who receives or obtains information of a violation or possible violation of [the Procurement Integrity Act (PIA)] must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor."). And the FAR recognizes that the "exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it." FAR § 9.505.

Accordingly, in investigating potential conflicts of interest, contracting officers have wide discretion to determine how much information they need to make their determinations.

Cf. John C. Grimberg Co., Inc. v. United States, 185 F.3d 1297, 1303 (Fed. Cir. 1999) ("the contracting officer is the arbiter of what, and how much, information he needs [to make a responsibility determination]. . . Because responsibility decisions are largely a matter of judgment, contracting officers are generally given wide discretion to make this decision.") (citation omitted). And the FAR provides that, in "fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should *avoid creating unnecessary delays, burdensome information requirements, and excessive documentation*." FAR § 9.504(d) (emphasis added).

C. Oracle Is Impermissibly Seeking *De Novo* Review Of The Contracting Officer's Determination That DeMartino And Ubhi's Potential Conflicts Of Interest Did Not Negatively Impact The Integrity Of The Procurement

The first major problem with Oracle's motion for supplementation/discovery is that it effectively seeks an improper *de novo* review of the contracting officer's no impact determination. As we demonstrated in Section II.B, above, it is the contracting officer's duty to make the discretionary determination of whether the integrity of the procurement had been tainted by potential conflicts of interest. Here, the contracting officer investigated potential conflicts of interest regarding DeMartino and Ubhi and determined, before releasing the solicitation, that their limited involvement in the JEDI procurement did not negatively impact the integrity of the procurement. AR 685-87. The Court may review whether the scope of the contracting officer's investigation or her rationale was unreasonable, but it may not conduct a *de novo* review to determine whether DeMartino or Ubhi's involvement in the procurement negatively impacted the integrity of the procurement. *See Axiom*, 564 F.3d 1379-82. If the Court were to supplement the record with documentation that the agency did not consider, but Oracle alleges should have been considered, and determine for itself whether DeMartino and

Ubhi negatively impacted the integrity of the procurement, the Court would be performing an impermissible *de novo* review.

The Court's decision in *Jacobs* is instructive. In *Jacobs*, one of the plaintiffs moved to supplement the administrative record to "discover information from [another party] to determine if there was a violation of the PIA or if there was an OCI." 100 Fed. Cl. at 207. Similar to Oracle, the plaintiff in *Jacobs* argued that supplementation was warranted because "discovery will likely yield evidence of a PIA violation (which would have been part of the record if the agency had conducted an investigation) and because effective judicial review will not be possible without supplementation." *Id.* at 208. The Court denied the motion to supplement, reasoning that, in "light of the Court's determination . . . that the agency—not the Court or [the plaintiff]—is charged with conducting the OCI analysis and a PIA investigation (if warranted), [the plaintiff's] motion is inappropriate." *Id.* The Court correctly stated that its role was to "determine whether the agency's failure to conduct further OCI analysis or a PIA investigation was arbitrary and capricious," so supplementation to determine whether there was, in fact, an OCI or PIA violation was unnecessary.

Similar to *Jacobs*, the issue in this case, with regard to DeMartino and Ubhi, is whether the contracting officer reasonably investigated their potential conflicts of interest and determined that their involvement in the procurement had no negative impact on the procurement. Accordingly, supplementation with regard to the extent of their potential conflicts regarding Amazon and involvement in the procurement will not yield relevant information for purposes of APA review. If the Court determines that the scope of the contracting officer's conflict of interest investigation was unreasonable, as Oracle alleges, then the "proper course" is for the Court to remand to the agency for further investigation, *not* to supplement the administrative

record and conduct its own *de novo* review. *Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009) ("If the record is inadequate, '[t]he reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry,' and instead 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'") (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)); *see also Sara Lee*, 252 F.R.D at 35-36; *cf. Jacobs*, 100 Fed. Cl. at 222 (declaring the decision not to conduct further OCI analysis to be arbitrary and capricious and enjoining the agency from awarding the contract until the additional OCI analysis is completed).

