REDACTED VERSION

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Bid Protest

ORACLE AMERICA, INC., Plaintiff, v. THE UNITED STATES, Defendant, and AMAZON WEB SERVICES, INC., Defendant-Intervenor.	No. 18-1880C Senior Judge Eric G. Bruggink [redacted]

AMAZON WEB SERVICES, INC.'S RESPONSE TO ORACLE AMERICA, INC.'S SUPPLEMENTAL MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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AMAZON WEB SERVICES, INC.'S RESPONSE TO ORACLE AMERICA, INC.'S SUPPLEMENTAL MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Amazon Web Services, Inc. ("AWS") hereby opposes Oracle America, Inc.'s ("Oracle") supplemental motion for judgment on the administrative record ("MJAR") and cross-moves for judgment in favor of the Government and AWS.

INTRODUCTION

Oracle's protest seeks to eliminate the Department of Defense's ("DoD") right to determine its needs and to decide how best to meet them, including with respect to national security requirements. It is undisputed that DoD has concluded that its current information technology infrastructure is insufficient. Leadership across DoD spent nearly a year, from September 2017 to July 2018, developing and refining the Joint Enterprise Defense Infrastructure ("JEDI") procurement to assess and acquire a modern enterprise cloud services solution to meet the complex and evolving needs of our nation's military.

Oracle does not dispute that DoD has the exclusive right to determine its own needs, and that a modern cloud computing solution is necessary to protecting DoD's legitimate national security interests. Oracle also has conceded that it cannot meet the needs DoD has defined in the solicitation. Thus, in an attempt to get around those fundamental facts and delay DoD's transition to a modern enterprise cloud services solution, Oracle asks this Court to dictate to DoD what DoD's needs should be and to declare that Oracle's admittedly deficient solution is "good enough." The law demands otherwise. As discussed below, and detailed more fully herein, each of Oracle's arguments must be dismissed or denied.

First, the Tucker Act mandates deferential arbitrary and capricious review, and Oracle must establish that it was specifically prejudiced by each of the supposedly irrational agency

[redacted]

actions it challenges. Oracle repeatedly distorts the law in a futile attempt to lower its burden and hide the fact that it has suffered no prejudice whatsoever. But Oracle's disagreement with DoD's reasoned findings—no matter how loud and persistent that disagreement might be—does not render those findings irrational.

Second, DoD rationally excluded Oracle from the competitive range. Oracle concedes that it did not meet the solicitation's mandatory Gate Criteria 1.1. Thus, Oracle challenges the rationality of the Gate Criteria and opines that Oracle could have met the requirement had it been measured in a different way. But DoD justified the criteria as written, and Oracle does not even attempt to challenge that justification. Accordingly, Oracle cannot demonstrate that DoD's Gate Criteria 1.1 reflects anything other than DoD's minimum requirements—which Oracle cannot meet. For this reason, standing alone, the Court need not reach the remainder of Oracle's protest.

Third, DoD rationally determined that statute and regulation mandate a single award. Pursuant to FAR 16.504, the Contracting Officer identified three separate rationales that each independently required DoD to use a single award. Oracle's challenges to those rationales, however, ignore the Contracting Officer's detailed factual findings regarding national security and technological complexity—Oracle simply disagrees as to the best interests of DoD and the United States military. But it is the Contracting Officer's determination, not Oracle's, that is entitled to great deference.

Meanwhile, the Under Secretary of Defense determined that a single-award approach is fully consistent with 10 U.S.C. § 2304a, which allows for a single award when task orders will be issued on a fixed-price basis and the available services and pricing are specified in the contract—as is the case here. Oracle argues that additional services that might potentially be added in the future are not yet priced and that this lack of specific pricing at the time of award

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violates the statute. But Oracle's argument is based on a gross misreading of the plain text and legislative history of 10 U.S.C. § 2304a. Moreover, if such an argument were adopted then, as GAO found, that would preclude the Government from making any changes to single-award contracts. That is not and cannot be the law.

Fourth, DoD thoroughly investigated the limited involvement of former government officials Deap Ubhi, [redacted], and Anthony DeMartino in the procurement, and rationally determined that they could not have negatively impacted JEDI and did not negatively impact JEDI. Oracle disagrees with those determinations, but it does so by ignoring controlling legal precedent and misreading the factual record. Regarding Mr. Ubhi, for example, Oracle continues to grossly exaggerate his role, incorrectly referring to him as the JEDI "lead PM" and "one of four DDS personnel leading JEDI." In reality, Mr. Ubhi's role was limited to preliminary market research and he recused himself from JEDI in October 2017, which was:

- before the Joint Requirements Oversight Council identified the initial requirements in December 2017;
- before DoD published draft solicitations in March, April, and May of 2018;
- before DoD submitted the RFP package for a detailed peer review in April 2018;
- before DoD finalized the acquisition strategy and Solicitation in July 2018; and
- before the Contracting Officer, Under Secretary, and DDS Deputy Director approved the single-award and Gate Criteria determinations in July 2018.

Mr. Ubhi was not even working at DoD during these critical time periods. Thus, Oracle's assertion that Mr. Ubhi somehow influenced each decision is not only illogical but a nakedly self-serving attempt to impugn the integrity of the entire Department of Defense.

Fifth, the Contracting Officer thoroughly investigated AWS's actions in hiring (and firewalling) Mr. Ubhi and [redacted]—AWS did not hire Mr. DeMartino—and rationally

[redacted]

determined that AWS neither violated the Procurement Integrity Act nor has any conflicts of interest. Indeed, after a months-long review, she determined that AWS's hiring of Mr. Ubhi and [redacted] was entirely unrelated to JEDI; she found that Mr. Ubhi's compensation is "relatively standard for that industry and does not reflect any special compensation"; and she found, categorically, that there is "no evidence that AWS received any nonpublic information from Mr. Ubhi, [redacted], . . . or anyone else." AWS has fully complied with its ethical obligations, has disclosed all relevant information to the Contracting Officer, and has acted above reproach throughout the entire procurement. Oracle's misleading allegations are nothing more than tabloid sensationalism and attempt to make something out of nothing.

Finally, Oracle is not entitled to declaratory or injunctive relief. For the reasons above, Oracle's arguments fail on the merits. On the equities, the Tucker Act mandates that this Court "shall give due regard to the interests of national defense and national security." There can be no debate that DoD—not Oracle—is the sole authority for determining those interests. Accordingly, the law and equities each should result in a ruling against Oracle and in favor of the Government and AWS. Taken together, they compel it.

QUESTIONS PRESENTED

1. Whether DoD rationally excluded Oracle from the competitive range due to Oracle's conceded failure to meet DoD's legitimate Gate Criteria 1.1 requirements.

2. Whether the Contracting Officer's and Under Secretary of Defense's discretionary determinations to pursue a single award rationally articulated DoD's needs.

3. Whether the Contracting Officer's thorough investigations and determinations that former government officials Mr. Ubhi, [redacted], and Mr. DeMartino did not negatively impact the procurement were rational.

4. Whether the Contracting Officer's thorough investigation and determination that AWS neither violated the Procurement Integrity Act nor obtained any unfair competitive advantage was rational.

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STATEMENT OF THE CASE

Oracle's myopic arguments ignore the magnitude of the JEDI procurement and the herculean efforts leadership across DoD made to ensure that the acquisition strategy and solicitation requirements reflect and will meet the needs to the warfighter. Thus, the following sections detail those efforts and the numerous decision-makers involved. With this necessary context, it is evident that Oracle's self-serving narrative—including Oracle's material overstatement of the limited roles of Mr. Ubhi, [redacted], and Mr. DeMartino—is nothing more than a thin veneer designed to mask the weakness of Oracle's substantive challenges.

I. Leadership Across DoD—with Significant Public Input—Designed the JEDI Cloud Procurement to Meet the Needs of the Warfighter

In a September 13, 2017 memorandum, then-Deputy Secretary of Defense ("DSD") Patrick Shanahan identified the adoption of cloud computing technologies as critical to maintaining the U.S. military's technological advantage. AR Tab 90 at 5947-48.[1] Thus, he directed DoD to establish a Cloud Executive Steering Group ("CESG") "to devise and oversee the execution of a strategy to accelerate the adoption of cloud architectures and cloud services, focusing on commercial solutions." *Id.* at 5947. He directed that the CESG be chaired by Under Secretary of Defense Ellen Lord, and include standing voting members representing DoD's Strategic Capabilities Office, the Defense Innovation Unit Experimental, the Defense Digital Service ("DDS"), and the Defense Innovation Board.

Over the ensuing ten months, the CESG and Under Secretary Lord—with input from across DoD, as well as voluminous public and industry comment—led the development of what later came to be known as the JEDI procurement. The graphic below provides a high-level

[1] Citations to "AR Tab" refer to the second amended administrative record filed with this Court on May 2, 2019. All emphasis to quoted material has been added unless otherwise noted.

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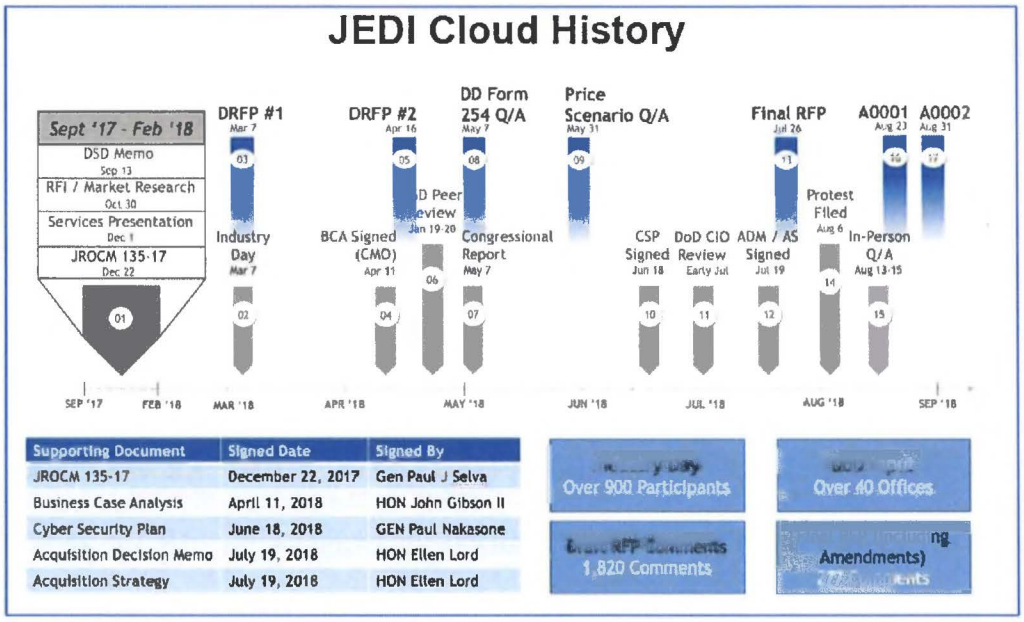
overview of DoD's development of the JEDI Cloud Solicitation, and the following sections address the seminal events and DoD decision-makers relevant here.



AR Tab 70 at 5022.

A. DoD Began Preliminary Market Research in Late 2017

On March 27, 2018, DoD's Cloud Computing Program Office ("CCPO") published a Market Research Report (AR Tab 20) summarizing DoD's preliminary market research for what would ultimately become the JEDI solicitation. As detailed therein, from September-November 2017, multiple DoD Offices hosted "cloud focus sessions" with the Military Services, larger DoD Components, and industry thought leaders; from October 2017-January 2018, DDS conducted one-on-one meetings with vendors; and on October 30, 2017, the CESG released a public Request for Information ("RFI") seeking industry input on how to best approach and structure the JEDI acquisition. AR Tab 20 at 367-68 (summarizing preliminary activities); *id.* at 388-90 (standardized questions and agenda for vendor meetings and cloud focus sessions); *id.* at 391-96 (RFI). Ultimately, only the final March 27, 2018 Report—"not the individual [RFI]

[redacted]

responses or any notes from the interested vendor meetings"—was provided to DoD decision-makers. AR Tab 70 at 4986.

B. The Joint Requirements Oversight Council Identified the Warfighter Requirements in December 2017

Separate and apart from DoD's market research efforts, the Joint Requirements Oversight Council, led by General Paul Selva, Vice Chairman of the Joint Chiefs of Staff, established the following "cloud characteristics and elements of particular importance to warfighting missions": (1) Cloud Resiliency Linkage to Mission Criticality; (2) Cyber Defenses; (3) Cyber Defenders; and (4) Role-Based Training. AR Tab 17 at 321-24. These requirements, which were first identified in a December 22, 2017 Memorandum 135-17 (the "JROCM," AR Tab 17), would ultimately serve as the foundation for the JEDI solicitation requirements. AR Tab 78 at 5408-09 (DDS Deputy Director: "a team of experts from across the Department . . . spent time taking those requirements from the Joint Staff's list, and translating those into" the JEDI solicitation).[2]

C. DoD Published Draft Solicitations In March, April, and May of 2018

DoD also factored into the solicitation significant public input, both from responses to the October 30, 2017 RFI and comments on multiple draft solicitations. For example:

- 64 vendors submitted responses to the October 30, 2017 RFI;
- Over 900 individuals attended a March 7, 2018 Industry Day;
- 46 vendors submitted over 1,000 comments on an initial March 7, 2018 draft RFP;
- Vendors submitted over 400 comments on a revised April 16, 2018 draft RFP; and
- Vendors submitted over 100 comments on a draft pricing worksheet and pricing scenarios released in late May 2018.

[2] On October 23, 2017, DDS General Counsel Sharon Woods emailed General Selva a "draft requirements memo for your consideration," intended to "provide a starting place for the conversation." AR Tab 244 at 60345-47. However, the JROC conducted its own analysis and ultimately did not use the draft from Ms. Woods. *See* AR Tab 17.

[redacted]

AR Tab 20 at 368; AR Tab 105 at 6144, 6362-442; AR Tab 109 at 6500; AR Tab 115 at 6762, 6791-823. Notably, DoD also publicly released the JROCM along with the initial March 7, 2018 draft RFP. *See* AR Tab 75 at 5231.

D. DoD Submitted the RFP Package for a Detailed Peer Review in April 2018

In addition to soliciting and incorporating public comments, DoD submitted the RFP package for a peer review by high-level Defense Procurement and Acquisition Policy ("DPAP") officials. AR Tab 107. That peer review, led by Shay Assad, then-Director of Defense Pricing/DPAP, resulted in detailed comments on a number of solicitation provisions and contract clauses, which DoD then incorporated into the solicitation. *See* AR Tab 113.

E. DoD Finalized the Acquisition Strategy and Solicitation in July 2018

On March 5, 2018, Under Secretary Lord tasked the CCPO Program Manager with delivering a formal Business Case and Acquisition Strategy for approval prior to determining whether to proceed with any final Solicitation. AR Tab 19 at 361. Thereafter, the DoD Chief Management Officer approved the Business Case on April 11, 2018. AR Tab 21. Meanwhile, a draft of the Acquisition Strategy was released in April 2018; it was then revised in June 2018; and Under Secretary Lord approved the final version on July 19, 2018. AR Tab 25 at 468-70.

The final Acquisition Strategy summarizes how DoD translated the initial JROCM requirements into the solicitation's Cybersecurity Plan and Statement of Objectives; solicited extensive public comment; and ultimately packaged everything together in the final solicitation. *See id.* at 480-86, 492-97. It also outlines DoD's inclusion of seven threshold Gate Criteria as a first evaluation step to ensure that offerors could meet DoD's unique requirements. *Id.* at 497. The Gate Criteria would be evaluated in descending order, and if a proposal did not meet even a

[redacted]

single Gate Criteria, it would not be further evaluated. *Id.* Only proposals that met all seven Gate Criteria would be eligible for further evaluation and inclusion in the competitive range. *Id.*

F. The Contracting Officer, Under Secretary Lord, and DDS Deputy Director Approved the Single Award and Gate Criteria Determinations in July 2018

Prior to releasing the solicitation on July 26, 2018, Under Secretary Lord and other responsible DoD officials issued multiple determinations explaining how DoD's unique needs mandate a single award and necessitate each of the threshold Gate Criteria.

First, on July 17, 2018, the Contracting Officer identified three rationales that each independently require the JEDI Cloud procurement to result in a single award:

(1) more favorable terms and conditions will be provided if a single award is made;

(2) the expected administrative cost of multiple contracts outweighs the expected benefits of making multiple awards; and

(3) multiple awards would not be in the best interests of the Government, because they would (i) increase security risks; (ii) create impediments to operationalizing data through data analytics, machine learning, and artificial intelligence; and (iii) introduce technical complexity in a way that both jeopardizes successful implementation and increases costs.

See AR Tab 24 (citing FAR 16.504(c)(1)(ii)(B) ("The contracting officer must not use the multiple award approach if [any of these rationales applies]."")). The DDS Deputy Director attested to the technical findings underpinning the Contracting Officer's analysis. *Id.* at 462-64.

Second, on July 19, 2018, Under Secretary Lord issued a Determination and Findings ("D&F," AR Tab 16) explaining that a single award is specifically authorized under 10 U.S.C. § 2304a(d)(3) and FAR 16.504(c)(1)(ii)(D), which allow for single-award IDIQ contracts "for firm, fixed price task or delivery orders for services for which prices are established in the contract for the specific tasks to be performed." AR Tab 16 at 318. She explained that the JEDI contract provides only for firm-fixed price task orders and that the awardee's pricing for all services available at the time of award will be specifically fixed in the contract. *Id.* at 319. She

[redacted]

also explained that two unique contract clauses—H3 and H2, which, respectively, require the ultimate awardee to (1) extend any future commercial price reductions to the Government, and (2) make available new commercial offerings to the Government at the awardee's established commercial pricing—are necessary to protect the Government's interests and are fully compliant with 10 U.S.C. § 2304a and FAR 16.504 because they provide only for fixed price task orders based on services and commercial prices to be specified in the contract. *Id.* at 319-20.