This case is not like typical bad faith cases, such as *Starry Associates, Inc. v. United States*, 125 Fed. Cl. 613 (2016), where supplementation of the record is sometimes appropriate. When a plaintiff alleges that a procurement decision, such as a contract award or solicitation cancellation, was made in bad faith, evidence of this alleged flaw typically "by its very nature would not be found in an agency record[.]" *Starry*, 125 Fed. Cl. at 621 (citation omitted). Accordingly, in those types of cases, a plaintiff may be permitted to supplement the administrative record if it "can make a threshold showing of 'motivation for the Government employees in question to have acted in bad faith or conduct that is hard to explain absent bad faith,' and that 'discovery could lead to evidence which would provide the level of proof required to overcome the presumption of regularity.'" *Id.* at 622 (citation omitted).

Unlike in *Starry*, however, the JEDI contracting officer, in fulfilling her responsibilities under the FAR, contemporaneously investigated whether DeMartino and Ubhi's limited involvement in the JEDI procurement negatively impacted the integrity of the procurement and determined that it did not. AR 685-87. She is also currently investigating whether Amazon has

an OCI due to its employment of Mr. Ubhi that cannot be avoided, mitigated, or neutralized, now that Amazon has submitted a proposal. App. 2. Thus, if the Court were to supplement the administrative record in this case, it would not assist the Court in reviewing the rationality and legality of particular procurement decisions, but rather, would effectively create an impermissible *de novo* review of the contracting officer's contemporaneous no impact determination and ongoing OCI investigation regarding Amazon.

Starry is distinguishable for other reasons, as well. First, in *Starry*, the allegations of bias related the person who made the decision at issue (cancellation of solicitation), *id.*, whereas here, they relate to individuals who did not make any final decisions regarding the solicitation terms. AR 320, 364, 464, 952, 958. Second, in *Starry*, the primary allegations of bias related to a current Government employee who involved himself in the procurement even after his recusal, whereas here, the allegations relate to employees who have left Government service, AR 685-86, App. 8, so there should be no concerns regarding the propriety of any decision on remand. *See Boston Harbor Dev. Partners, LLC v. United States*, 103 Fed. Cl. 499, 503 (2012) ("Plaintiff's assertion that the [agency] evaluators will be biased if the lease is not cancelled contradicts a fundamental tenet of Federal procurement law, to wit, that 'government officials are presumed to act in good faith.' . . . Absent countervailing indications, this presumption ought to be at its zenith where the government has yet to act.") (citations omitted).

Accordingly, supplementation of the administrative record is inappropriate.

D. Oracle Has Not Presented The Hard Facts Of Potential Bad Faith Necessary To Justify Supplementation/Discovery

Another reason to deny Oracle's request for supplementation is that it has not met the standard necessary to demonstrate that supplementation for a bad faith claim is warranted.

As demonstrated above, a plaintiff alleging bad faith may be able to supplement the administrative record if it "can make a threshold showing of 'motivation for the Government employees in question to have acted in bad faith or conduct that is hard to explain absent bad faith,' and that 'discovery could lead to evidence which would provide the level of proof required to overcome the presumption of regularity.'" *Starry*, 125 Fed. Cl. at 622 (citation omitted). This threshold showing must provide "sufficient well-grounded allegations of bias to support supplementation" that "rest on hard facts, not merely suspicion or innuendo." *Price Gordon Servs. v. United States*, 139 Fed. Cl. 27, 50 (2018) (citation omitted); *see also Madison Services, Inc. v. United States*, 92 Fed. Cl. 120, 130 (2010). Even if the plaintiff "identifies a handful of 'hard facts'" to support its allegations of bias or bad faith by the agency, supplementation is still inappropriate where "the conduct upon which plaintiff relies can be explained absent bias or bad faith." *Price Gordon*, 139 Fed. Cl. at 50.

Oracle has not presented any hard facts suggesting that either Mr. DeMartino or Mr. Ubhi was biased in favor of Amazon. Rather, its allegations rest on suspicion, innuendo, and misunderstandings of internal DoD communications. Perhaps more importantly, Oracle has not demonstrated that either Mr. DeMartino or Mr. Ubhi had the opportunity to impact the solicitation with their alleged bias, in a manner prejudicial to Oracle.

1. Oracle Has Presented No Hard Facts Suggesting That Mr. DeMartino Was Biased, And, In Any Event, The Contracting Officer Reasonably Determined That His Duties Were Perfunctory And Ministerial, So His Potential Conflict Did Not Negatively Impact The Procurement

Oracle has presented no evidence whatsoever suggesting that Mr. DeMartino was attempting to steer the JEDI contract to Amazon. Oracle's allegations of bias rest primarily upon the fact that Mr. DeMartino performed consulting services for Amazon *before* joining DoD. *See*

Pl. Mot. 33.[9] Accordingly, the DoD Standards of Conduct Office advised him not to engage in "personal and substantial participation" in a matter involving Amazon for one year after he consulted for Amazon. *See* AR 4345.

The record indicates that Mr. DeMartino sought in good faith to follow this advice with regard to JEDI in his roles as Chief of Staff for the Deputy Secretary of Defense and Deputy Chief of Staff for the Secretary of Defense. The contracting officer determined that Mr. DeMartino's role in the procurement was "ministerial and perfunctory in nature and he provided no input into the JEDI Cloud acquisition documents[.]" *Id.* at 685. The administrative record supports this assessment.

Mr. DeMartino did not have access to the Google Drive where JEDI procurement documents are stored and edited or the Slack channels where personnel involved in the procurement discussed the JEDI-related matters. *Id.* at 5232. Mr. DeMartino did not participate in drafting the solicitation or the various acquisition strategy documents. *Id.* Rather, consistent with his roles in the Office of the Secretary of Defense, Mr. DeMartino essentially acted as a liaison between the Secretary/Deputy Secretary and those who were substantially involved in the JEDI procurement, scheduling meetings and routing documents through the Secretary and Deputy Secretary.

For example, Mr. DeMartino prepared notes from a November 2018 meeting between DoD personnel involved in the procurement and the Deputy Secretary of Defense to keep everyone aware of the Deputy Secretary's taskers from the meeting. *Id.* at 4390-91. Likewise, Mr. DeMartino met with DDS personnel to receive or provide information to or from the Deputy

[9] Oracle also implies that Mr. DeMartino again consulted for Amazon after leaving DoD, but provides no evidence of this. *See id.* (claiming, without citation, that DeMartino maintained a relationship with Amazon "after [his] work on the JEDI Cloud acquisition[.]")

Secretary of Defense. *See, e.g.*, *id.* at 2926. Similarly, in April 2018, Mr. DeMartino provided edits to a two-page briefing for the Secretary of Defense that was prepared by the DDS Director. *Id.* at 4366-68. Contrary to Oracle's allegations, Mr. DeMartino did not "lobb[y] on behalf of the JEDI Cloud single award approach" in this document. Pl. Mot. 32. Rather, he asked the DDS Director to include "some specifics the [Secretary of Defense] is going to need" regarding the single-award approach (for which DDS was advocating in the briefing). AR 4366, 4368. This included the facts that the base period of the contract was expected to be only two years and there would be opportunities for other companies to compete for the JEDI cloud contract later in the lifecycle. *See id.* at 4366.

The contracting officer was personally aware of Mr. DeMartino's involvement with the procurement and to what degree, and she discussed the matter with others on the JEDI team. *See id.* at 5239, 5663-64. She reasonably characterized Mr. DeMartino's involvement in the JEDI procurement as "ministerial and perfunctory[.]" *Id.* at 685. There is no reason to believe that Mr. DeMartino was acting in bad faith to steer the JEDI contract to Amazon or that he had the ability to do so with his limited involvement in the procurement. Conducting a detailed review of all Mr. DeMartino's e-mails and documents related to the JEDI procurement would have created "unnecessary delays, burdensome information requirements, and excessive documentation," under the circumstances. FAR § 9.504(d).

Oracle also erroneously alleges that Mr. DeMartino "exchanged emails with [Amazon] leadership about DoD cloud contracting" while he was involved with the JEDI procurement. Pl. Mot. 33. In reality, an Amazon official e-mailed Mr. DeMartino an article regarding DoD cloud computing and there is no evidence that Mr. DeMartino responded. AR 4429.

Accordingly, Oracle has failed to demonstrate an entitlement to supplementation of the administrative record and discovery with regard to Mr. DeMartino.

2. Oracle Has Presented No Hard Facts Suggesting That Mr. Ubhi Was Biased, And, In Any Event, His Involvement In The Procurement Ended Way Before The Procurement Decisions At Issue Were Made

Likewise, Oracle has presented no hard facts suggesting that Mr. Ubhi was biased, but only suspicion and innuendo based largely upon messages that Oracle takes out of context and a presumption that Mr. Ubhi delayed reporting the partnership discussions with Amazon's parent company that led to his recusal from the JEDI procurement.