Finally, on July 23, 2018, the DDS Deputy Director issued a detailed "Justification" explaining the technical rationale for each of solicitation's seven Gate Criteria and why they are "necessary and reflect the minimum requirements for JEDI Cloud." *See* AR Tab 42.

G. The Contracting Officer Conducted an Initial Investigation and Concluded that No Potential Conflicts Negatively Impacted the JEDI Procurement

On July 23, 2018, the Contracting Officer executed a memorandum for record explaining that she had become aware of and investigated five potential conflicts of interest involving current or former government officials. AR Tab 33. Relevant here, she reviewed the conduct of Anthony DeMartino and Deap Ubhi, and determined that neither negatively impacted JEDI.

First, the Contracting Officer explained that, at some point prior to January 2017, Mr. DeMartino had "provided consulting services to AWS while employed with" another company. *Id.* at 685. Then, he had "worked as a Chief of Staff/Deputy Chief of Staff for the Deputy Secretary and Secretary, respectively," and, "[i]n this capacity, he scheduled and attended meetings relative to the JEDI Cloud procurement." *Id.*[3] However, he "had no input or involvement in the reviewing or drafting of the draft solicitation package, the Acquisition Strategy, Business Case Analysis, or other pre-decisional sensitive documents relative to the

[3] Mr. DeMartino resigned from DoD effective July 6, 2018—before DoD issued the JEDI solicitation. *See* AR Tab 75 at 5232; AR Tab 186 at 23973; ECF 40-1 at Gov't Appx. 8.

[redacted]

JEDI Cloud acquisition." *Id.* Thus, the Contracting Officer determined that his involvement was "ministerial and perfunctory in nature," "he provided no input into the JEDI Cloud acquisition documents," he "did not participate personally and substantially in the procurement," and his involvement "did not negatively impact the integrity of the JEDI Cloud acquisition." *Id.*

Second, the Contracting Officer explained that Mr. Ubhi worked for AWS prior to January 2016 and that, for seven weeks in September-October 2017, he had supported DDS's preliminary market research efforts for what would later become JEDI. *Id.* at 686. On October 31, 2017, Mr. Ubhi recused himself from JEDI, purportedly "due to potential conflicts that may arise in connection to my personal involvement and investments. Particularly, Tablehero, a company I founded, may soon engage in further partnership discussions with Amazon, Inc." AR Tab 45 at 2777. The Contracting Officer determined that Mr. Ubhi could not have negatively impacted JEDI because "his participation was limited to market research activities" and he left DoD long before it finalized the acquisition strategy and solicitation. AR Tab 33 at 687.

II. GAO Correctly Denied Oracle's Initial Protest

On July 26, 2018, DoD issued the JEDI solicitation. AR Tab 1. Shortly thereafter, Oracle protested at GAO, challenging three primary issues: (1) DoD's decision to make a single award; (2) three of the seven Gate Criteria; and (3) the Contracting Officer's determination that the procurement was not negatively impacted by Mr. DeMartino's or Mr. Ubhi's limited involvement. GAO granted Oracle extensive document discovery—DoD produced over 1,200 pages of emails, calendar invitations, and Slack messages (electronic conversations)—and conducted a lengthy hearing. Still, GAO denied each of Oracle's allegations. *Oracle Am., Inc.*, B-416657, Nov. 14, 2018, 2018 CPD ¶ 391.

[redacted]

First, GAO determined that a single award is not only compliant with but mandated by statute and regulation. GAO upheld each of the Contracting Officer's three independent rationales mandating a single award, emphasizing that "the contemporaneous agency record contains significant documentation supporting the agency's national security concerns associated with a multiple-award solution." *Id.* GAO also upheld the Under Secretary's D&F because the JEDI contract provides only for fixed-price task orders and Oracle's draconian interpretation of 10 U.S.C. § 2304a would "preclude any modifications to single-award IDIQ contracts." *Id.*

Second, GAO rejected each of Oracle's Gate Criteria challenges. *Id.* GAO found the DoD's asserted justifications for the criteria reasonable, and emphasized that to the extent DoD's findings relate to national security, they are "subject to even greater agency discretion." *Id.*

Finally, GAO denied Oracle's materially overstated conflict of interest allegations. Having found DoD's single-award and Gate Criteria requirements reasonable, GAO explained that the alleged conflicts of Mr. DeMartino and Mr. Ubhi could not possibly warrant requiring DoD to proceed "in a manner that is inconsistent with meeting its actual needs":

> [W]e have reviewed the agency's explanations for all of the challenged RFP requirements, including the single-award determination, and have concluded 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. Accordingly, even if we were to conclude that either [Mr. DeMartino] or [Mr. Ubhi] meaningfully participated in the agency's determinations regarding the RFP requirements, it would be improper for our Office to recommend that the agency proceed with the JEDI Cloud procurement in a manner that is inconsistent with meeting its actual needs.

Id.[4]

[4] Because the Contracting Officer had not yet reviewed AWS's proposal or considered the issue, GAO dismissed as premature Oracle's separate allegation that AWS gained an unfair competitive advantage by rehiring Mr. Ubhi back into AWS's commercial organization.

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III. After this Court Correctly Denied Oracle's Requested Fishing Expedition, AWS Voluntarily Submitted Information to Aid the Contracting Officer

On December 6, 2018, Oracle filed its initial complaint in this court, essentially repeating the same allegations GAO had just denied. Shortly thereafter, Oracle filed a broad request to supplement the record and for discovery into its various conflict allegations. *See* ECF 31. On January 23, 2019, this Court rightly denied Oracle's motion, emphasizing that the administrative record already contained the voluminous materials relevant to the Contracting Officer's analyses and that, even "[i]f her decision or the way she arrived at it was arbitrary, the remedy, presumably, will be to remand for further consideration." ECF 48 at 7; *see also id.* at 9 (emphasizing that "it is 'the agency—not the Court or [the protestor]—[that] is charged with conducting the OCI analysis and a PIA investigation (if warranted),' and thus we will not usurp DoD's role" (quoting *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 208 (2011)).

Notwithstanding this Court's denial of Oracle's requested supplementation and discovery, on February 12, 2019, AWS voluntary provided the Contracting Officer a letter addressing a newly learned discrepancy in Mr. Ubhi's recusal from DoD. AR Tab 251 at 60702-04. Specifically, upon seeing the full text of Mr. Ubhi's recusal letter, AWS investigated Mr. Ubhi's references to potential discussions with Amazon, Inc. regarding Tablehero. *Id.*[5] That investigation revealed that although Amazon Restaurants (a food ordering service under a non-

[5] AWS first saw the full text of Mr. Ubhi's recusal letter when it was released in a redacted filing on January 10, 2019. *See* AR Tab 251 at 60702 n.1. Prior to that time, there was no reason for AWS to suspect (let alone conclude) that the multiple representations of compliance that Mr. Ubhi made to AWS during the hiring process were inaccurate. Moreover, AWS was not a party to Oracle's GAO protest, and nothing in either the GAO decision or Oracle's redacted complaint revealed the full contents of Mr. Ubhi's recusal letter. Although GAO's decision stated that the Contracting Officer concluded no conflict existed based on alleged discussions involving Tablehero, there was no reason for AWS to conclude that Mr. Ubhi had not disclosed other information to DoD, specifically including his employment discussions with AWS.

[redacted]

AWS subsidiary of Amazon, Inc.) had previously discussed with Mr. Ubhi the possibility of a partnership with Tablehero, those discussions concluded (with no deal) in December 2016, long before the JEDI Cloud procurement began. *Id.* Even though AWS was under no obligation to alert the Contracting Officer to this discrepancy, AWS brought the issue to her attention.

IV. DoD Reopened and Significantly Expanded Its Conflicts Review, and Once Again Concluded that No Conflicts Negatively Impacted the JEDI Procurement

In response to AWS's February 12 letter, the Contracting Officer reopened and expanded her conflicts review. Relevant here, she issued AWS a series of questions regarding its hiring of Mr. Ubhi and the representations that Mr. Ubhi made to AWS during that process. *See* AR Tabs 221, 257, 261. She also requested that AWS provide further information about the OCI mitigation plan and firewalls discussed in its proposal, and about other Government officials (including [redacted]) AWS had hired or was contemplating hiring. *See id.*; AR Tab 194a (AWS OCI Proposal) at 24536-54. AWS provided all requested information, including contemporaneous emails related to the hiring of Mr. Ubhi and multiple sworn declarations from AWS personnel addressing their interaction—and, more frequently, their lack of interaction—with Mr. Ubhi and [redacted]. *See generally* AR Tabs 259, 260.

On April 9, 2019, the Contracting Officer completed her investigation. In accordance with the Procurement Integrity Act ("PIA"), the Contracting Officer determined—and the Deputy Director of the Acquisition Directorate within DoD's Washington Headquarters Services ("WHS") concurred—that neither Mr. Ubhi's nor [redacted] limited involvement negatively impacted the JEDI procurement. AR Tabs 221, 222.[6] Similarly, in accordance with the FAR's

[6] The Contracting Officer determined it was not necessary to further investigate Mr. DeMartino's limited involvement. The WHS Deputy Director concurred that Mr. DeMartino did not negatively impact the JEDI procurement. AR Tab 221 at 58723.

[redacted]

organizational conflict of interest ("OCI") regulations, the Contracting Officer determined that AWS gained no unfair competitive advantage by hiring Mr. Ubhi, [redacted], or any other individuals. AR Tab 223. The following sections summarize many—though not all—of the Contracting Officer's key findings, which are noticeably omitted from Oracle's MJAR.

A. The Contracting Officer Determined, and the Deputy Director for the WHS Acquisition Directorate Concurred, that Mr. Ubhi Did Not Negatively Impact the JEDI Procurement

The Contracting Officer's analysis regarding Mr. Ubhi is, to put it mildly, thorough. She reviewed a voluminous documentary record—including, *e.g.*, thousands of pages of emails, Slack messages, proposal materials, and affidavits signed under penalty of perjury—as well as conducted interviews with eight Government officials who were "closely involved in the process and/or physically present during the entire interval of time when Mr. Ubhi was involved with the DoD JEDI Cloud acquisition." AR Tab 221 at 58704-07. She then documented her detailed findings and analyses in a 28-page, single-spaced assessment, which was followed by an additional 20 single-spaced pages of appendices.[7] Following that comprehensive review, the Contracting Officer made the following determinations.

First, AWS's interest in potentially rehiring Mr. Ubhi to its commercial organization was "not related to JEDI." *Id.* at 58710-11.

- "AWS showed interest in Mr. Ubhi returning to AWS . . . before the inception of the JEDI Cloud initiative." *Id.* at 58710. AWS's interest in Mr. Ubhi could thus not possibly have been due to his limited role on JEDI.

[7] Appendix 4, for example, provides the Contracting Officer's assessment of a dozen Slack conversations from which Oracle selectively—and misleadingly—quotes in an attempt to show bias by Mr. Ubhi and/or prejudice to the procurement. AR Tab 221 at 58736-43. The Contracting Officer explains in detail that "[t]he content of the messages I reviewed do not indicate that any specific company was favored by Mr. Ubhi"; and "there are messages that further reinforce that Mr. Ubhi considered the potential scope of the DoD's enterprise cloud needs to be vast based on the actual needs of the DoD." *Id.* at 58736.

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- Mr. Ubhi was recruited back to AWS by his former supervisor [redacted], based on their "prior working relationship . . . as well as a personal relationship," not because of Mr. Ubhi's position with the Government or work on any particular projects.[8] *Id.* at 58711.

- [redacted] encouraged Mr. Ubhi to craft his own position under AWS's commercial organization, further "indicat[ing] . . . that the AWS hiring efforts, which started long before the JEDI Cloud, were not related to JEDI Cloud." *Id.*

- Mr.Ubhi repeatedly represented to AWS that he had complied with all ethical obligations, and that he would be precluded from supporting AWS's Worldwide Public Sector. *Id.*

Second, "Mr. Ubhi's AWS employment offer, including bonuses and options, is relatively standard for that industry and does not reflect any special compensation." *Id.*

- The Contracting Officer reviewed relevant salary data and had "discussion with others about typical AWS employment offers, including the amounts and terms of AWS employment offers." *Id.*

- She also reviewed information provided by AWS explaining that the structure of Mr. Ubhi's compensation—including a base salary, a signing bonus paid over the first two years of employment, and a grant of Restricted Stock Units ("RSUs") that vest over four years—is "standard practice" for Amazon. *See* AR Tab 253 at 60711.

- She specifically concluded that "[g]iven that Mr. Ubhi had a prior working relationship with [redacted] as well as a personal relationship with him, and in light of how much effort [redacted] spent recruiting Mr. Ubhi back to AWS; in my opinion Mr. Ubhi's employment offer, including his bonus, to rejoin his team reflects a reasonable and standard practice in that industry." AR Tab 221 at 58711.

Third, there is "no evidence" that Mr. Ubhi provided any nonpublic information to anyone at AWS, let alone competitively useful nonpublic information, to AWS's JEDI team. *Id.* at 58711-16.

- The Contracting Officer reviewed the detailed firewall and mitigation efforts in AWS's proposal—discussed further in § IV.C below—as well as multiple sworn affidavits from AWS personnel with first-hand knowledge of the creation of that proposal, all of which confirmed that Mr. Ubhi never worked on the proposal and never provided any member of the proposal team any nonpublic information. *Id.* at 58711-12.

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[8] In fact, [redacted] "had never heard of the term 'JEDI Cloud procurement' until many months after Mr. Ubhi rejoined AWS." AR Tab 259 at 60796.

[redacted]

- Moreover, the Contracting Officer determined that any nonpublic information to which Mr. Ubhi had access was not "competitively useful" because, during Mr. Ubhi's brief, seven-week tenure at DDS, "the acquisition was in its predecisional planning phase without any requirement document." *Id.* at 58716; *see also id.* at 58712-15, 58724-35 (detailed narrative and appendices addressing publicly available nature of preliminary information during Mr. Ubhi's early tenure supporting JEDI market research).

Fourth, Mr. Ubhi "was not biased towards any one particular vendor; he simply thought the needs of the DoD were vast." *Id.* at 58717.

- Based on her personal experiences with Mr. Ubhi as well as her detailed analysis of Mr. Ubhi's communications with other Government officials, the Contracting Officer explained that he "was not biased towards any one particular vendor." For example, during a late October 2017 meeting that the Contracting Officer personally attended, "Mr. Ubhi stated that he thought that there were legitimately two, maybe three, organizations in the entire universe that can do what the DoD needed for this effort, considering the unique and complex services that would need to be provided, and that as long as 'they' attended Industry Day, that's what mattered to him." *Id.*

- Similarly, the Contracting Officer highlighted that "[t]here are several instances detailed in Appendix 4 where I assess that Mr. Ubhi considered Microsoft and AWS to be equally capable of meeting DoD's needs and did not show bias toward AWS." *Id.*

- The Contracting Officer also explained that the slack messages Oracle characterizes as showing bias or attacking individual officials or vendors in reality were simply "attempt[s] at humor" and/or addressed factual distinctions between different services and vendor capabilities. *Id.* at 58717-19; *see also id.* at 58736-43.

Fifth, "[e]ven if Mr. Ubhi was biased and seeking to steer the JEDI Cloud contract award to AWS, . . . there [wa]s no impact to the procurement for three independent reasons": (1) "Mr. Ubhi did not have the technical expertise to substantially influence JEDI Cloud requirement"; (2) "Mr. Ubhi's actual attempts to influence the JEDI Cloud requirement were limited"; and (3) "most importantly, all the key decisions for the JEDI Cloud procurement, such as the actual RFP terms and whether to award one or multiple contracts, were made well after Mr. Ubhi recused himself, after being vetted by numerous DoD personnel to ensure that the JEDI Cloud RFP truly reflects DoD's requirement." *Id.* at 58719.

[redacted]

- In support of these findings, the Contracting Officer explained in detail that "the terms of the RFP and the key acquisition documents . . . were drafted after Mr. Ubhi's recusal." *Id.* at 58722; *see also id.* (based on the Contracting Officer's personal knowledge and detailed review, identifying creation date of all foundational acquisition and requirements documents as after Mr.Ubhi had recused himself).

- Moreover, "[t]he documents that did exist [during Mr. Ubhi's limited time at DDS] were simply too premature to be considered a foundational document," *id.*, and Mr. Ubhi's personal contributions were minimal and/or soon undone, *see, e.g.*, *id.* at 58720 ("Mr. Ubhi's contributions to the BCA Outline were rendered moot . . . because Mr. Dewan created his own BCA on 9 November 2017."); *id.* ("Mr. Ubhi contributed a total of eight (8) edits to the RFI, all of which were contained within two sentences.").

- Lastly, the RFP and key acquisition documents "were reviewed by numerous DoD and military personnel, including DPAP Peer Review, the CIO, other DoD components, and numerous hard-working members of the JEDI procurement team." *Id.* at 58722. Thus, the notion that Mr. Ubhi's seven-week stint at DDS nearly a year before the final Acquisition Strategy and Solicitation were approved had any material impact on the acquisition is illogical.

Finally, after the Contracting Officer made each and all of the determinations above, the WHS Deputy Director reviewed the information and supporting documentation and expressly concurred that Mr. Ubhi had "no negative impact on the JEDI Cloud procurement." *Id.* at 58723.

B. The Contracting Officer Determined, and the Deputy Director for the WHS Acquisition Directorate Concurred, that [redacted] Did Not Negatively Impact the JEDI Procurement

The Contracting Officer issued a separate analysis regarding [redacted]. AR Tab 222. As with Mr. Ubhi, she found that his limited involvement in the procurement and unrelated hiring by AWS did not negatively impact the procurement. *See generally id.*

Relevant here, the Contracting Officer explained that [redacted] had been the [redacted] of the Navy for C4I and Space Programs. *Id.* at 58745. In the summer of 2017, in anticipation of retiring from the Navy, [redacted] consulted with Navy ethics counsel about potential employment opportunities with defense contractors. *Id.* at 58746. Between

[redacted]

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August 2017 and early January 2018, [redacted] had general discussions with AWS and multiple other contractors, including Oracle and Microsoft. *Id.*; AR Tab 259 at 60802.

On January 11, 2018, [redacted] submitted a "Request for Disqualification from Duties" to the Navy requesting to be excluded from, and relieved of, all matters and responsibilities affecting AWS. AR Tab 222 at 58746; AR Tab 259 at 60806. After that recusal, [redacted] interviewed with AWS on January 15, 2018, received a job offer on March 29, 2018, and accepted it on April 2, 2018. AR Tab 260 at 61004. [redacted] ultimately joined AWS in June 2018 and, since that time, "has not (1) been involved in any AWS JEDI proposal preparation activities, (2) accessed or reviewed any AWS proposal materials, (3) provided any input on AWS's proposal or proposal strategy, or (4) disclosed any non-public information relating to the JEDI procurement to anyone at AWS." AR Tab 194a (AWS OCI Proposal) at 24539.

The Contracting Officer also summarized [redacted] limited interactions with JEDI: he attended a grand total of two meetings involving JEDI. AR Tab 222 at 58746.[9] First, before he ever interviewed with AWS, he attended an October 2017 meeting and "provided information on the Navy's experience with cloud services." *Id.* Second, he attended an April 2018 meeting where a draft of the later-revised Acquisition Strategy was discussed. *Id.* The Contracting Officer also attended that April 2018 meeting, and explained that [redacted] (1) "did not provide any suggested edits . . . before, during, or after the meeting"; and (2) "did not show any bias towards any vendor and advocated in favor of a multiple-award approach." *Id.*

[9] [redacted] would later represent to AWS and to the Government that he attended only one such meeting. *See* AR Tab 194a at 24549. Oracle asserts this was a misrepresentation by [redacted], while the truth appears to be that he simply forgot the second meeting. Either way, [redacted] had no meaningful role on JEDI.

[redacted]

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Ultimately, the Contracting Officer concluded that while [redacted] should not have been invited to the April 2018 meeting "so as to avoid even the appearance of any conflict of interest," his actions "did not impact the pending award or selection of a contractor under the JEDI Cloud procurement because his participation was in advance of the issuance of the RFP, final decisions made to key acquisition documents, and receipt of any proposals, nor was the multiple award approach advocated by [redacted] adopted." *Id.* at 58747. Likewise, she explained:

> I found no evidence that [redacted] (1) provided any input impacting the JEDI Cloud acquisition decisions or documents; (2) disclosed any competitively useful nonpublic information; (3) obtained or disclosed contractor bid or proposal information to AWS; or (4) introduced any bias into the JEDI Cloud acquisition. Further, I found no evidence that (1) AWS obtained any nonpublic information from [redacted]; or (2) AWS received an unfair competitive advantage based on its dealings with [redacted] or otherwise.

Id. at 58747-48. The WHS Deputy Director reviewed and expressly concurred with the Contracting Officer's findings. *Id.* at 58748.

C. The Contracting Officer Determined that AWS Did Not Gain Any Unfair Competitive Advantage

The Contracting Officer also conducted a detailed review for actual or potential OCIs and determined that AWS neither has any OCI nor has received any unfair competitive advantage in the JEDI procurement. *See generally* AR Tab 223.

First, although AWS does not have any actual or potential OCIs, out of an abundance of caution and to avoid even the appearance of a conflict, AWS affirmatively disclosed in its proposal that it had hired Mr. Ubhi and [redacted] into roles unrelated to JEDI. AR Tab 194a at 24536-54. AWS explained that neither Mr. Ubhi nor [redacted] had any role in preparing or reviewing AWS's JEDI proposal, and in fact they never had any substantive conversations with anyone on AWS's proposal team regarding JEDI. *See id.* at 24537-40. Moreover, AWS explained that it had formally firewalled Mr. Ubhi and [redacted] from the JEDI team and any

[redacted]

JEDI-related materials, and confirmed acknowledgement of the firewalls with each and every member of the JEDI proposal team. *See id.* at 24537-45. AWS also provided sworn affidavits from Mr. Ubhi, [redacted], and [redacted], attesting to the fact that Mr. Ubhi and [redacted] had no role whatsoever in AWS's JEDI efforts. *Id.* at 24546-54.

The Contracting Officer reviewed this information, and also asked AWS a series of detailed follow-up questions regarding the roles of Mr. Ubhi and [redacted], and the timing and effectiveness of AWS's firewalls. AR Tab 259 at 60790-91. In turn, AWS provided multiple sworn affidavits addressing the Contracting Officer's factual questions and demonstrating that:

- through both formal and informal measures—including functional organizational, and geographic separation—Mr. Ubhi and [redacted] were effectively firewalled from AWS's JEDI Cloud activities from the day they joined AWS;
- "AWS obtained certification from each member of its capture team that no one had received any information from Mr. Ubhi [or [redacted]] in connection with JEDI at any point"; and
- "at all times since Mr. Ubhi [and [redacted]] joined AWS, and in particular during the period AWS was preparing its proposal in response to the RFP, Mr. Ubhi [and [redacted]] was fully firewalled."

AR Tab 260 at 61021; *see also* AR Tab 259. The Contracting Officer reviewed this information in detail and rationally determined that AWS's proposed OCI mitigations were "effective to maintain the integrity of the procurement process." AR Tab 223 at 58752, 58754.

Second, as further evidence that AWS's mitigation efforts were effective and precluded any unfair competitive advantage, the Contracting Officer found "no evidence that AWS received any nonpublic information from Mr. Ubhi, [redacted], . . . or anyone else." AR Tab 223 at 58757. She based this finding on her comprehensive review of AWS's OCI proposal and related submissions, and the numerous sworn affidavits from personnel with direct personal knowledge of the issues. *Id.* at 58752-54. She also further elaborated on this finding in her

[redacted]

separate analysis regarding Mr. Ubhi, detailing numerous independent sources confirming that Mr. Ubhi did not provide AWS any nonpublic information. *See* AR Tab 221 at 58711-12.

Finally, the Contracting Officer reiterated that Mr. Ubhi did not have access to any competitively useful nonpublic information given that his involvement in JEDI was limited to preliminary market research when no actual requirements were yet known. AR Tab 223 at 58753. Similarly, she reiterated that the only potentially competitively useful document to which [redacted] had access was a draft Acquisition Strategy document discussed at one CESG meeting; and even that document was subsequently revised before DoD finalized the solicitation. *Id.* at 58754. These findings further supported the Contracting Officer's determination that AWS has neither an actual nor an apparent OCI, and has received no unfair competitive advantage.

V. DoD Excluded Oracle From the Competitive Range Because Oracle Did Not Meet DoD's Minimum Requirements

Separate from the conflicts analyses, DoD evaluated offerors' proposals against the solicitation's requirements and, on April 10, 2019, formed a competitive range. The evaluators determined, and the Contracting Officer and Source Selection Authority concurred, that the proposals submitted by AWS and Microsoft met all of the solicitation's mandatory Gate Criteria and thus would be included in the competitive range. The proposals submitted by IBM and Oracle failed Gate Criteria 1.2 and 1.1, respectively, and thus were not eligible for further consideration. On April 26, 2019, Oracle filed its Supplemental Complaint.

ARGUMENT

I. Jurisdiction and Standard of Review

This Court reviews bid protests pursuant to the Tucker Act, which incorporates the Administrative Procedure Act's ("APA") arbitrary and capricious standard of review. *See* 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706. Under that standard, "great deference is given to the

[redacted]

agency's decision," and this Court "will not disrupt [that] decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *FCN, Inc. v. United States*, 124 Fed. Cl. 365, 369 (2015); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001) (an agency need only "provide[] a coherent and reasonable explanation of its exercise of discretion").

Moreover, and of particular importance here, 28 U.S.C. § 1491(b)(3), mandates that the Court "shall give due regard to the interests of national defense and national security." *See, e.g.*, *Fisher Sand & Gravel Co. v. United States*, No. 19-615C, 2019 WL 2276711 at *6 (Fed. Cl. May 21, 2019) (finding the "declaration of a national emergency to be the anvil that falls on the scale of justice in favor of the government"); *Elmendorf Support Servs. Joint Venture v. United States*, 105 Fed. Cl. 203, 210 (2012) (citing 28 U.S.C. § 1491(b)(3) and Supreme Court precedent emphasizing that the Court is required "to give deference 'to the professional judgment of military authorities concerning the relative importance of a particular military interest'").

Finally, a prerequisite for this Court's jurisdiction is that the protester must be an "interested party"—*i.e.*, it must have a direct economic interest at stake and be specifically "prejudiced by a significant error in the procurement process." *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1358 (Fed. Cir. 2018); *Elec. Data Sys., LLC v. United States*, 93 Fed. Cl. 416, 437 (2010) (violations of procurement regulations, standing alone, are not prejudicial, regardless of whether they are framed in mandatory terms). Where, as here, a protestor has been excluded from the competitive range, to demonstrate competitive prejudice it must show that, "but for the error, it would have had a substantial chance of securing the contract." *CliniComp*, 904 F.3d at 1358 (citations omitted). The protester must also establish prejudice "on a claim-by-

[redacted]

claim basis." *Sys. Dynamics Int'l, Inc. v. United States*, 130 Fed. Cl. 499, 511 (2017) (citing *Lewis v. Casey*, 518 U.S. 343, 358 (1996) ("[S]tanding is not dispensed in gross.")).

As discussed in the following sections, Oracle cannot meet these standards for any of its allegations. DoD's Gate Criteria (*infra* § II), single-award (§ III), and conflicts (§§ IV, V) analyses were thorough and well-reasoned, and Oracle's arguments to the contrary present nothing more than mere disagreement founded on repeated misstatements of fact and law and a fundamental refusal to engage with DoD's documented findings on national security and mission-critical requirements. Moreover, and just as importantly, because Oracle's proposal failed Gate Criteria 1.1, which reflects a minimum DoD requirement, it could not be prejudiced by and thus lacks standing to pursue any of its remaining allegations. *See infra* § II.C. Oracle ignores its heavy burden and the necessary predicates for its various allegations. But, when properly understood, Oracle's arguments are nothing more than a house of cards ready to topple.

II. DoD Was Required to Exclude Oracle From the Competitive Range For Failing to Meet the Mandatory Gate Criteria 1.1

The first—indeed, the only—issue this Court must decide is whether Oracle meets DoD's minimum needs, as expressed in Gate Criteria 1.1. If Oracle does not, then it cannot be prejudiced by, and lacks standing to raise, any of its remaining challenges.

Gate Criteria 1.1 required an offeror to demonstrate that if JEDI Cloud unclassified usage numbers (specified in the RFP)[10] were added to the offeror's own usage numbers for January and February 2018, the DoD unclassified usage would not represent 50% or more of all usage based on three separate metrics that approximate infrastructure and platform usage (network, compute, and storage). AR Tab 35 at 791, 805-806.

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[10] DoD limited the specified JEDI Cloud usage to "provide[] for a conservative representation of what JEDI Cloud is projected to host." AR Tab 42 at 945.

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Critically, Oracle now concedes that it failed this Gate Criteria. *See* MJAR at 38 ("Oracle just missed the 50% metric for storage in the January and February period"). Thus, Oracle instead challenges the criteria as somehow improper. As discussed below, there was nothing improper.

First, it is hornbook law that Government agencies are the exclusive authorities when it comes to determining their own needs. Moreover, that principle is rightly amplified when the needs at issue concern national defense and security. Here, the DDS Deputy Director executed a detailed memorandum specifically justifying the use of Gate Criteria 1.1 and explaining how it is critical to ensuring the efficacy of JEDI. That determination was eminently rational, is entitled to significant deference, and must be upheld.

Second, having conceded that it cannot meet Gate Criteria 1.1 as drafted, Oracle is forced to manufacture arguments as to why Gate Criteria 1.1 is supposedly unlawful. In doing so, however, Oracle barely acknowledges, let alone substantively engages with, DoD's stated rationale. For that reason alone, its protest should be denied. Moreover, the arguments that Oracle does advance are premised on misstated facts and tortured legal interpretations.

Finally, because DoD correctly found Oracle unacceptable under Gate Criteria 1.1, the solicitation precluded DoD from evaluating the remainder of Oracle's proposal, and mandated that Oracle be eliminated from the competitive range.

A. The DDS Deputy Director's Multiple Justifications for Why Gate Criteria 1.1 Reflects DoD's Minimum Requirements Are Eminently Rational and Entitled to Deference

"Determining an agency's minimum needs 'is a matter within the broad discretion of agency officials . . . and is not for [the] court to second guess.'" *Savantage Fin. Servs., Inc. v. United States*, 595 F.3d 1282, 1286 (Fed. Cir. 2010) (citation omitted); *Infrastructure Defense*

[redacted]

Technologies, LLC v. United States, 81 Fed. Cl. 375, 393 (2008) ("The law is well-settled that the determination of an agency's procurement needs and the best method for accommodating them are matters primarily with the agency's discretion." (citation omitted)); *Remote Diagnostic Technologies LLC v. United States*, 133 Fed. Cl. 198, 202 (2017) ("agency deference is a cornerstone of the solicitation process."). Moreover, "'[w]here a requirement relates to national defense or human safety . . . an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness.'" *CHE Consulting, Inc. v. United States*, 78 Fed. Cl. 380, 387 (2007) (quoting *MCI Worldcom Deutschland GmbH,* B-291418 *et al.*, Jan. 2, 2003, 2003 CPD ¶ 1). Indeed, the military is in the best—the only—position to know what force protection products it requires. *Infrastructure Defense Technologies, supra* (citing *North Dakota v. United States*, 495 U.S. 423, 443 (1990).

Given this significant agency discretion, in alleging that a solicitation term "unduly restricts competition," the protester bears the heavy burden of "showing that the allegedly restrictive solicitation term 'is so plainly unjustified as to lack a rational basis.'" *Cleveland Assets, LLC v. United States*, 132 Fed. Cl. 264, 279 (2017) (quoting *Savantage Fin. Servs.*, 595 F.3d at 1285-87). The burden is *not* on the agency "to demonstrate that the specification is reasonably necessary," but rather "decidedly is upon the plaintiff to demonstrate that the [agency's] judgments ... are arbitrary and capricious." *Wit Associates, Inc. v. United States*, 62 Fed. Cl. 657, 662 n.6 (2004).

Here, the DDS Deputy Director executed a "Justification" articulating two independent rationales necessitating Gate Criteria 1.1.

First, because the JEDI Cloud "will be an enterprise solution that provides foundational infrastructure and platform services to DoD" and will "host applications and data, to include data

[redacted]

at the highest classification levels and data critical to warfighting missions," DoD must ensure that the contractor is capable of providing the "full scope of services even under surge capacity during a major conflict or natural disaster event."[11] AR Tab 42 at 944 ("[i]t is imperative to the mission of national defense"). "Not including this criteria will risk future military operations that depend on the overall ability of the Offeror to support surge usage at vital times." *Id.*

Second, DoD reasonably determined that the elastic usage metrics are necessary to ensure that JEDI Cloud "experiences ongoing innovation and development and capability advancements for the full potential period of performance." *Id.* Ensuring innovation is vital because the JEDI cloud services "are too critical to military operations to allow for capability stagnation to happen here." *id.* at 945. With respect to the 50% usage threshold in particular, the DDS Deputy Director explained:

> A key underpinning of the JEDI Cloud acquisition strategy is achieving ongoing commercial parity with the commercial marketplace so that DoD can continue to take advantage of commercial advancements in cloud technology, which are driven by global marketplace competition, not military demand. Over reliance on military business would increase the risk of unsuccessful program execution over the potential 10-year contract. Limiting JEDI Cloud to 50%, excluding the Offeror's own usage, is essential to ensuring the Offeror's ability to support commercial innovation by requiring a critical mass of non-JEDI customers and usage that will drive further development of the service offerings.

Id. Thus, DoD reasonably determined that the 50% usage threshold is needed to validate whether there "[i]s there sufficient business there that [DoD won't] represent a majority of the use . . . so that there is . . . market demand that will keep that infrastructure developing, and will make sure that the infrastructure is capable of supporting a surge at any point in time." AR Tab

[11] Gate Criteria 1.1 requires offerors to "demonstrate existing, firsthand experience in operating at the scale required to support the DoD, including: maintaining the necessary facilities, acquiring, configuring, and maintaining the necessarily hardware, managing the required processes and personnel, and offering sufficient cloud services in the competitive public market space to obtain some percentage of the market." AR Tab 71 at 5086.

[redacted]

78 at 5476-77.[12] The "Justification" further explains that "[s]tagnation of innovation is a risk that has been observed in numerous other information technology (IT) programs and was highlighted in several RFI responses." AR Tab 42 at 944.