There is no dispute that Mr. Ubhi worked for Amazon prior to joining DoD and that this Amazon employment was sufficiently distant that it did not prohibit Mr. Ubhi from participating personally and substantially in the JEDI procurement. *See* AR 686. Indeed, his Amazon employment was specifically vetted by DoD counsel. *See id.* at 3049. Accordingly, Mr. Ubhi was permitted to be personally and substantially involved in the procurement until October 31, 2017, when he recused himself based upon a potential business transaction between a company he owned and Amazon's parent company. *See id.* at 686, 2777. Oracle erroneously suggests that Mr. Ubhi "negotiated a business transaction and future employment with [Amazon] apparently at the same time he was working on the JEDI Cloud acquisition." Pl. Mot. 33. Oracle has provided no hard facts to suggest that Mr. Ubhi did not promptly recuse himself from the JEDI procurement once he became aware of the anticipated partnership discussions between his company and Amazon's parent.

There is also no evidence that, in informing DoD counsel of his anticipated partnership discussions with Amazon, Inc., Mr. Ubhi was motivated by anything other than a good faith desire to comply with his ethical duties. If Mr. Ubhi was seeking to steer the JEDI contract to

Amazon, rather than promptly comply with his ethical duties, it makes no sense that he would recuse himself 17 days before responses to the RFI were due and before final decisions had been made regarding the number of awards, performance requirements, or evaluation criteria. His statement in his recusal e-mail that "a company I founded, may soon engage in *further* partnership discussions with Amazon, Inc.," *id.* at 2777 (emphasis added), could have meant that his company had previously engaged in partnership discussions with Amazon without his knowledge or that his company engaged in partnership discussions through a broker that had not previously disclosed the identity of the potential buyer. Regardless, Oracle's suggestion that the word "further" means that Mr. Ubhi was ignoring his ethical duties is based upon suspicion and innuendo, not hard facts.

Oracle also relies upon blog and twitter posts while Mr. Ubhi worked at DoD where he referred to himself as "an Amazonian." Pl. Mot. 33. Although these comments were imprudent for someone in Mr. Ubhi's position, they do not demonstrate bias. They simply demonstrate that Mr. Ubhi maintained respect for his former employer. While judges often maintain respect for their former employers, that does not mean judges are biased in their favor when they appear in Court.

Oracle's twisting of e-mail and Slack messages in the administrative record fares no better. While some of the messages demonstrate some intemperate and crude language, none of them demonstrate bias in favor of Amazon. For example, when Mr. Ubhi said "waste of time" and "what. the. f---. is. this" (dashes added) in reference to an e-mail from John Weiler of the IT Acquisition Advisory Council (IT-AAC), he does not appear to be criticizing a "multiple award approach" or "non-[Amazon] approach," as alleged by Oracle. Pl. Mot. 11. Rather, he appears to be criticizing the fact that the IT-AAC was seeking to obtain a $100,000 consulting contract

by providing largely outdated information. *See* AR 2881-82. Likewise, when Mr. Ubhi wrote "SAIC," "nooooooooooo!," he was referencing the fact that the United States Marine Corps used an integrator, SAIC, to build its cloud, rather than obtaining cloud services directly from a commercial cloud provider, such as Microsoft. *See id.* at 3110-12; *see also id.* at 2603 ("SAIC is a value-added reseller and integrator of commercial cloud solutions"). Similarly, when Mr. Ubhi and two others involved in the JEDI procurement criticized the September 2017 United States Air Force cloud contract, it was because it was with a team with a cloud reseller, integrator, and provider, which added unnecessary complexity in their view. *See id.* at 2914; *see also id.* at 1844, 22827-89. Also, when Mr. Ubhi wrote "*sigh*" at the possibility of needing to have a meeting with Salesforce because it owned Heroku, it was simply because Salesforce could not meet DoD's entire anticipated requirement for both IaaS and PaaS, as Heroku is only a PaaS offering, so a meeting with Salesforce might not be the best use of DDS's limited time. *See id.* at 3151-52; *see also id.* at 2617 (Salesforce touting PaaS and SaaS solutions).