Finally, the DDS Deputy Director fully explained DoD's justification for a measurement period of January to February 2018: it is necessary to "facilitate a fair competition, as this prevents potential Offerors from taking measures to change their numbers once they became aware of this Sub-factor requirement at the release of the draft RFP in March 2018." *Id.* at 945. During the GAO hearing, he further testified that "these metrics would be particularly easy to game, if you were so inclined to do so." AR Tab 78 at 5422; *id.* at 5482 (he could "think of a whole wide variety of strategies that could be used to show and reflect those numbers, but that is not representative of actual paying commercial usage").

Each of these rationales supports a finding that Gate Criteria 1.1—and the specific measurement period chosen—reflects a legitimate DoD need. Accordingly, and in light of the great deference owed to the military's determination of its needs, Gate Criteria 1.1 must be upheld. *See, e.g., CHE Consulting, Inc. v. United States*, 74 Fed. Cl. 742, 748 (2006) (abiding by the agency's judgment that a particular "clause is the best way to manage its risk").

B. Oracle's Challenges to Gate Criteria 1.1 Misstate the Law and Offer No Legitimate Basis to Second Guess DoD's Rational Criteria

Having conceded that it cannot meet Gate Criteria 1.1 as drafted, Oracle manufactures arguments as to how Gate Criteria 1.1 is somehow unlawful. But Oracle barely acknowledges, let alone substantively engages with, DoD's stated rationales above. *See* MJAR at 35-38. The

[12] Put differently, without a sufficient volume of paying customers, it will be "unlikely that there will be money to continue investing in ongoing development" or "in infrastructure that will allow rapid scale to meet the Department's needs." AR Tab 78 at 5422-23.

[redacted]

arguments that Oracle does advance are premised on untimely and illogical legal theories. Oracle thus falls far short of meeting its heavy burden of demonstrating that DoD's judgements as to its minimum needs were in any way arbitrary and capricious.

1. Gate Criteria 1.1 Is Neither a Qualification Requirement Nor a Limitation on Competition; It Is a Minimum DoD Need

Oracle's first argument mischaracterizes Gate Criteria 1.1 and misstates the law to imply that DoD should have obtained high-level approval before including the Gate Criteria in the solicitation. *See* MJAR at 36-37 (arguing that the elastic usage metrics are a qualification requirement that cannot be used without justification by a head of agency, which did not occur here); *id.* at 34 (arguing that the elastic usage metrics are an "award limitation provision" that required justification and approval, which did not occur here). Setting aside the fact that DoD did obtain multiple high-level approvals prior to issuing the solicitation,[13] Oracle's specific arguments are untimely and facially deficient.

First, Oracle's arguments are untimely. Under *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007), any challenge to the propriety of Gate Criteria 1.1 had to be filed prior to the deadline for proposal submission: October 12, 2018. AR Tab 48 at 4303. However, Oracle did not allege that Gate Criteria 1.1 was a supposed qualification requirement or an impermissible limitation on competition (akin to award caps recently addressed in *National Government Services, Inc. v. United States*, 923 F.3d 977 (Fed. Cir. 2019)) until well after that deadline:

[13] The record shows that the RFP and key acquisition documents "were reviewed by numerous DoD and military personnel, including DPAP Peer Review, the CIO, other DoD components, and numerous hard-working members of the JEDI procurement team." AR Tab 221 at 58722.

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- In its post-hearing GAO comments—filed six days after the deadline for proposal submission—Oracle alleged for the first time that Gate Criteria 1.2 was a supposed qualification requirement. AR Tab 80 at 5799.

- Oracle did not expand its challenge to cover Gate Criteria 1.1 until its initial complaint in this Court on December 6, 2018—nearly two months after the deadline for proposal submission.

- Finally, Oracle's latest limitation on competition argument appears for the very first time in its most current MJAR filed on May 24, 2019—over seven months after the deadline for proposal submission.

Accordingly, Oracle has waived these arguments, which must be dismissed.

Second, Oracle argues that Gate Criteria 1.1 violates 10 U.S.C. § 2319 because the elastic usage metrics are a qualification requirement that cannot be used without justification by the head of the agency. But Oracle's argument is based on a false predicate—the elastic usage metrics do not and cannot meet the definition of a "qualification requirement." 10 U.S.C. § 2319(a) ("the term . . . means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract."); *see also California Industrial Facilities Resources, Inc. v. United States*, 80 Fed. Cl. 633, 642 (2008) (the statute "'only applies where the agency establishes a systematized quality assurance demonstration requirement on a continuing basis as an eligibility for award, such as a qualified products list, qualified manufacturers list, or qualified bidders list'" (quotation omitted)). The elastic usage metrics are not a test or quality assurance demonstration; they are specifications. *California Industrial,* 80 Fed. Cl. at 642 ("the testing requirements related specifically to aspects of the particular contract for which bids were sought" are not "qualification requirements"); *W.G. Yates & Sons Constr. Co. v. Caldera*, 192 F.3d 989 (Fed. Cir. 1999) (defining "specifications"). As such, DoD was not required to obtain written justification from the head of the agency to use Gate Criteria 1.1.

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Third, Oracle misleadingly alleges that DoD's elastic usage metrics are a limitation on competition that required justification and approval ("J&A") under CICA, 10 U.S.C. § 2304(c). MJAR at 34-35. Oracle's argument is premised on a single, factually inapposite case: Oracle equates Gate Criteria 1.1 with the "award limitation provision" that the Federal Circuit held required a J&A in *National Government Services, Inc. v. United States*, 923 F.3d 977 (Fed. Cir. 2019). But in that case, the Federal Circuit found that the workload caps contained in the Centers for Medicare & Medicaid Services procurement were not based on "some capability or experience requirement, but . . . instead based on the agency's attempt to divvy up" the work. *Id.* at 986. Here, however, Gate Criteria 1.1 is not a workload cap; it instead reflects DoD's minimum needs for cloud services "to host applications and data, to include data at the highest classification levels and data critical to warfighting missions." AR Tab 42 at 944. As such, Oracle's argument fails: there was no requirement for a J&A.

2. Oracle's Self-Serving Suggestion of an Alternative Measurement Period Is Legally Irrelevant

Oracle next argues that Gate Criteria 1.1 violates a supposed prohibition on agencies requiring capability demonstrations prior to the point in time needed by the agency. MJAR at 35 (citing *USA Jet Airlines, Inc., Active Aero Grp., Inc.*, B-404666, Apr. 1, 2011, 2011 CPD ¶ 91). No such blanket prohibition exists. GAO's decision in this very matter demonstrates that Oracle's characterization of *USA Jet Airlines* is incorrect: agency may require an offeror to submit evidence of its ability to meet contract requirements at the time of proposal submission where the agency has articulated a reasonable basis for requiring the evidence at that time. *See, e.g., Oracle America, Inc.*, B-416657, *et al.*, Nov. 14, 2018, 2018 CPD ¶ 391 (citing *USA Jet Airlines, Inc., Active Aero Grp., supra*, and other cases).

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With Oracle's legal distortion set straight, Oracle's argument is unmasked as nothing more than a self-serving suggestion that DoD should have taken a different approach to defining the Gate Criteria 1.1 metrics and allowed proposals to meet the storage metric closer to the time of proposal submission. *See* MJAR at 37-38 (asserting that its proposal purportedly meets the storage metric in June and July 2018).[14] But the mere fact that Oracle might prefer another measurement period does not render DoD's use of its chosen, and justified metrics irrational. *Parcel 49C Limited Partnership v. United States*, 130 Fed.Cl. 109, 126-27 (2016) ("while there may be other options for meeting the [agency's] needs . . . re-examining those options is not the role of this Court when determining whether the . . . requirements unduly restrict competition").

Finally, as the DDS Deputy Director testified, none of Oracle's proposed alternative measurement periods would overcome the fundamental problem that once offerors learned in the draft solicitation that DoD would evaluate these elastic usage metrics, offerors could manipulate their numbers. *See* AR Tab 78 at 5480, 5482.[15]

For each of these reasons, Oracle's argument must be denied.

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[14] To be clear, Oracle's proposal did not satisfy any of the three Gate Criteria 1.1 metrics. For both the network and compute metrics, Oracle failed to present the required information in the manner sought by the Solicitation. AR Tab 204 at 57847 ("[redacted]"); *id.* at 57848 ("[redacted]."). While Oracle addressed these evaluation conclusions in its Amended Complaint (¶¶ 266-274), it did not do so in its MJAR. Thus, any arguments to these documented findings are waived.

[15] Additionally, as further evidence that there was no need to shift the measurement period, three of the four offerors passed Gate Criteria 1.1. Only Oracle failed. But again, that does not render DoD's legitimate requirements irrational or unduly restrictive. *Am. Safety Council, Inc. v. United States*, 122 Fed. Cl. 426, 435 (2015) (noting that receipt of multiple proposal "undercut[s] the argument that the terms are unduly restrictive").

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C. Oracle's Failure to Meet Gate Criteria 1.1—Which Reflects DoD's Minimum Requirements—Mandated Its Exclusion from the Competitive Range and Eliminates Its Standing in This Protest

As discussed above, competitive prejudice is a threshold jurisdictional requirement. 28 U.S.C. § 1491(b)(1). And, where a competitive range has already been established, the protester must demonstrate that, "but for the error, it would have had a substantial chance at award." *CliniComp Int'l, Inc.*, 904 F.3d at 1358. Challenges to alleged procurement errors that will not change the agency's decision to exclude the protestor are not sufficient. *See Sys. Dynamics Int'l, Inc. v. United States*, 130 Fed. Cl. at 512-13 (protestor lacked standing to raise past performance argument where modification in rating would not change agency's decision to exclude it from competitive range); *North Carolina Div. of Servs. for Blind v. United States*, 53 Fed. Cl. 147, 164 (protestor lacked standing to challenge procurement error where challenge involved application of regulation only applicable to offerors within competitive range, which protestor was not).

For the reasons discussed in the preceding sections, Gate Criteria 1.1 rationally reflects DoD's minimum requirements, Oracle has conceded that it cannot meet those minimum requirements, and Oracle has no timely or valid challenge to those minimum requirements. Thus, under the Solicitation's express terms, DoD was required to exclude Oracle from the competitive range. *See* AR Tab 35 at 802-03 (providing that an offeror's failure to meet any of the Gate Criteria would render it ineligible for further evaluation and ineligible for award).

Additionally, because Gate Criteria 1.1 reflects DoD's minimum requirements, regardless of whether Oracle might prevail on any of its other allegations—which it will not—Oracle will remain ineligible for award. Even if Oracle's challenges to Gate Criteria 1.2 and 1.6 were meritorious, Oracle would never be evaluated under those factors because it is ineligible under Gate Criteria 1.1. *Sys. Dynamics*, 130 Fed. Cl. at 512-13; *North Carolina Div. of Servs. for*

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Blind, 53 Fed. Cl. at 164.[16] Even if either or both of DoD's single-award determinations were irrational and DoD adopted a multiple award approach, Oracle would not receive one because it is ineligible under Gate Criteria 1.1. *See, e.g.*, *CliniComp Int'l*, 904 F.3d at 1360 (dismissing protest for lack of standing where even if contracting process were made competitive, protestor failed to show that it could compete for contract). Even if Oracle's conflicts allegations were meritorious, and even if AWS were excluded from the competition, Oracle would remain ineligible under Gate Criteria 1.1. *Sys. Dynamics*, 130 Fed. Cl. at 512-13; *North Carolina Div. of Servs. for Blind*, 53 Fed. Cl. at 164. Accordingly, Oracle lacks standing to pursue any of its remaining arguments, which must each be dismissed.

Indeed, even Oracle recognizes this harsh reality. That is why it argues in vain that DoD's exclusion of its proposal from the competitive range—for failing to meet the mandatory Gate Criteria 1.1—was somehow unequal given DoD's inclusion of the Microsoft and AWS proposals—which passed all seven Gate Criteria. MJAR at 38-39. But Oracle's argument is both untimely and frivolous. First, the solicitation was clear on its face that an offeror that failed any Gate Criteria would be eliminated: its proposal would not be further evaluated under any of the remaining criteria, and it would not be eligible for inclusion in the competitive range. AR Tab 35 at 802-03. Prior to proposal submission, Oracle did not challenge the terms of the solicitation that allowed DoD to include in the competitive range offerors whose initial proposals were [redacted] under Factors 2-7. Oracle cannot do so now. *Blue & Gold Fleet*, 492 F.3d at 1313. Second, a necessary predicate for any unequal treatment allegation is that the agency must have treated similarly situated offerors differently. *See, e.g.*, *ManTech Advanced Sys. Int'l, Inc.*

[16] Besides conceding in its MJAR that Oracle cannot satisfy Gate Criteria 1.1, Oracle also effectively admits that it cannot meet Gate Criteria 1.2. *See* MJAR at 41.

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v. United States, 141 Fed. Cl. 493, 510 (2019). Here, Oracle failed, while Microsoft and AWS passed. They were not similarly situated. Thus, there cannot be any unequal treatment.

Accordingly, DoD rationally determined that Oracle's conceded failure to meet Gate Criteria 1.1 renders it ineligible for award; that finding deprives Oracle of its standing to challenge any other alleged errors; and Oracle's Hail Mary unequal treatment allegation falls flat. This Court must dismiss the remainder of Oracle's protest.

III. The Contracting Officer's and Under Secretary's Single-Award Determinations Are Based on DoD's Unique Requirements and Entirely Rational

Agencies have "broad discretion to determine what particular method of procurement will be in the best interests of the United States in a particular situation." *Res–Care, Inc. v. United States*, 735 F.3d 1384, 1390 (Fed. Cir. 2013) (quoting *Tyler Constr. Grp. v. United States*, 570 F.3d 1329, 1334 (Fed. Cir. 2009)); *CHE Consulting, Inc. v. United States*, 552 F.3d 1351, 1354 (Fed. Cir. 2008) (The Court's assessment of discretionary decisions are subject to a "highly deferential rational basis review." (internal quotation marks omitted)). That is especially the case when national security considerations are at issue. *Infrastructure Def. Techs., LLC v. United States*, 81 Fed. Cl. 375, 403 (2008) (denying pre-award protest and emphasizing that, on matters of national security, the "military determines what force protection products it requires").

In addition to lacking standing to challenge the Contracting Officer's and Under Secretary Lord's single award determinations, *see* supra § II.C, Oracle's arguments fail. First, Oracle's disagreement with the Contracting Officer's detailed findings regarding the technical complexity of the JEDI Cloud and DoD's security requirements is not a valid basis of protest. There is no reason to elevate Oracle's opinion over the reasoned conclusions of the responsible Contracting Officer as to the best interests of our military and the national security interests of the United States. Second, Oracle's challenge to the Under Secretary's D&F is based on a gross

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misreading of the plain text and legislative history of 10 U.S.C. § 2304a, and would preclude the Government from making any changes to such single-award IDIQ contracts, upending a cornerstone of the United States' federal procurement system. For each of these reasons, Oracle's protest must be denied.

A. The Contracting Officer Rationally Determined that Three Conditions Each Independently Require a Single Award

As discussed above (SOC § I.F), the Contracting Officer determined that a single award is required for three independent reasons:

(1) "[b]ased on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made";

(2) "[t]he expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards"; and

(3) "[m]ultiple awards would not be in the best interests of the Government."

AR Tab 24 (citing FAR 16.504(c)(1)(ii)(B)(2), (3), (6)); *see* FAR 16.504(c)(1)(ii)(B) ("The contracting officer must not use the multiple award approach if [any of these rationales applies].").

Oracle does not deny that the Contracting Officer complied with the procedural requirements in FAR 16.504.[17] Instead, Oracle merely disagrees with the decision the Contracting Officer arrived at and her reasoned judgment as to the Government's best interests and the interests of national security. *See, e.g.*, *Avtel Servs. v. United States*, 70 Fed. Cl. 173, 218, 230 (2005) (holding protester's mere disagreement with documented agency decision

[17] To the extent Oracle purports to frame its argument about a supposed requirement to consider the benefits of multiple awards as a procedural violation, it is not. Congress's multiple-award preference is expressed through the framework of FAR 16.504 whereby multiple-award contracting is the default to be used unless one of the FAR 16.504(c)(1)(ii)(B) scenarios is found to be present. The benefits of multiple-award contracting, to the extent they are to be weighed at all, are to be considered to varying degrees within the Contracting Officer's substantive analyses under the FAR 16.504(c)(1)(ii)(B) scenarios—which is what the Contracting Officer did here.

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implicating national security is inadequate). Oracle has little or no response to the numerous considerations—including concerns about potential national security risks—relied upon by the Contracting Officer, issues on which the Contracting Officer has significant discretion. For these reasons, Oracle fails to demonstrate that any—let alone all three—of the Contracting Officer's detailed rationales are arbitrary or capricious.

1. The Contracting Officer Rationally Determined that Multiple Awards Are Not In the Best Interests of the Government Due to Potential National Security Risks

In accordance with FAR 16.504(c)(1)(ii)(B)(6) the Contracting Officer found that "[m]ultiple awards would not be in the best interests of the Government.[18] AR Tab 24 at 461-64. In particular, the Contracting Officer concluded that there is no possible financial benefit that could outweigh the acute national security risks posed by multiple-award contracting:

> JEDI Cloud is about acquiring foundational technology in a manner that enables warfighters to better execute a mission that is increasingly dependent on exploitable information. For the reasons set forth above, a single award achieves better security, better positions the DoD to operationalize its data, and decreases barriers to rapid adoption. I have considered that multiple• award ID/IQ contracts are often more advantageous to the Government because they can provide more favorable pricing at the task order level *through competition*. For the reasons stated above, however, I do not think that would be the case with this contract. And, in any event, even if I expected significant cost savings from a multiple-award contract, those savings would not outweigh the benefits to national security of having a single awardee.