And Mr. Ubhi's intemperate criticism of DoD official Jane Rathbun at AR 3160-61 was not because she was equating Microsoft services with Amazon services generally. Rather, it was because Mr. Ubhi (and others) perceived that she did not understand that Microsoft *Office 365* was *different* from Amazon cloud offerings because Office 365 is SaaS, whereas Amazon offers IaaS and PaaS. *See id.* Indeed, in another Slack message, Mr. Ubhi did not hesitate to place Microsoft's cloud offerings on equal footing with Amazon's cloud offerings, where they were similar in nature. *See id.* at 3181 ("Largely, the multiple vs single cloud conversation, in my opinion, is a total red herring", "what is likely gonna be way more critical to discuss is commercial public gov (i.e. Azure Government Cloud or AWS GovCloud) + hybrid\/private cloud (i.e. Azure Stack or VMWare-on-AWS)").

In any event, even if Oracle could demonstrate that Mr. Ubhi was biased, it cannot demonstrate that he negatively impacted the integrity of the procurement because he recused himself so early in the process. During his brief time working on the JEDI procurement, Mr. Ubhi performed market research, but he recused himself before DoD received a single response to its request for information. *See id.* at 5438. Mr. Ubhi started drafting a table of contents for the business case analysis, but even this limited work was effectively scrapped after he recused himself. *See id.* at 5442-43, 5615-16. Mr. Ubhi did not participate in drafting the acquisition strategy or solicitation documents because the drafting process did not begin until December 2017 or 2018, after he recused himself. *See id.* at 5405, 5407.

While he was working on the JEDI procurement, Mr. Ubhi did advocate for a single-award strategy, but the final single-award decision was made in July 2018, more than eight months after he recused himself. *See id.* at 88, 318-20, 455-67. And Mr. Ubhi was not the only advocate for a single-award strategy. *See id.* at 5742, 5934. He did not drive the single-award decision, as alleged by Oracle. Pl. Mot. 9. Rather, he considered the single versus multiple award discussion "[l]argely . . . a total red herring[.]" *Id.* at 3181.

Also, Oracle's new argument that the single-award decision was effectively made by November 6, 2017, is meritless. Pl. Mot. 5. Oracle bases its argument on a document that purports to be approved for public release on November 6, 2017, and states that the JEDI acquisition strategy will include a "[s]ingle-award [IDIQ] contract using full and open competitive procedures[.]" *Id.*; *see also* AR 5957. However, in February 2018, DoD publicly explained that this document was actually a "draft document[] used to spark discussion and debate" within DoD and "the CESG is still in the analysis and fact finding phase of this process to determine how many contracts will best meet DoD's needs." AR 5986-87. Accordingly,

contrary to what this leaked document may imply, the single-award decision was not made by November 6, 2017. Indeed, there was still robust debate within DoD regarding a single versus multiple award strategy after Mr. Ubhi recused himself, as evidenced by a November 10, 2018, internal DoD e-mail stating that the Deputy Secretary of Defense was "[o]pen to the first cloud contract being single source OR multiple source" and tasked the JEDI cloud team to "layout all options and recommendations[.]" *Id.* at 4352 (emphasis in original).

Ultimately, the decision to use a single-award approach was justified by Ms. Lord, Ms. Brooks, and Mr. Van Name, in July 2018, the decision to use the evaluation criteria at issue in this case was justified by Mr. Van Name in July 2018 and September 2018 (amended Sub-factor 1.2 criterion), and the solicitation release was approved by Ms. Lord. AR 318-20, 363-64, 455-67, 944-52, 955-56, 958. Oracle has not argued that any of these individuals are biased in favor of Amazon or that they based their decisions and justifications upon anything other than a good faith believe that this was the best way to meet DoD's minimum needs.

Under these circumstances, conducting a detailed review of Mr. Ubhi's actions of the kind Oracle seeks would have created "unnecessary delays, burdensome information requirements, and excessive documentation." FAR § 9.504(d). Oracle may question the rationality and legality of the challenged solicitation terms, but it may not seek broad discovery based upon the alleged biases of someone who recused himself from the decision-making process many months before the decisions to use those terms were made.

E. Oracle's Document Requests Are Overly Broad, Not Likely To Lead To Evidence That Is Relevant For APA Review, And Therefore Inconsistent With The Limited Nature Of Supplementation

Even if some limited supplementation/discovery were appropriate, Oracle's requests are overly broad and unlikely to lead to the evidence that is relevant for APA review. Accordingly, they should be denied.