Id. at 464. Thus, in the Contracting Officer's informed, discretionary judgment, there is no possible financial benefit that could outweigh the acute national security risks that multiple awards would pose here.

[18] AWS addresses the third rationale first because of the overriding significance of the Contracting Officer's conclusions in this portion of her analysis.

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The Contracting Officer's memorandum includes a detailed discussion of three particular categories of national security-implicating technical performance concerns that all cut strongly against multiple-award contracting in the particular circumstances of DoD's JEDI procurement. As the Contracting Officer summarized:

> Technologies such as artificial intelligence, machine learning, and software orchestration are fundamentally changing the character of war. Battlefield advantage is driven by who has access to the best information that can be analyzed to inform decision-making at the point and time of need. Providing the DoD access to foundational commercial cloud infrastructure and platform technologies on a global scale is critical to national defense and preparing the DoD to fight and win wars. Based on the current state of technology, multiple awards are not in the best interests of the Government because they: i) increase security risks; ii) create impediments to operationalizing. data through data analytics, machine learning (ML), and artificial intelligence (AI); and iii) introduce technical complexity in a way that both jeopardizes successful implementation and increases costs.

AR Tab 24 at 461-62. The Contracting Officer's subsequent analysis of each of these three considerations is lengthy and largely speaks for itself. *Id.* at 462-64.

Oracle fails to engage with the Contracting Officer's analysis. Notably, the phrases "national security" and "national defense" do not appear a single time in Oracle's discussion of the Contracting Officer's FAR 16.504(c)(1)(ii)(B)(6) "best interest" analysis. *Id.* at 22-33. Additionally, while Oracle attempts to paint the Contracting Officer as lacking sufficient subject-matter expertise, Oracle also fails to acknowledge that the Contracting Officer did not act alone. In developing the national security analysis, the Contracting Officer closely consulted with the DDS Deputy Director, who is an expert in cloud computing technology. The Deputy Director co-signed the Contracting Officer's Memorandum and explicitly "attest[ed] to the technical findings that support the analysis." AR Tab 24 at 464; *see also* AR Tab 78 at 5506-07 (GAO testimony confirming his attestation). Thus, Oracle is asking this Court to second guess the factual findings of the Contracting Officer, and in so doing, to find that the Contracting Officer

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lacked a rational basis for relying on the expert guidance of one of DoD's top cloud computing experts. Oracle has come nowhere close to satisfying its burden. *See, e.g.*, *CHE Consulting, Inc*, 552 F.3d at 1354.

Relatedly, Oracle's assertion that other agencies have taken a different view of the risks of developing multiple clouds is irrelevant. MJAR at 31-32. Even if another agency previously faced the identical scenario faced by DoD at the present time and reached a different conclusion, "[e]ach procurement stands alone, and a selection decision made under another procurement does not govern the selection under a different procurement." *SDS Int'l v. United States*, 48 Fed.Cl. 759, 772 (2001). Moreover, every agency faces a unique cloud challenge. In this regard, Oracle glosses over the fact that DoD is starting from scratch in its JEDI cloud efforts and seeking "foundational" technology to cover the needs of a massive population of DoD personnel. AR Tab 24 at 462. Other agencies—such as the CIA, which Oracle highlights began with a single-award foundational cloud contract and only now, years later, is transitioning to a multiple award environment—may be further down the road in initial cloud development, or may have a less expansive or diverse population of users to satisfy. Thus, those other agencies could be entirely correct about the benefits of multiple awards for their particular circumstances. But that is not relevant to DoD and JEDI today. *Id.* ("It is DoD's hope that cloud technology will become more interoperable and seamlessly integrated, with lower transaction costs and better inter-cloud security features, across multiple providers. However, that is speculative at this point, and DoD needs to move out now on bringing in foundational cloud capabilities."). The Contracting Officer, DDS Deputy Director, and other DoD officials who scrutinized this procurement at every step know DoD's unique needs, and they have stated, unequivocally, that DoD's needs require a single award.

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2. The Contracting Officer Rationally Determined that More Favorable Terms and Conditions Will Be Provided with a Single Award

The Contracting Officer also found, pursuant to FAR 16.504(c)(1)(ii)(B)(2), that a single award was necessary because "more favorable terms and conditions, including pricing, will be provided if a single award is made."[19] AR Tab 24 at 457-59. In performing her analysis of the applicability of this FAR exception to the multiple-contract preference, the Contracting Officer identified two non-price substantive technical performance problems that would arise in a multiple-award scenario. *Id.* Both problems arise from the reality that JEDI requires the development of two distinct cloud environments, classified and unclassified.

First, the Contracting Officer noted that separately procuring classified and unclassified services from different contractors would create significant risk of integration problems. *Id.* at 457-58. While there are major differences between the unclassified cloud and classified cloud/tactical edge work, both categories of task orders fold into the same single JEDI Cloud system. *Id.* To have two companies develop distinct cloud environments in isolation from one another creates risk when DoD requires information to move from one to the other, or requires software developed in the unclassified environment to be migrated to the classified environment. *Id.* These problems are avoided when the same company is contractually obligated to develop all parts of the JEDI cloud at the same time. *Id.*

Second, the Contracting Officer explained that the structure of JEDI is such that the unclassified cloud work is larger in volume than the classified work. It is also more profitable because investment in the unclassified cloud services can be recouped from sales in the commercial marketplace, while advanced tactical edge and classified cloud work requires

[19] FAR 16.504(c)(1)(ii)(B)(2) does not call for a cost-only assessment. While the analysis under this provision must "includ[e] pricing," financial value is only one consideration.

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substantial one-off upfront investment that cannot be repurposed for commercial work. *Id.* at 458-59. With multiple contractors, DoD rationally was concerned that the contractors would bid on neither tactical edge nor certain classified task orders, they would either not bid on such task orders or would not do so with competitive pricing. These problems are avoided with a single vendor that would be incentivized to provide competitive pricing. *Id.*

Ignoring the lengthy, detailed discussion of these considerations, Oracle tries to convert the entire discussion into a debate over which option is likely to be cheaper, and then attacks the Contracting Officer for stating that she believes single-award contracting will produce cost savings in addition to mission-critical non-pricing benefits. MJAR at 29. However, as the Contracting Officer's analysis makes clear, the ultimate basis for her first rationale is that cost issues cannot overcome the acute program risks posed by having multiple JEDI contractors. AR Tab 24 at 458-59. That analysis was reasonable—and entitled to deference—and Oracle does not even attempt to dispute it.

3. The Contracting Officer Rationally Determined that the Expected Administrative Cost of Multiple Contracts Outweighs the Expected Benefits of Making Multiple Awards

The Contracting Officer also found that a single award is required pursuant to FAR 16.504(c)(1)(ii)(B)(3), which forbids multiple-award contracting when "the expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards." AR Tab 24 at 459-61. To reach this conclusion, the Contracting Officer analyzed the additional man-hour commitments that would be required for the average JEDI task order if those orders have to be competed, and subject to GAO bid protest review. *Id.* The Contracting Officer determined that administering a multiple-contract environment would cost the government more

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than $500 million over the duration of the JEDI contract. *Id.* at 460. A more detailed breakdown of this estimating analysis was provided as an attachment to her Memorandum. *Id.* at 465-67.

The Contracting Officer specifically considered the offsetting benefits of multiple-award contracting, but found each of the most commonly-referenced benefits to be either inapplicable, or only minimally applicable, in the specific context of JEDI. *Id.* at 461. For example, the Contracting Officer explained that two circumstances serve to reduce the expected cost savings of competing JEDI task orders. First, as discussed earlier, any cost-saving competition would only realistically occur for the unclassified cloud services, and the competitive benefits of competing the unclassified work would be offset by the fact that offerors bidding for the classified and tactical edge work would bid higher in the multiple-award context. *Id.* Second, the Contracting Officer found that typical competitive savings would be diminished here due the fact that DoD already included in the JEDI contract a pricing term requiring offerors to downwardly adjust pricing to match their commercial rates, which are a byproduct of the highly competitive commercial marketplace. Thus, DoD will already obtain all or nearly all of the savings of a multiple-award contract structure, and it will do so with the added efficiency of having to administer only a single-award vehicle.

Oracle takes issue with the Contracting Officer's estimating process and suggests that the Contracting Officer instead should have used six-year-old data supposedly indicating that task order competitions may be conducted more quickly than the Contracting Officer estimated. *See* MJAR at 30 (citing AR Tab 77 at 5337). However, the data Oracle proffers appears to identify timelines for generic task order competitions that bear no similarity to the highly complex task orders to be sought under JEDI. Moreover, the fact that Oracle itself might use a different dataset—one that advances its particular agenda—does not in any way prove the Contracting

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Officer's analyses irrational. *See CHE Consulting, Inc*, 552 F.3d at 1354. Accordingly, the Court should deny Oracle's protest.

B. The Under Secretary's D&F Complies with Statute and Regulation and Rationally Justifies a Single Award

Oracle also challenges Under Secretary Lord's D&F justifying a single-award acquisition by relying on a tortured legal theory. While FAR 16.504(c)(ii)(B) requires the Contracting Officer to award a single-award IDIQ contract whenever any of the three conditions above are present—as each is here—10 U.S.C. § 2304a(d)(3), implemented at FAR 16.504(c)(1)(ii)(D), requires that an agency head issue a D&F supporting a single-award IDIQ contract that will exceed $100 million.[20]

When Congress added the D&F requirement in 2008, it identified four conditions in which an agency head may approve a single-award IDIQ contract over $100 million:

> (1) [T]he task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;
>
> (2) [T]he contract provides only for firm, fixed price task . . . or delivery orders for—products for which unit prices are established in the contract; or services for which prices are established in the contract for the specific tasks to be performed;
>
> (3) [O]nly one source is qualified and capable of performing the work at a reasonable price to the government; or
>
> (4) Because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source due.

§ 2304a(d)(3). Each of these conditions, standing alone, may justify a single award. *Id.*

[20] The FAR threshold has been raised to $112,000,000, pursuant to a statutory inflation adjustment. For convenience, this brief references the $100,000,000 threshold.

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Under Secretary Lord reasonably identified the second exception as applicable to JEDI: the contract provides only for firm-fixed price task orders for specific services priced in the contract. *See* AR Tab 16.[21] For example, she explained:

> The CLINs for cloud offerings (*i.e.*, IaaS, PaaS, and Cloud Support Package) will be priced by catalogs resulting from the full and open competition, thus enabling competitive forces to drive all aspects of the FFP pricing. All catalogs will be incorporated at contract award and cover the full potential 10 years. Each offering in the catalog is provided "as a service", meaning that users will not be invoiced for labor-hours, time, or material; but rather a single, fixed unit price for delivery of that particular cloud service.

Id. at 319.

In addition to addressing the contract's CLIN structure and fixed pricing, Under Secretary Lord explained that two contract clauses—H3 and H2—would allow DoD "to take advantage of global marketplace competition on cloud pricing and new cloud services that emerge in the marketplace overtime," "while still resulting in fixed unit price for delivery of all cloud services under the contract." *Id.* H3 requires the awardee to lower its JEDI prices should its corresponding commercial prices decrease:

> To reflect the consistent downward trends in public cloud catalog pricing based on commercial competition, the contract automatically lower[s] DoD's prices when the contractor's public commercial prices are lowered. The lower unit price is fixed.

Id. at 319-20. Meanwhile, H2 requires the awardee to make available, at fixed commercial prices, new or improved cloud services critical to maintaining DoD's technological advantage:

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[21] In light of the Contracting Officer's detailed findings above that a single-award is in the Government's best interests—particularly as related to national security and operational effectiveness—Under Secretary Lord likely could have identified the fourth "exceptional circumstances" exception as applicable as well. In the unlikely event that this Court should reject the Under Secretary's D&F, the proper remedy would be a remand to the Under Secretary, during which she could simply execute a new D&F identifying the fourth exception as well.

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> [T]o achieve commercial parity over time, the contract contemplates adding new or improved cloud services to the contract. The new services clause requires contracting officer approval for the addition of new services and includes mechanisms to ensure that the fixed unit price for the new service cannot be higher than the price that is publicly-available in the commercial marketplace in the continental United States. The same clause requires that, if a service in the JEDI Cloud catalogs is eliminated from the Contractor's publicly-available commercial catalog, the Contractor shall offer replacement service(s) with substantially similar functionality as, and at a price no higher than, the service being eliminated. As with any other cloud offering, once the new service is added to the catalog, the unit price is fixed and cannot be changed without contracting officer approval.

Id. at 320.

* * *

Oracle challenges Under Secretary Lord's D&F, alleging that H2 is inconsistent with § 2304a(d)(3)(B). Specifically, Oracle reads into that statute an unstated requirement that the services and pricing in a single-award IDIQ contract over $100 million must supposedly be fixed at the time of award and cannot change in any way thereafter. However, as discussed below, Oracle's argument conflicts with both the plain text and legislative history of the statute and, perhaps most importantly, would "preclude any modifications to single-award IDIQ contracts." GAO Decision at 11.

1. Oracle's Argument Conflicts with the Plain Text of § 2304a(d)(3)(B)

Statutory construction "begin[s] 'with the language of the statute.' . . . If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent' . . . '[t]he inquiry ceases.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citations omitted). Moreover, "'courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Aaron v. United States*, 56 Fed. Cl. 98, 101 (2003) (citations omitted).

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Here, the statutory exception at § 2304a(d)(3)(B) applies when "the contract provides only for firm, fixed price task . . . or delivery orders for . . . services for which prices are established in the contract for the specific tasks to be performed." This unambiguous language imposes two—and only two—requirements: (1) that there be "only . . . firm, fixed price" task or delivery orders; and (2) that the services and pricing be "established in the contract." *Id.*

Oracle does not dispute, and cannot dispute, that the first requirement is met here: the JEDI contract provides only for firm-fixed price task orders. Similarly, Oracle does not dispute, and cannot dispute, that the services and pricing for any and all services available at the time of award are "established in the contract": offerors' proposals include firm-fixed pricing for a subset of CLINs, and, for all other CLINs, the awardee's commercial catalog and fixed pricing will be expressly incorporated into the contract. Finally, Oracle cannot dispute that H2 satisfies these two § 2304a(d)(3)(B) requirements. Under H2, ¶ 1, any new services that may ultimately be added to the contract must be added to the awardee's commercial catalog. And under H2, ¶¶ 2-4, the awardee must offer the Government fixed pricing terms consistent with its commercial catalog prices.[22] Thus, H2 is simply a mechanism for (1) proactively identifying potential new services to be added through the contract's Changes clause and (2) limiting the awardee's leverage in any subsequent pricing negotiations.[23] Those new services, though, if added, will be "firm, fixed price," and will be "established in the contract."

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[22] *See, e.g.*, AR Tab 35 at 740 (H2, ¶ 2: "Any discounts, premiums, or fees in Attachment J-3: Contractor Discounts, Premiums, and Fees shall equally apply to new services, unless specifically negotiated otherwise."); *id.* (H2, ¶ 3: "The price incorporated into the JEDI Cloud catalog for new unclassified services shall not be higher than the price that is publicly-available in the commercial marketplace in CONUS, plus any applicable discounts, premiums or fees pursuant to paragraph 2.").

[23] Because JEDI is a commercial item contract with the bilateral FAR 52.212-4(c) Changes clause—unlike the standard unilateral changes clauses found in non-commercial item (Continued...)

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By contrast, the only way H2 could possibly be read as inconsistent with § 2304a(d)(3)(B) is if the statute included a third requirement that all services and pricing—even services and pricing to potentially be added in the future—must be specifically fixed at the time of award. But the statute does not say that. Accordingly, Oracle may not read in such a new requirement now. *Aaron*, 56 Fed. Cl. at 101; *see also, e.g.*, *Adam Sommerrock Holzbau, GmbH v. United States*, 866 F.2d 427, 429 (Fed. Cir. 1989) ("Had [Congress] desired to include a [certain] provision in the [statute], it certainly could have done so.") (citing, *inter alia*, *In re Borba*, 736 F.2d 1317, 1320 (9th Cir. 1984) ("The Court cannot omit or add to the plain meaning of a statute."); *De Soto Securities Co. v. Commissioner of Internal Revenue*, 235 F.2d 409, 411 (7th Cir.1956) ("Courts have no right, in the guise of construction of an act, to either add words to or eliminate words from the language used by congress.")).

2. The Legislative History of § 2304a(d)(3)(B) Does Not Support Oracle's Position

Because § 2304a(d)(3)(B) is clear on its face, it is neither necessary nor appropriate to attempt to discern any further meaning from the statute's legislative history. *See, e.g.*, *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous."). Yet, Oracle asserts that the legislative history supposedly supports reading in its unstated requirement that all potential services and pricing be established at the time of award. Oracle is wrong.

Congress enacted § 2304a(d)(3) in the National Defense Authorization Act ("NDAA") for 2008, and the legislative history for this particular provision is limited. It was part of an

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contracts—absent H2, the awardee could theoretically develop a new and improved cloud service with a lower commercial price than an existing JEDI service, yet refuse to add it to the JEDI catalog. H2 prevents that from happening, by requiring the awardee to make available its cutting edge cloud services, and at competitive market prices.

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amendment proposed by the Senate and was accepted by the House without discussion in the Conference Report. *See* H. Rep. 110-477 (2007) at 956. The only contemporaneous discussion that Oracle identifies is from a Senate Armed Services Committee ("SASC") Report:

> The committee recommends a provision that would: . . . require that task or delivery order contracts for or on behalf of the Department of Defense (DOD) in excess of $100.0 million be awarded to multiple contractors, with certain exceptions . . . .
>
> At the committee's April 19, 2007 hearing on DOD's management of costs under the Logistics Civil Augmentation Program (LOGCAP) contract in Iraq, Senator Levin asked why the Army had waited 5 years to split the LOGCAP contract among multiple contractors, allowing for the competition of individual task orders. The Assistant Secretary of the Army for Acquisition, Technology, and Logistics responded: "I don't have a good answer for you." The provision recommended by the committee would ensure that future contracts of this type provide for the competition of task and delivery orders unless there is a compelling reason not to do so.

S. Rep. No. 110-77 at 367 (2007).

Oracle highlights the last sentence above as expressing a generic preference for multiple awards.[24] However, even that sentence recognizes exceptions when a single award will be appropriate, and it says nothing about Oracle's unstated requirement to fix services and pricing at the time of award. Moreover, when read in context, the passage above actually disproves Oracle's argument about the purpose of the 2008 D&F requirement.

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[24] This SASC Report is the only piece of legislative history that Oracle cites from Congress's enactment of the § 2304a(d)(3) D&F requirement in the 2008 NDAA. *See* Oracle MJAR at 23. Elsewhere, Oracle implies that Congress added the D&F requirement specifically to avoid "single award IDIQ technology contracts with refresh provisions." *See id.* at 24-25 (citing AR Tab 77). However, the document Oracle cites is neither legislative history nor from the 2008 NDAA, and it lacks the force and effect of law. Instead, it is a "best practices" guide published by the Office of Management and Budget in 1997 (and updated in 1999)—*i.e.*, nearly a decade before Congress even created the § 2304a(d)(3) D&F requirement and the fixed price exception (d)(3)(B).

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During the referenced April 19, 2007 hearing regarding the LOGCAP contract—which provides civilian contingency support for military operations abroad[25]—Congress's primary concerns were that (1) the then-LOGCAP III task orders were predominantly cost reimbursable, placing all cost risk on the Government; and (2) given the unpredictable nature of military operations, the amount, type, and even locations of necessary contingency support services were inherently unpredictable. *See, e.g.*, S. Hrg. 110-206 (Apr. 19, 2007) at 18 ("The [LOGCAP III] contractor is paid a cost-plus 1 percent base fee, and the contractor may earn up to 2 percent award fee on negotiated costs. The program has grown rapidly from a peacetime value of several million dollars to over $5 billion."); *id.* at 20. Thus, Congress mused about potential solutions to avoid minimally defined, cost reimbursable IDIQ contracts, *e.g.*, *id.* at 120 ("Would it negatively impact the Army's mission if Congress prevented the use of cost reimbursement task orders under single award IDIQ contracts for services valued over $100 million?"), before later enacting § 2304a(d)(3) and its multiple exceptions permitting single-award IDIQs.

Here, neither of Congress's LOGCAP concerns is applicable. First, the JEDI contract provides only for firm-fixed price task orders. Thus, the contractor bears the price risk, not the Government. Second, unlike contingency military support—which fluctuates wildly depending on whether, when, and where, the United States goes to war—DoD's cloud requirements are defined in the JEDI Solicitation and offerors' responsive proposals. The awardee's catalog of services addressing those specific requirements—including DoD's documented cybersecurity requirements—will be expressly incorporated into the contract, with fixed pricing. And although

[25] *See, e.g.*, S. Hrg. 110-206 (Apr. 19, 2007) at 2 ("Under the LOGCAP contract, the contractor is responsible for providing a full spectrum of services to U.S. troops in the field, including dining facilities, living quarters, base camp operations and maintenance, facilities management, transportation, and distribution of supplies, water and ice, laundry and bath, airfield operations, detainee camp construction, and firefighting.").

[redacted]

additional commercial services may potentially be added to those catalogs in the future, they will also be fixed price and with commercial catalog pricing specifically established in the contract and with a guarantee that the Government will receive the lowest pricing that the Contractor offers in the commercial marketplace. In short, JEDI is not LOGCAP, and never will be.

3. Oracle's Argument Would Preclude Any Changes to Single-Award IDIQ Contracts, Even those Necessary to Protect National Security

Oracle's interpretation of § 2304a is further unreasonable because it would "preclude any modifications to single-award IDIQ contracts." GAO Decision at 11.

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

Here, a fundamental element within the "overall statutory scheme" and "coherent regulatory scheme" of federal government contracting is the concept of changes, whereby the Government may modify its contracts as necessary to protect the public interest. Despite the significance of Government contract Changes, if Oracle's interpretation of § 2304a(d)(3)(B) were correct, then for IDIQ contracts over $100 million—*i.e.*, for some of the Government's largest and most important contracts—the Government would be precluded from exercising a fundamental right.[26] That cannot possibly be the law and Oracle simply ignores this inconvenient truth.[27]

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[26] The necessary effect of Oracle's unstated "at the time of award" requirement would be that clause H3 is also illegal, as potential future price reductions are not strictly priced at the time (Continued...)

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IV. Oracle's Conflict Allegations Regarding Messrs. Ubhi, [redacted], and DeMartino are Non-Prejudicial, Misstate the Law, and Mischaracterize the Facts

Oracle next alleges that the Contracting Officer "irrationally determined that conflicts of interest [by former Government officials Messrs. Ubhi, [redacted], and DeMartino] have not impacted JEDI and performed an incomplete investigation." *See* MJAR at 45-61 (§ F) (capitalization removed). Oracle's title properly frames the argument as one regarding the rationality of the Contracting Officer's determination. In substance, however, Oracle asks this Court to conduct a *de novo* review of its cherry-picked, out of context "facts," and to then enjoin DoD from proceeding with the entire procurement until the Contracting Officer somehow "redresses" the supposed conflicts. *See* ECF 80-2 at 3 (Oracle proposed order).

There is nothing to "redress." Neither Mr. Ubhi, nor [redacted], nor Mr. DeMartino was the Government decision-maker for the single-award determinations or any of the Solicitation requirements. Nor were any of them involved in evaluating offerors' proposals, which were only submitted multiple months (close to a year in Mr. Ubhi's case) after they each left the

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of award. Such a challenge would be absurd on its face, given that the clause could only ever lower pricing for the Government.

[27] In its original MJAR, Oracle attempted to dismiss this argument as a "red herring," arguing that H2 would be unnecessary if the Government could add the same services through the Changes clause—which Oracle was not challenging. *See* ECF 56-1 at 27 ("Enforcing the single award prohibition here does not prevent DoD from using the changes clause in future contract administration . . . ."). However, Oracle has no basis to assume that H2 will permit any out of scope changes to the contract. H2 does not in and of itself add any services to the Contract. Instead, as discussed above, H2 simply forces the awardee to make available for the Government its cutting edge cloud services, and at competitive market prices. Those services, to ultimately be added to the contract must still be approved by the Contracting Officer and, as GAO held, Oracle may file a protest should the Government attempt to add any out of scope services. *See* GAO Decision at 11 n.25. To the extent Oracle is preemptively anticipating improper agency action, however, any such protest is premature. *See, e.g.*, *Eskridge Research Corp. v. United States*, 92 Fed. Cl. 88, 95 (2010) (emphasizing that Government officials are presumed to act in good faith and thus this Court will not presume that Government officials will read a contract clause in a way that violates the law).

[redacted]

Government. Indeed, Mr. Ubhi, [redacted], and Mr. DeMartino had each left the Government before DoD even finalized the Solicitation.

For these reasons and more, Oracle's allegations fail. At the threshold, because DoD's Gate Criteria and single-award determinations were each rational—as discussed in §§ II and III above—Oracle cannot establish competitive prejudice from the supposed involvement of Messrs. Ubhi, [redacted], and/or DeMartino. Thus, its conflict allegations must be dismissed. *Infra* § IV.A.[28] And even if not dismissed, Oracle's allegations fail on the law and the facts. First, Oracle misstates the applicable standard of review: pursuant to 28 U.S.C. § 1491(b)(4), the Court must apply the APA's arbitrary and capricious standard of review, giving deference to the Contracting Officer's and WHS Deputy Director's detailed no impact analyses. *Infra* § IV.B. Second, Oracle's disagreement with those detailed analyses is based on gross mischaracterizations of fact and does not demonstrate that they were in any way irrational. *Infra* § IV.C.

A. Oracle Cannot Establish Prejudice Because It Has Not Alleged, Let Alone Proven, Any Bad Faith on the Part of the Actual Agency Decision-Makers

Prejudice is a required element of any bid protest. *See, e.g.*, *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996). There is no exception for protests involving alleged conflicts of interest. *See, e.g.*, *Chenega Mgmt., LLC v. United States*, 96 Fed. Cl. 556, 583 (2010) ("The United States Court of Appeals for the Federal Circuit . . . has applied a 'clear and prejudicial violation standard' to bias and conflict of interest allegations.") (citing *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1330-31 (Fed. Cir. 2004)). Thus, even if a protester establishes the existence of an actual or potential conflict, its protest must nonetheless be denied unless it can show that it was specifically prejudiced. *See, e.g.*, *MTB Grp., Inc. v.*

[28] This prejudice failure is in addition to that discussed in § II.C above. For either reason, Oracle's allegations are entirely non-prejudicial and must be dismissed.

[redacted]

United States, 65 Fed. Cl. 516, 523 (2005) (explaining in the context of an alleged PIA violation, that "[i]f the record demonstrates no reasonable possibility of a competitive prejudice to the protestor, even though there is a defect in the procurement, the protestor's claim should not be sustained"); *JWK Int'l Corp. v. United States*, 52 Fed. Cl. 650, 657-58 (2002) ("But, even if we assume *arguendo* that [conflicted individual's] presence on the TEB violated FAR § 3.101, the fact of the matter is that plaintiff was not prejudiced . . . ."); *QinetiQ N. Am., Inc.*, B-405163.2 *et al.*, Jan. 25, 2012, 2012 CPD ¶ 53 ("Even where a protester shows an actual or potential violation of the PIA, our inquiry does not end there. Rather, the question becomes whether the alleged PIA violation created an unfair competitive advantage."); *see also Eng'g Support Personnel, Inc.*, B-410448, Dec. 24, 2014, 2015 CPD ¶ 89 (same).

Here, Oracle disregards the facts and attempts to make it look like Mr. Ubhi, [redacted], and/or DeMartino were supposedly involved in DoD's approval of the solicitation requirements and/or DoD's decision to seek a single JEDI award, decisions which Oracle argues were to its disadvantage. *See generally* MJAR at 14-22. Even assuming *arguendo* that these former officials played a significant role in those decisions—which they did not, *see infra* § IV.C—they were not the ultimate decision-makers. Instead:

- the DDS Deputy Director justified the Gate Criteria as reflecting DoD's mandatory minimum functional and security requirements, *supra* § II.A;
- the Contracting Officer determined that a single award is required for three independent reasons, including national security and technological complexity, *supra* § III.B; and
- Under Secretary Lord determined that a single award is specifically authorized because all task orders will be firm-fixed price and all services to be ordered will be specifically priced in the contract, *supra* § III.C.

For these official, documented reasons, this Court need not ever reach Oracle's conflict allegations. DoD's Gate Criteria and single-award determinations were rational on their face,

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and Oracle has not challenged—and has no basis to challenge—the integrity of the DDS Deputy Director, the Contracting Officer, or Under Secretary Lord. Thus, regardless of the involvement, if any, of Messrs. Ubhi, [redacted], or DeMartino in the procurement, Oracle cannot establish that the DDS Deputy Director's, the Contracting Officer's, and Under Secretary Lord's official determinations were in any way pretextual or made in bad faith. *See, e.g.*, *NCL Logistics Co. v. United States*, 109 Fed. Cl. 596, 625 (2013) (allegations of pretext are tantamount to bad faith and a protester's proof "must be almost irrefragable.") (internal citations omitted); *Madison Servs., Inc. v. United States*, 92 Fed. Cl. 120, 131 (2010).

Recognizing this hurdle, Oracle deliberately misstates the law in a transparent attempt to lower its prejudice burden. Specifically, Oracle cites *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), and *K & R Eng'g Co., Inc. v. United States*, 616 F.2d 469 (Ct. Cl. 1980), for the supposed proposition that where a conflicted government official participates "personally and substantially" in any aspect of a procurement, the entire procurement is irrevocably tainted. *See* MJAR at 47.

That is not the law. In *Godley v. United States*, the Federal Circuit explained that critical to the decision in *Mississippi Valley* were the facts that (1) the contractor knowingly condoned an illegal conflict of interest and (2) absent that illegality, "no contract would have been made." 5 F.3d 1473, 1475-76 (Fed. Cir. 1993) (citation omitted).[29] Thus, the Federal Circuit held that "[i]llegal acts by a Government contracting agent do not alone taint a contract" and that "the record must show some causal link between the illegality and the contract provisions." *Id.* at

[29] The Federal Circuit also explained that the Court of Claims in *K & R Eng'g Co.* had misread the facts of *Mississippi Valley*; even so, it concluded that the Court of Claims had correctly recognized that a contract is only tainted where prejudice is shown, *i.e.*, "'when it is the product of a conflict of interest.'" *Godley*, 5 F.3d at 1475 n.1 (quoting *K & R*, 616 F.2d at 475).

[redacted]

1476 (remanding to determine "whether [the government agent's] illegal conduct caused any unfavorable contract terms"). That is, there must be actual prejudice. *See id.*

Godley is binding precedent and expressly rejects Oracle's interpretation of *Mississippi Valley* and *K & R Engineering*. Yet, Oracle does not even acknowledge it.[30] That is because Oracle has no response.

Finally, even if *Godley* did not exist, Oracle's interpretation of the decades-old decisions in *Mississippi Valley* and *K & R Engineering* cannot be reconciled with the extensive body of precedent since then consistently requiring specific prejudice from alleged conflicts. *E.g.*, *Galen Med.*, 369 F.3d at 1330; *Chenega Mgmt.*, 96 Fed. Cl. at 583; *MTB Grp.*, 65 Fed. Cl. at 523; *JWK Int'l*, 52 Fed. Cl. at 657-58; *Eng'g Support Personnel*, B-410448; *QinetiQ N. Am.*, B-405163.2.

Indeed, even GAO in this very matter denied Oracle's conflict allegations because, having found DoD's Gate Criteria and single-award decisions reasonable, sustaining the conflict allegations would force the Government to abandon its actual requirements:

> [W]e have reviewed the agency's explanations for all of the challenged RFP requirements, including the single-award determination, and have concluded 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. Accordingly, even if we were to conclude that either [Mr. DeMartino] or [Mr. Ubhi] meaningfully participated in the agency's determinations regarding the RFP requirements, it would be improper for our Office to recommend that the agency proceed with the JEDI Cloud procurement in a manner that is inconsistent with meeting its actual needs.

GAO Decision at 18-19.

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[30] Oracle cannot reasonably claim that it was not aware of *Godley* when it drafted its MJAR. Not only would *Godley* have been readily available had Oracle's legal research included any due diligence, but AWS specifically highlighted *Godley* in its letter to the Contracting Officer rebutting Oracle's interpretation of *Mississippi Valley* and *K & R Engineering*. *See* AR Tab 260 at 61009-10. Oracle has simply chosen to ignore the decision.

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Thus, the law is clear: Oracle must show actual prejudice. Because it cannot do so, it lacks standing to pursue its conflict allegations, which must be dismissed.

B. Even If Not Dismissed, Oracle's Challenges to DoD's Individual Conflict Investigations Must Overcome Deferential Arbitrary and Capricious Review

Continuing to misapply *Mississippi Valley* and *K & R Engineering*, Oracle asserts that where a conflict of interest is found, "the agency must act." MJAR at 47. By extension, Oracle would have this Court conduct a de novo review of its conflict of interest allegations, affording the Contracting Officer no discretion to determine what response, if any, is in the Government's best interests. Once again, that is not the law.

As discussed above, the Tucker Act incorporates the APA's arbitrary and capricious standard of review, under which this Court has recognized that "great deference is given to the agency's decision." *FCN, Inc.*, 124 Fed. Cl. at 369; *see also* 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706. That is especially true when dealing with alleged conflicts of interest, as "it is 'the agency—not the Court or [the protestor]—[that] is charged with conducting the OCI analysis and a PIA investigation (if warranted),' and thus we will not usurp DoD's role." *Oracle Am., Inc. v. United States*, No. 18-1880C, 2019 WL 354705, at *5 (Fed. Cl. Jan. 23, 2019) (quoting *Jacobs Tech.*, 100 Fed. Cl. at 208).

The agency is not only charged with conducting an OCI and PIA analysis; it is further charged with determining whether and how to apply any remedy. For example, under FAR Subpart 9.5, the Contracting Officer is solely responsible for identifying and evaluating potential OCIs, and has the discretion to "avoid, neutralize, or mitigate significant potential conflicts." FAR 9.504(a). Meanwhile, an agency head may simply waive an OCI whenever they determine that strict enforcement would not be in the Government's interest. FAR 9.503. Similarly, the PIA provides only that where a violation occurs, an agency "shall consider taking one or more

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[specified] actions, as appropriate." 41 U.S.C. § 2105(c)(1). And the PIA's implementing regulations further prescribe specific procedures whereby an agency may determine that a violation has not negatively impacted a procurement and thus take no action at all.

> (a) A contracting officer who receives or obtains information of a violation or possible violation of [the PIA] must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor.
>
> (1) If the contracting officer concludes that there is no impact on the procurement, the contracting officer must forward the information concerning the violation or possible violation and documentation supporting a determination that there is no impact on the procurement to an individual designated in accordance with agency procedures.
>
> (i) If that individual concurs, the contracting officer may proceed with the procurement.