Even where the Court grants supplementation, it should be limited. "The Court must carefully tailor discovery in bid protest cases to reduce its intrusiveness and to limit it to matters that may lead to relevant evidence." *Orion Int'l Techs. v. United States*, 60 Fed. Cl. 338, 345 (2004). Oracle's document requests are intrusive, not carefully tailored.

First, Oracle seeks a multitude of documents related to Sally Donnelly, a former Special Advisor to the Secretary of Defense, who is now an intermittent Special Government Employee. *See* Pl. Mot. 24-27; App. 7. In its 96-page complaint, however, Oracle has not made any allegations that Ms. Donnelly's actions relating to the JEDI procurement negatively affected the integrity of the procurement. For this reason alone, the Court should deny Oracle's request to supplement the administrative record with documentation regarding Ms. Donnelly. *See Terry v. United States*, 96 Fed. Cl. 156, 164 (2011). Moreover, the contracting officer determined that Ms. Donnelly was not involved in "reviewing or drafting" any "pre-decisional sensitive documents relative to the JEDI Cloud acquisition." AR 686. Oracle has provided no basis to question this conclusion, and it has not provided a basis for the extensive discovery it seeks with regard to Ms. Donnelly. These requests highlight the nature of Oracle's motion as a fishing expedition.

With regard to Oracle's specific discovery requests, they are all overbroad and unnecessary for effective judicial review. For example, Oracle requests "[a]ll documents related

to the role of DeMartino, Ubhi, or Donnelly" in the Deputy Secretary's September 13, 2017, memorandum directing DoD to accelerate the adoption of cloud computing technology through the JEDI procurement and an August 2017 trip by the Secretary of Defense (and a White House delegation) to the Amazon headquarters as part of a broader West Coast trip. *See* Pl. Mot. 23-24. It is unclear what Oracle hopes to learn from these requests. The September 13 memorandum is in the administrative record, *e.g.*, AR 5955-56, it does not direct a single-award strategy or any Gate Criteria, and Oracle is not challenging its rationality. Likewise, Oracle identifies no reason why it would be improper for the Secretary of Defense to visit Amazon or any other technology company. Moreover, although requests for "all documents relating to" certain things may be appropriate for typical discovery, they are not appropriate for bid protests, where the Court should guard against an "inappropriate" inquiry into the deliberative processes of agency officials. *See Impresa*, 238 F.3d at 1339.

Oracle also seeks "[a]ll documents related to the CESG meetings and any other DoD meetings that Donnelly, Ubhi, and DeMartino attended related to the JEDI Cloud." Pl Mot. 24-25. We have included summaries of CESG meetings that were prepared for the JEDI team and the one agenda we could locate. *See* AR 5927-34, 5980. Instead of targeting particular meetings of interest, Oracle essentially seeks any documents related to any meetings that involved the two people it suspects were biased, plus Ms. Donnelly. This is a broad, inappropriate fishing expedition into the mental processes of DoD personnel.

Oracle next seeks the proposals submitted in response to the JEDI solicitation and the evaluations of those proposals, even though it is challenging solicitation terms and a pre-solicitation no impact determination. Pl. Mot. 25. Oracle alleges that these documents will "directly evidence the impact of the unduly restrictive criteria challenged by Oracle." *Id.* But if

the terms have a rational basis, then they are not unduly restrictive of competition, regardless of how many offerors can meet the criteria. *See Savantage Fin. Servs., Inc. v. United States*, 595 F.3d 1282 (Fed. Cir. 2010); *CHE Consulting, Inc. v. United States*, 552 F.3d 1351 (Fed. Cir. 2008); *American Diesel Eng'g Co., Inc.*, 92-1 CPD ¶ 79, 1992 WL 15033, at *3 (Comp. Gen. 1992). Also, there are no final evaluations of the proposals yet. *See* App. 1.

Next, Oracle seeks documents in our possession related to: 1) communications between Amazon and Donnelly, DeMartino, or Ubhi, regardless of whether they relate to JEDI; 2) communications involving Donnelly, DeMartino, or Ubhi about Amazon, again, regardless of whether they relate to JEDI; and 3) communications involving Donnelly, DeMartino, or Ubhi, about the JEDI cloud procurement. Pl. Mot. 25-26. Oracle's request is overbroad, and all but the most irrelevant information should already be in the administrative record. DeMartino and Ubhi's e-mails have already been searched for documents related to the JEDI procurement from at least September 13, 2017 through their departure from Federal service. *See* AR Tabs 34, 45-47, 51. And, contrary to Oracle's argument (pp. 33-34), the administrative record already contains communications involving Mr. DeMartino and Amazon that "a reporter successfully obtained . . . through FOIA." *See* AR 4429-37. Oracle's broad request should be denied.

Oracle also seeks all "non-privileged [Standards of Conduct Office] documents or communications regarding the JEDI Cloud or its participants." Pl. Mot. 27. First, we are not aware of any additional non-privileged Standards of Conduct Office documents regarding DeMartino or Ubhi during their Federal service that are not already in the record. Second, it is unclear why Oracle needs Standards of Conduct Office communications with people other than DeMartino or Ubhi. This request is overbroad and unlikely to lead to any evidence demonstrating bad faith.

From a logistical and breadth standpoint, Oracle's most problematic requests are the requests for the "JEDI Cloud Google Drive or at a minimum the index of documents on the drive and metadata showing the author, name of document, version, date, etc." and all "documents related to the JEDI Cloud which DeMartino, Donnelly, or Ubhi created or accessed." Pl. Mot. 26-28. The "JEDI Google Drive" (technically multiple drives) are repositories for documents related to the JEDI procurement. App. 4. Accordingly, they are changing frequently as working documents are added, moved, or modified. *Id.* Donnelly and DeMartino did not have access to the JEDI Google Drives, given their limited involvement with the procurement. *See id.*

There are currently more than 1,900 documents in the JEDI Google Drives, with a size of nearly 1.8 gigabytes total. *Id.* Besides acquisition planning documents that Oracle presumably seeks with this request, the Google Drives contain, for example, privileged drafts of documents created for the protests of the JEDI solicitations, working draft evaluations of proposals, and other documents irrelevant to the issues in this litigation. *See id.* Accordingly, producing the "Google Drive" in its current state would be unduly burdensome in relation to any probative value it could have regarding Mr. Ubhi's role in the JEDI procurement. While it is technically possible to re-create the Google Drive as it existed on a particular day, that would be an extremely time consuming task that would have to be done document-by-document and would likely take several weeks just to re-create the drive (which would then need to be reviewed for privilege). *See id.* at 4-5.

From a logistical standpoint, the index Oracle alternatively seeks is even more problematic. As explained in more detail in Jordan Kasper's declaration, an index would need to be created by: 1) manually inspecting documents in the Google Drives and copying the

information into an index; 2) gathering the "DocumentId" for each document and running reports through "Google Vault" for each document; or 3) creating a new application to automate the task of creating the index. *Id.* at 5. Any of these tasks would likely take several weeks to perform. *See id.* Moreover, the index would still be misleading, as it would state that a person "accessed" and "downloaded" a document, even if the person simply synced an entire drive to his laptop and may never have reviewed that particular document. *Id.* at 6.

Determining which documents Mr. Ubhi "accessed" in the Google Drive would require either using Google Vault or creating an application, as described above. *See id.* at 5. And, again, Google Drive would indicate that Mr. Ubhi accessed a document, even where he only synced the JEDI Google Drives to his laptop, but did not view the document. *Id.* at 6. Moreover, the documents, as they exist now, might not look like they did 15 months ago when Ubhi created or accessed them, so they would have to be restored to their state each time Mr. Ubhi accessed them. The burden of trying to produce all JEDI-related documents "created" or "accessed" by Donnelly, DeMartino, or Ubhi, outweighs any potentially relevant information that could be gleaned.

Finally, Oracle's third-party document requests are not "limited," as Oracle claims. Rather, they consist of 30 separate document requests, most of which ask for documents "related to" a particular subject. *See* Pl. Mot. Exhs. E-F. Even if depositions of DeMartino and Ubhi were appropriate, which they are not, Oracle should not be permitted to seek broad ranging discovery in a bid protest from either the Government or third-parties. *See Orion*, 60 Fed. Cl. at 345.

CONCLUSION

For these reasons, the Court should deny Oracle's motion to complete or supplement the administrative record and deny Oracle's request for discovery.

Respectfully submitted,

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