FAR 3.104-7.

Here, this is precisely what happened. The Contracting Officer performed a detailed review of the alleged conflicts of Mr. Ubhi, [redacted], and Mr. DeMartino. *See* AR Tab 221 (Ubhi); AR Tab 222 ([redacted]); AR Tab 33 (DeMartino); *see also* SOC § IV. She then forwarded those determinations and supporting materials to the WHS Deputy Director, who reviewed and expressly concurred that no conflicts negatively impacted the procurement. AR Tab 221 at 58723; AR Tab 222 at 58748 (same).[31]

[31] In concurring with the Contracting Officer's April 2019 no impact determinations regarding Mr. Ubhi, the WHS Deputy Director explained that he previously "reviewed and orally concurred with" the Contracting Officer's July 2018 determination that the actions of various individuals, including Mr. DeMartino "did not negatively impact the procurement." AR Tab 221 at 58723. He further affirmed that "I still concur that there is no negative impact to the JEDI Cloud procurement from the actions of the individuals named in the [Contracting Officer] investigation." *Id.*

[redacted]

Accordingly, DoD's conflicts investigations and analyses were conducted pursuant to statutory and regulatory schemes specifically emphasizing agency discretion, and they are entitled to great deference.

C. The Contracting Officer and WHS Deputy Director Rationally Determined that Neither Mr. Ubhi, Nor [redacted], Nor Mr. DeMartino Negatively Impacted the JEDI Procurement

With the APA's arbitrary and capricious standard of review thus in place, Oracle's substantive challenges regarding Mr. Ubhi, [redacted], and Mr. DeMartino must fail.[32] As discussed below, Oracle's arguments take one of two tacks: either (1) Oracle highlights a fact already reviewed by the Contracting Officer and disagrees with her finding of no impact; or (2) Oracle bastardizes the record to invent supposed "facts" that the Contracting Officer should have considered. But Oracle's subjective disagreement is not a valid challenge, and Oracle's fabricated "facts" are neither true nor relevant.

1. The Contracting Officer Thoroughly Considered Mr. Ubhi's Recusal and Rationally Determined that His Seven-Week Stint at DDS Performing Market Research—Over Eight Months Before the Solicitation was Released—Did Not Negatively Impact JEDI

Oracle challenges the Contracting Officer's consideration of Mr. Ubhi in two respects. First, Oracle alleges that the Contracting Officer should have given more weight to Mr. Ubhi's belated recusal. MJAR at 45-50. Second, Oracle attempts to poke holes in the Contracting Officer's numerous independent bases for finding that Mr. Ubhi did not negatively impact JEDI. *Id.* at 50-55. Oracle fails on both tries.

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[32] Oracle intersperses its allegations regarding Messrs. Ubhi and [redacted] with factually inaccurate assertions that AWS "knew" of their alleged improper conduct and with unfounded assertions that they may have provided unspecified nonpublic information to AWS. There is no truth to any of these allegations, which are addressed in § V below.

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Regarding Mr. Ubhi's recusal, there can be no dispute that the Contracting Officer thoroughly considered the issue and documented her findings:

- She reviewed all communications related to AWS's recruitment of Mr. Ubhi and determined that it was entirely unrelated to JEDI;
- She reviewed Mr. Ubhi's salary and bonus information and found them standard for the industry;
- She reviewed Mr. Ubhi's conduct while at DDS and determined that he did nothing to actively favor AWS; and
- She determined that even if Mr. Ubhi attempted to favor AWS, he could not possibly have impacted the procurement given his limited participation long before any of the final acquisition decisions were made.

See AR Tab 221; SOC § IV.A.

Fully aware of the operative facts, the decision whether Mr. Ubhi's conduct negatively impacted the procurement was the Contracting Officer's to make—not Oracle's. Thus, absent this Court ignoring the applicable APA arbitrary and capricious standard, Oracle cannot possibly prevail on this issue. *See, e.g.*, *Novak Birch, Inc. v. United States*, 132 Fed. Cl. 578, 589 (2017) (While a court must make a "searching and careful" inquiry into whether a "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," it "is not empowered to substitute its judgment for that of the agency.") (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057-58 (Fed. Cir. 2000) ("[T]he arbitrary and capricious standard . . . requires a reviewing court to sustain an agency action evincing rational reasoning and consideration of relevant factors.") (citations omitted); .

None of Oracle's other arguments about Mr. Ubhi's supposed involvement withstand scrutiny.

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First, Oracle cites isolated references to Mr. Ubhi as a "technical expert" and challenges the Contracting Officer's assertion that he lacked the ability to influence the entire procurement. MJAR at 50. However, the Contracting Officer's assertion was simply that "[w]hile [Mr. Ubhi] was very capable in his core area of expertise, he did not have the level of technical understanding necessary to make the case for some of the most important foundational decisions." AR Tab 221 at 58719-20. The record amply supports that finding. For example, the DDS Deputy Director explained that Mr. Ubhi's role was limited to market research and that any other characterization is "not true":

> At the time, Deap was a product manager, who was . . . one of the leads of work we were doing at the behest of the Cloud Executive Steering Group. The initial product he was asked to take the lead on was the market research report . . . . I think characterizing him as the lead for the acquisition is not fair. It's not true."

AR Tab 78 at 5531. Similarly, the Contracting Officer summarized a Slack message wherein Mr. Ubhi himself admitted to getting "school[ed] . . . on tactical edge" by a DoD official:

> Mr. Ubhi sends additional messages to the group stipulating that [she] is a "tl [total] Dr. on tactical edge. She's got some really compelling takes on looking at hybrid options, i.e. Azure Stack[33] bringing cloud capabilities INSIDE our networks (vs assuming we can always securely punch out of our networks into the internet and commercial regions). She says the tactical edge will always suffer from inconsistent comms, therefore hybrid solutions become essential, since they can work with NO comms." . . .

AR Tab 221 at 58741. In light of these and other findings, the Contracting Officer rationally concluded that Mr. Ubhi's limited expertise—particularly on DoD's tactical edge and related requirements—prevented him from influencing the entirety of the JEDI procurement.

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33 Azure Stack is a Microsoft platform. Thus, the Contracting Officer rightly cited Mr. Ubhi's favorable statements in this Slack exchange as another example that Mr. Ubhi "did not show bias[] towards AWS." AR Tab 221 at 58742.

[redacted]

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Second, Oracle selectively excerpts Slack messages from September and October 2017 to assert that Mr. Ubhi supposedly impacted the acquisition documents and decisions that would not even be finalized until, in most cases, July 2018. MJAR at 50-52. But a review of the full messages and necessary context—which Oracle omits—only confirms the Contracting Officer's determination: there is "no evidence that . . . Ubhi's participation . . . had any substantive impact on the acquisition." AR Tab 221 at 58723.

For example, Oracle cites a Slack message by Ms. Woods that references "metrics" and "get[ting] to one," and asserts that this relates to the solicitation's gate criteria and requirements. MJAR at 52.[34] However, the Contracting Officer explained that this message related to the Problem Statement, which was merely "being used as a talking point" related to the single vs. multiple award discussion and "was ultimately not used." AR Tab 221 at 58718-19.[35]

Similarly, Oracle asserts that Mr. Ubhi "played a role in drafting and revising the [JROCM]." MJAR at 51. But as the Contracting Officer explained, Mr. Ubhi's only "role" was that he made minor grammatical edits to a draft document that once again was ultimately not used:

> [T]he formal JROC approval process started on 15 November 2017. A draft "requirements" document was created by Ms. Woods on 23 October 2017 and sent to a member of the Joint Staff the same day. Mr. Ubhi made minor edits to the document which included three grammatical edits and three edits where he changed or added simple terms. . . . After the 23 October 2017 email, the Joint Staff made substantial revisions to the draft "requirements" document. When the JROC met to discuss, they reviewed the document as substantially revised by the Joint Staff.

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[34] Oracle asserts that this Slack message is from "Woods to Ubhi." MJAR at 52 (citing AR Tab 47c at 3123). However, Mr. Ubhi's Slack identifier (U23P5EJCU) does not appear anywhere in this conversation. *See* AR Tab 47a at 2901 (Slack identifiers).

[35] The majority of Mr. Ubhi's contributions were to the Problem Statement, *see* AR Tab 258 (listing relevant documents and editors), which "was ultimately not used." AR Tab 221 at 58719.

[redacted]

AR Tab 221 at 58722. Moreover, as discussed above, the JROCM was only the first step in DoD formulating its specific requirements, and the final version was not completed until December 2017—after Mr. Ubhi had left DoD. *See* SOC §§ I.A, B.[36]

Finally, Oracle attempts to paint Mr. Ubhi as the decisive actor in DoD's decision to pursue a single JEDI award. MJAR at 50-52. As discussed above, however, the Contracting Officer and Under Secretary Lord were the responsible authorities who independently determined that a single award was mandated by FAR 16.504 and in the Government's best interest. *See supra* §§ III.B, C. They executed their determinations in July 2018—over eight months after Mr.Ubhi left DDS. The Contracting Officer also explained, from her own personal experience, that the single vs. multiple award debate "continued long after Mr. Ubhi's recusal":

> This decision was debated amongst the CESG, DSD, US Military, and other DoD representatives, including USD(A&S). In fact, the internal DoD debate on this issue was robust from Fall 2017 through Spring 2018, as demonstrated by the questions received about the draft JEDI Cloud RFP from both industry and government agencies, and during the review of the Acquisition Strategy. I personally participated in a meeting with numerous individuals representing the USD(A&S) to discuss the draft acquisition strategy in April 2018, wherein the single versus multiple award decision was still being vigorously debated. Additionally, as evidenced from emails I reviewed, and statements from Mr. Lynch and Mr. Van Name, the DSD requested debate about the single award decision issue in November 2017 and December 2017. Mr. Ubhi did not attend the debates held with the DSD.

AR Tab 221 at 58721. The Contracting Officer also explained, again based on her personal knowledge, that Mr. Ubhi was "not considered instrumental or influential in this debate, even in the early stages of the procurement." *Id.* ("Others such as Mr. Lynch, who was named as part of

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[36] The Contracting Officer explained that numerous other acquisition documents similarly did not exist until after Mr. Ubhi left DDS. *See* AR Tab 221 at 58722 (RFI responses received on 17 November 2017, after Mr. Ubhi left; Market Research Report finalized on 27 March 2018, after Mr. Ubhi left; RFP drafting begun in January 2018, after Mr.Ubhi left; Gate Criteria justification not started until 23 February 2018, after Mr. Ubhi left).

[redacted]

the CESG, and Mr. Van Name, who attended numerous meetings at which I was present, as well as other meetings where I was not present, were much more influential . . . .").

Oracle's distortions are simply inadequate to overturn the Contracting Officer's detailed findings. Accordingly, Oracle's arguments once again fail.

Third, Oracle challenges the Contracting Officer's finding that there was "'no evidence that . . . Ubhi's participation . . . introduced any bias in favor of AWS" on the procurement decisions or documents." MJAR at 52 (quoting AR Tab 221 at 58716 (emphasis by Oracle)). Oracle alleges, without citation, that "the AWS-Ubhi employment arrangement establishes Ubhi's bias as a legal matter," and Oracle further asserts that "the record is littered with Ubhi statements to favor AWS or harm a competitor." *Id.*

To Oracle's first point, even if Mr. Ubhi may have had reason to favor AWS, that does not mean he did. Nor does it in any way establish that Mr. Ubhi had the capacity, technically or temporally, to impact the JEDI procurement, which he did not.

To Oracle's second point, Oracle's proverbial smoking gun of Mr. Ubhi's bias is a Slack exchange in which Oracle claims Mr. Ubhi "suggested that DoD consider simply having AWS build the JEDI cloud." MJAR at 52-53 (citing AR Tab 242 at 60169-70). Mr. Ubhi "suggested" no such thing. He was simply discussing with his DDS colleagues whether it might be advantageous for DoD to have any vendor develop a DoD-specific cloud:

> so out of the box here on RFI/RFP . . . why wouldn't we ask AWS or Azure or whoever to just build an entire global infrastructure footprint, mapped to DoD strategic needs? . . . build another AWS, with only one customer: DOD . . .
>
> you know how fast AWS builds regions? . . . Why wouldnt they just build out an entire region footprint just for us? . . .
>
> Staffed with Amazon or MS or whatever employees . . . that way each of these regions can be engineered with the idiosyncrasies imposed by the components that will need to leverage them . . . from the ground up

[redacted]

AR Tab 242 at 60169-70. Oracle misleadingly excerpts only the middle section of this discussion. Yet, rather than evidencing bias, the full discussion demonstrates that Mr. Ubhi referenced AWS as one among multiple capable vendors. Indeed, that is what the Contracting Officer rationally found. *See* AR Tab 221 at 59716-19, 58736-43 (Contracting Officer specifically evaluating Mr.Ubhi's statements about other vendors and determining he did not express bias in favor of AWS or against other vendors).

Fourth, Oracle challenges the Contracting Officer's finding of "no evidence that . . . Ubhi obtained or disclosed any competitively useful nonpublic information." MJAR at 53-55 (quoting AR Tab 221 at 58723 (emphasis by Oracle)). In this argument, Oracle asserts that Mr. Ubhi "deliberately positioned himself to obtain competitively valuable" information, and Oracle implies further that Mr. Ubhi did so at the behest or for the benefit of AWS. *Id.* at 55. But Oracle's argument is nothing more than smoke and mirrors.

First, Oracle ignores that Mr. Ubhi's primary if not sole responsibility was to conduct market research. *See, e.g.*, AR Tab 78 at 5531 (DDS Deputy Director Testimony at 136:7-16). Thus, in meeting with DoD components and vendors, Mr. Ubhi was simply doing his job.[37]

Second, the Contracting Officer explained in detail that any nonpublic information to which Mr. Ubhi had access was not "competitively useful" because, during Mr. Ubhi's early, seven-week tenure, "the acquisition was in its predecisional planning phase without any requirement document." AR Tab 221 at 58716; *see also id.* at 58712-15, 58724-35 (detailed

[37] Similarly, the Contracting Officer's no impact analysis addressed a September 25, 2017 Slack message where Mr. Ubhi volunteered to be the main DDS point of contract for industry. *See* AR Tab 221 at 58718. The Contracting Officer specifically rejected Oracle's contention that the message shows bias, and instead explained that "due to the general administrative nature of [the other candidate's] position with DDS, I believe that Mr. Ubhi thought that he would be better equipped to handle the industry capabilities meetings based on his skillset and experiences." *Id.*

[redacted]

narrative and appendices providing "scripted questions to be asked in all vendor meeting sessions" and addressing publicly available nature of information discussed with each vendor).

Finally, and most importantly, the Contracting Officer determined that Mr. Ubhi did not and could not provide any nonpublic information—competitively useful or otherwise—to AWS. *See* AR Tab 221 at 58711-16. This fact, which will be further addressed in § V below, renders Oracle's entire argument irrelevant. Regardless of the materials to which he had access, he did not provide them to AWS. Thus, there was no possible prejudice to the procurement.

For each of these reasons, Oracle's challenges regarding Mr. Ubhi must be denied.

2. [redacted], Who Attended a Grand Total of Two Meetings and Advocated for Multiple Awards, Did Not Negatively Impact JEDI

Oracle's arguments regarding [redacted] are even more specious, as they are entirely unrelated to the JEDI procurement. As discussed above (SOC § IV.B), [redacted] retired from the Navy in June 2018 and joined AWS. Prior to his retirement, he attended two meetings involving JEDI: one in October 2017 and one in April 2018. AR Tab 222 at 58746. The October 2017 meeting occurred before [redacted] had even interviewed with AWS; and at the April 2018 meeting, [redacted] "did not show any bias towards any vendor and advocated in favor of a multiple-award approach." *Id.* Thus, not only was the single vs. multiple award discussion still ongoing, but to the extent Oracle contends that a single-award structure favors AWS, [redacted] did not even advocate in AWS's interests. Additionally, although a draft Acquisition Strategy document was discussed at the April meeting, [redacted] "did not provide any suggested edits . . . before, during, or after the meeting." *Id.* Thus, the Contracting Officer concluded that [redacted] did not negatively impact the JEDI procurement. *Id.* at 58747-48.

Oracle has no basis to and does not challenge the Contracting Officer's summary of [redacted] participation at these meetings. Instead, Oracle speculates that the Contracting Officer

[redacted]

should have gathered additional information regarding [redacted] employment negotiations with AWS and whether [redacted] obtained an ethics letter from the Navy (which AWS specifically advised him to obtain). MJAR at 55-58.

However, the only relevant issue is whether [redacted] negatively impacted the JEDI procurement. To negatively impact the procurement, he had to first impact it. He did not. He attended two meetings, and the Contracting Officer, who was personally present at the second meeting, has explained that his participation had no impact whatsoever on the procurement.[38] There is no need for the Contracting Officer to gather or review any additional information. *See, e.g.*, *Jacobs Tech.*, 100 Fed. Cl. at 208 (holding that the agency (rather the court or protester) is responsible for conducting analysis and investigation "if warranted"); *see also John C. Grimberg Co., v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999) (affirming contracting officer's wide discretion to determine "what, and how much, information he needs" when making decisions that are "largely a matter of judgment").

3. Mr. DeMartino's Limited Interactions with JEDI Were "Ministerial and Administrative" and Did Not Negatively Impact the Procurement

Finally, Oracle continues to grossly exaggerate Mr. DeMartino's role, alleging that he supposedly "shaped JEDI from a policy level all the way down to specific acquisition details." MJAR at 60. But contrary to Oracle's fantasy, the Contracting Officer was personally aware of Mr. DeMartino's limited participation and rightly characterized it as "ministerial and administrative in nature, limited to scheduling and attending meetings," AR Tab 75 at 5232:

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[38] As will be discussed below (§ V.B), the Contracting Officer also concluded that to the extent [redacted] may have had access to any nonpublic information, the record reflects that [redacted] did not provide any such information to AWS' JEDI proposal team. *Inter alia*, [redacted] was specifically firewalled from AWS' JEDI proposal team.

[redacted]

- The Contracting Officer "never received, verbally or in writing, any feedback about the content of the RFI from Mr. DeMartino . . . Mr. DeMartino was not asked to provide and did not provide feedback about the RFI." AR Tab 75 at 5235-36.

- "[Mr. DeMartino] did not have any involvement in drafting or reviewing the JEDI Cloud Solicitation, [Acquisition Strategy], Business Case Analysis . . . , single award determination, or other pre-decisional sensitive documents." *Id.* at 5232.

- "Neither [the Contracting Officer] nor the DDS personnel working on JEDI Cloud ever received any inputs from Mr. DeMartino about any acquisition documents, including, but not limited to, the [Business Case Analysis], [Acquisition Strategy], and/or single award determination." *Id.* at 5237.

- Mr. DeMartino did not participate in the multi-day OSD Peer Review "in any capacity." *Id.* at 5238.

Given Mr. DeMartino's utter lack of substantive involvement in JEDI, the Contracting Officer rationally concluded that he did not negatively impact the procurement. Oracle's attempts to distort the facts do nothing to undermine that determination.

V. Oracle's Challenges to AWS Lack Merit

Oracle's final allegations relate to DoD's inclusion of AWS in the competitive range. Oracle alleges that AWS violated the PIA by negotiating employment with and hiring Mr. Ubhi. *See* MJAR at 18, 48-49.[39] Oracle also speculates that AWS may have obtained an unfair competitive advantage through its hiring of Mr. Ubhi and/or [redacted]. MJAR at 61-64.

Even if Oracle has standing to pursue this argument—which it does not, *see supra* § II.C—Oracle's arguments once again misrepresent the facts and law, and must be dismissed or denied. First, AWS did not violate the PIA. The Contracting Officer correctly determined that the authorities Oracle cites are not applicable here; and even if they were, Oracle's argument of a

[39] Although Oracle includes this allegation in its challenge regarding Mr. Ubhi, it is addressed here as AWS's conduct was separate and distinct from Mr. Ubhi's. Indeed, the Contracting Officer specifically found that "Mr. Ubhi was not truthful in his exchange with AWS." AR Tab 221 at 58711.

[redacted]

supposed violation rests on yet more legal and factual misstatements. Second, the Contracting Officer rationally determined that AWS did not gain any unfair competitive advantage. Put simply, there is no evidence whatsoever that Mr. Ubhi, [redacted], or anyone else provided AWS any competitively useful nonpublic information.

A. The Contracting Officer Rationally Determined That the PIA Did Not Apply to AWS and, Even If It Did, AWS Did Not Violate It

Even if Oracle has standing, the record disproves its allegations. Citing 41 U.S.C. § 2103(c) and FAR 3.104-8(b)—PIA provisions regarding employment discussions during an ongoing procurement—Oracle alleges that "AWS improperly failed to disclose the Ubhi employment contacts to DoD and proceeded to hire Ubhi knowing Ubhi had not recused himself." MJAR at 48. But Oracle conveniently omits the text of that statute and regulation—which do not apply to AWS's actions here—and once again materially distorts the facts.

First, 41 U.S.C. § 2103(c)(2) and FAR 3.104-8(b) apply only to a "bidder" or "offeror" in an ongoing procurement. Here, however, as the Contracting Officer correctly determined, AWS's employment discussions with Mr. Ubhi concluded in October 2017—*i.e.*, over eight months before DoD issued the JEDI solicitation, and over eleven months before AWS ever submitted its proposal. Accordingly, AWS was not a "bidder" or "offeror" at the time of the discussions, and the PIA did not apply. *See* AR Tab 221 at 58716 ("41 U.S.C. § 2103 and FAR Subpart 3.104 only use the term 'Offeror' rather than 'prospective offeror.' AWS was not an Offeror at the time of Mr. Ubhi's recusal because proposals had not been received.").

Second, even if the PIA did apply, AWS did not violate it. The PIA prohibits an offeror from conducting employment discussions with a Government official involved in a procurement "knowing that the official has not complied" with their obligations. 41 U.S.C. § 2103(c)(2); FAR 3.104-8(b). Here, AWS did not "know[]" that Mr. Ubhi had not complied with anything.

[redacted]

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To the contrary, AWS reasonably relied on Mr. Ubhi's repeated representations that he duly notified his designated agency ethics officials and disclosed the employment discussions. For example, the Contracting Officer summarized a conversation between Mr. Ubhi and an AWS recruiter wherein Mr. Ubhi clearly affirmed that he had complied with his obligations:

> On 24 October 2017, [an AWS recruiter] and Mr. Ubhi had a teleconference about compensation and terms of his employment. . . . Mr. Ubhi stated . . . that before he interviewed for the position with AWS . . . he (1) spoke with his designated government agency ethics officials and disclosed that he was engaging in employment discussions with AWS; (2) received permission from the government ethics officials to move forward with the employment discussions with AWS and was given permission to accept an offer of employment should one be extended; (3) was required to recuse himself from a program [i.e. JEDI Cloud] that he was working on at the DoD; and (4) was precluded from working with the AWS public sector team.

AR Tab 221 at 58711. Similarly, on at least two other occasions, Mr. Ubhi specifically represented to AWS that he was complying with his ethical obligations:

- On October 19, 2017, as part of his application to return to AWS, Mr. Ubhi asserted, unequivocally, that he had "confirmed by consulting with [his] employer's ethics officer" that he was permitted to have employment discussions with AWS. AR Tab 260 at 61016.
- On Friday October 27, 2017, when Mr. Ubhi accepted his offer, he again told the AWS recruiter that he was going to meet with the "DoD ethics committee" the next business day to submit his resignation. *Id.* at 61017, 61039.[40]

Finally, upon his return to AWS, even though his commercial startup role would have nothing to do the with the AWS Worldwide Public Sector or JEDI, Mr. Ubhi duly notified his supervisor

[40] Oracle disingenuously asserts that this particular example shows that AWS knew Mr. Ubhi had not yet complied with his obligations. MJAR at 49. However, it merely shows that Mr. Ubhi had not yet resigned from DoD when he accepted AWS's offer, and that he would do so the next business day. Before AWS ever extended a formal offer to Mr. Ubhi, he had affirmatively represented that he had already "received permission from the government ethics officials to move forward with the employment discussions with AWS and was given permission to accept an offer of employment should one be extended." AR Tab 259 at 60816.

[redacted]

that he could not work on any public sector matters. AR Tab 260 at 61017, 61030. Thus, again, AWS reasonably understood that Mr. Ubhi had fully complied with his ethical obligations.

Notwithstanding Mr. Ubhi's repeated assertions to AWS that he was fully compliant with his ethical obligations, Oracle misleadingly asserts that "AWS" knew that Mr. Ubhi had not properly recused himself. To that end, Oracle asserts that individuals in AWS's Worldwide Public Sector had interacted with Mr. Ubhi in his market research capacity around the same October 2017 timeframe. MJAR at 18, 48-49. That is irrelevant. Those AWS Worldwide Public Sector employees "had no idea that Mr. Ubhi was pursuing employment with the AWS commercial startup team." AR Tab 259 at 60809, 60813. Their jobs and responsibilities were completely unrelated to the AWS commercial startup business that Mr. Ubhi would be joining. *See, e.g.*, AR Tab 260 at 61018 (explaining that AWS employs "over 40,000 people in offices across the globe"; that "[d]uring 2017 and 2018 alone, AWS hired over 18,700 new employees"; and that "Mr. Ubhi was hired into and has always worked in the San Francisco office, and the AWS JEDI Cloud procurement team is based primarily in Northern Virginia").[41]

Accordingly, AWS did not "know[]" that Mr. Ubhi had not properly recused himself and did not violate the PIA, which did not apply.

Third, to the extent Oracle alleges that AWS "improperly failed to disclose the Ubhi employment contacts to DoD," that is neither the law nor accurate. *See* MJAR at 48. The PIA,

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[41] In a footnote, Oracle argues that "AWS seeks to set up a 'large business' safe harbor from the PIA," and contends that principles of agency law impute the knowledge of a company's employees to the company itself. MJAR at 49-50 n.42 (citing *Long Island Savings Bank, FSB v. United States*, 503 F.3d. 1234, 1244-50 (Fed. Cir. 2007); *Prime Eagle Grp. Ltd. v. Steel Dynamics, Inc.*, 614 F.3d 375, 378 (7th Cir. 2010)). In each of Oracle's cited cases, though, the Court merely imputed to the company the knowledge of a critical senior executive—the Chairman of the Board of Trustees and CEO in *Long Island Savings Bank*; the company President in *Prime Eagle*. The cases do not support the imputation of lesser employees' knowledge to the company as a whole, as would be the case here.

[redacted]

even if applicable, imposes disclosure obligations on the Government official, not the offeror. *See* 41 U.S.C. § 2103(c)(2); FAR 3.104-8(b). Moreover, notwithstanding the lack of any disclosure obligation, AWS fully disclosed all relevant information. In its proposal, AWS disclosed its hiring of Mr. Ubhi and the affirmative steps AWS took to prevent Mr. Ubhi from even potentially disclosing any nonpublic information to AWS's Worldwide Public Sector group and/or JEDI team. *See* AR Tab 259 at 60783-84; SOC § IV.A. Then, when AWS first learned of the discrepancy in Mr. Ubhi's recusal letter, AWS voluntarily disclosed it to the Contracting Officer. *See* SOC § III. AWS fully disclosed all information related to Mr. Ubhi's hiring, the fact that it was entirely unrelated to JEDI, and the fact that AWS neither sought nor obtained any nonpublic information from Mr. Ubhi. *See* AR Tab 251 (February 12, 2019 Letter); AR Tab 259 (March 21, 2019 responses to Contracting Officer questions, attaching sworn affidavits); AR Tab 260 (AWS response to Oracle allegations). Put simply, AWS did not hide anything from the Government.

Finally, the Contracting Officer considered all of the information above, conducted her own further internal investigation, and rationally concluded that there was neither any PIA violation nor any negative impact on the JEDI procurement. *See generally* AR Tab 221. The record amply supports the Contracting Officer's findings, which must be upheld.

B. The Contracting Officer Rationally Determined that AWS Neither Received Any Nonpublic Information Nor Gained Any Unfair Competitive Advantage

Oracle's final argument is that AWS supposedly gained an unfair competitive advantage by hiring Mr. Ubhi and/or [redacted]. MJAR at 61-64.[42] Oracle alleges that they had access to

[42] In its Supplemental Complaint, Oracle included additional unfounded allegations regarding other Government individuals AWS had hired or had considered hiring. Oracle did not address those other individuals in its MJAR, finally conceding that there is no merit to its (Continued...)

[redacted]

competitively useful nonpublic information while at DoD, and asks this Court to presume both that they provided that information to AWS and that it was used in AWS's proposal, regardless of what the facts may show. *Id.*

The law compels otherwise. Where a protester alleges that a competitor has a potential OCI or unfair competitive advantage, the protester must prove that allegation with "hard facts," not mere "suspicion and innuendo." *Turner Const. Co. v. United States*, 94 Fed. Cl. 586, 595 (2010); *C.A.C.I., Inc. v. United States*, 719 F.2d 1567, 1582 (Fed. Cir. 1983). Moreover, when the specific issue in question is whether former government officials may have provided an offeror nonpublic information, the Court must consider "whether the former government employee's activities with the firm were likely to have resulted in a disclosure of such information." *Interactive Info. Sols.*, Inc., B-415126.2, Mar. 22, 2018, 2018 CPD ¶ 115; *see also Physician Corp. of Am.*, B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198 (same).

Critically, a finding that a former government official had no involvement whatsoever with the proposal preparation effort has repeatedly disproven allegations of unfair competitive advantage. *See, e.g.*, *Threat Mgmt. Grp.*, B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84 (protest denied where protester "never alleged that the individual in question participated in the preparation of the firm's proposal"); *Cleveland Telecomms. Corp.*, B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 ("[T]here is no evidence that [the two former government officials] had any involvement in the preparation of the awardee's proposal."); *Creative Mgmt. Tech., Inc.*, B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 (similar).

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allegations. Oracle's inclusion of them at all in its Supplemental Complaint was a transparent attempt to drag additional individuals through the mud in the hopes of gaining additional traction in the press.

[redacted]

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Oracle ignores these established principles and instead relies almost exclusively on *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (2011), to argue that this Court should presume that Mr. Ubhi and [redacted] provided nonpublic information to AWS and that any firewall or mitigation efforts AWS may have implemented were categorically insufficient. MJAR at 62-64.[43] But the facts of *NetStar-1* are nothing like those here. For example, in *NetStar-1*, the awardee's employees had direct access to the protester's pricing information, which was decisive in the agency's award decision; the Contracting Officer did not identify or address that significant OCI prior to award; and the declarations the awardee ultimately provided after award were not from the relevant individuals and did not address whether all members of the awardee's proposal team had access to the protester's proprietary information. *See* 101 Fed. Cl. at 520-29. Here, by contrast, the Contracting Officer thoroughly investigated the issue prior to award; she determined that Mr. Ubhi and [redacted] had access to limited, if any, nonpublic information; and she determined, based on AWS's pre-award OCI proposal and numerous sworn affidavits, that no member of AWS's JEDI proposal team received any nonpublic information from Mr. Ubhi or [redacted]. *See generally* AR Tab 223; SOC §§ IV.A, B. Accordingly, she found "no evidence that AWS received any nonpublic information

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[43] Oracle also cites *International Resources Group*, B-409346.2 *et al.*, Dec. 11, 2014, 2014 CPD ¶ 369, and *McCarthy/Hunt, JV*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68. MJAR at 62, 64. Neither supports its arguments. In *International Resources Group*, the awardee hired a former Government official who then worked on the awardee's proposal, and the agency failed to conduct a "detailed inquiry" into former official's access to competitively useful information. Here, neither Mr. Ubhi nor [redacted] worked on AWS's proposal, and the Contracting Officer conducted a detailed inquiry. *McCarthy/Hunt*, meanwhile, stands for the unremarkable proposition that "an agency may not, in effect, delegate to the contractor itself complete responsibility for identifying potential organizational conflicts of interest." *McCarthy/Hunt, JV*, B-402229.2. Here, the Contracting Officer performed an exhaustive analysis of AWS' processes and procedures, determined that there was no actual or even potential conflict, and further determined that AWS had implemented procedures to vitiate even the appearance of impropriety. *See* AR Tabs 221, 222, 223. She did not delegate her responsibility to AWS.

[redacted]

from Mr. Ubhi, [redacted], . . . or anyone else," and that "AWS does not have an OCI based on the hiring of these former government employees." AR Tab 223 at 58757.

Ultimately, Oracle does not present a single case in which any court or protest forum has directed that a contracting officer must presume an OCI or unfair competitive advantage to exist where the facts—as here—establish that the allegedly conflicted individuals had no post-hiring involvement in the procurement and no substantive interaction with the individuals who were performing the capture work. Nor has Oracle identified a single case finding an impermissible unfair competitive advantage when—as here—a firewall was issued months before RFP issuance and the record reflects no influence on the capture team. No such cases exist because to rule in this way would be to obliterate the distinction between adjudicating potential OCI-type risks based on "hard facts" versus mere "suspicion and innuendo," and would deny the Contracting Officer the "considerable discretion" to which she is entitled. *PAI Corp. v. United States*, 614 F.3d 1347, 1352 (Fed. Cir. 2010).

For each of these reasons, Oracle's allegations of an AWS unfair competitive advantage are contrary to both law and fact and must be denied.

VI. Oracle Is Not Entitled to Declaratory or Injunctive Relief

Oracle requests broad injunctive relief. *See* ECF 80-2. However, "[i]n deciding whether a permanent injunction should issue, a court considers: (1) whether, as it must, the plaintiff has succeeded on the merits of the case; (2) whether the plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) whether the balance of hardships to the respective parties favors the grant of injunctive relief; and (4) whether it is in the public interest to grant injunctive relief." *PGBA, LLC v. United States*, 389 F.3d 1219, 1227-28 (Fed. Cir. 2004). Here, Oracle

[redacted]

cannot succeed on the very first factor because it has not demonstrated success on the merits for any of its challenges. For this reason alone, its request for relief must be denied.

But even if Oracle could demonstrate success on the merits (it cannot), Oracle cannot meet any of the other factors necessary for injunctive relief. Oracle cannot demonstrate irreparable harm because it cannot meet DoD's legitimate requirements and, therefore, remains ineligible for award. Moreover the balance of the hardships and the public interest factors both weigh heavily in favor of the Government because of the pervasive national security interests and related concerns that permeate this critical DoD procurement. *See Fisher Sand & Gravel,* 2019 WL 2276711, at *6 (finding the "declaration of a national emergency to be the anvil that falls on the scale of justice in favor of the government"). Oracle has failed to demonstrate any prejudicial error that would overcome these critical national security interests. As such, Oracle has failed to demonstrate any entitlement to relief, let alone the broad relief it requests.

CONCLUSION

For each and all of the foregoing reasons, AWS respectfully requests that the Court deny Oracle's MJAR in its entirety and grant judgment in favor of the Government and AWS.

June 11, 2019

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