2019-2326

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORACLE AMERICA, INC.,
Plaintiff-Appellant,
v.
UNITED STATES, AMAZON WEB SERVICES, INC.,
Defendant-Appellees,

Appeal from the United States Court of Federal Claims
in Case No. 18-1880C (Senior Judge Bruggink)

BRIEF FOR DEFENDANT-APPELLEE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for defendant-appellee, United States, states that he is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title.

Government counsel is aware of one case currently pending before the United States Court of Federal Claims that could potentially directly affect or be affected by the Court's decision in this case. On October 25, 2019, the Department of Defense (DoD) awarded a contract to Microsoft Corporation (Microsoft), pursuant to the procurement at issue. On November 22, 2019, defendant-appellee, Amazon Web Services, Inc. (AWS), filed a bid protest in the Court of Federal Claims seeking to enjoin the contract awarded to Microsoft. *Amazon Web Services, Inc. v. United States*, Fed. Cl. No. 19-1796C.

INTRODUCTION

Plaintiff-appellant, Oracle America, Inc. (Oracle), appeals from a Court of Federal Claims' judgment denying Oracle's bid protest and granting defendant-appellees, the United States and AWS, judgment on the administrative record. This Court should affirm.

Oracle is protesting the Joint Enterprise Defense Infrastructure (JEDI) procurement, in which DoD sought commercial cloud offerings to support its business and mission operations. The JEDI contract is worth up to $10 billion and is critical to our national defense. Accordingly, JEDI requirements and solicitation terms have been thoroughly reviewed by a multitude of stakeholders within DoD to ensure that the resulting contract will serve the needs of the warfighter.

Oracle admits that it failed to meet two of the solicitation's pass/fail Gate Criteria, including one that addresses DoD's minimum requirements for data security (Sub-factor 1.2). Oracle alleged that Sub-factor 1.2 was irrational and illegal, but the trial court properly deferred to DoD's determination of its needs and correctly rejected Oracle's alleged statutory violations.

At the trial court, Oracle also alleged that, by proposing to award a single JEDI contract, DoD violated statutory preferences for multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts. The trial court correctly rejected Oracle's argument that the JEDI procurement violated the requirement to award

multiple IDIQ contracts to "the maximum extent practicable," 10 U.S.C. § 2304a(d)(4)(A), because the contracting officer (CO) rationally determined that multiple JEDI contracts would not be in the Government's best interests. Oracle has not appealed this issue.

The trial court incorrectly held, however, that DoD violated 10 U.S.C. § 2304a(d)(3), which prohibits single-award IDIQ contracts over $112 million, unless the agency determines that one of the enumerated exceptions applies. The trial court incorrectly held that the particular exception invoked by DoD does not apply to the JEDI contract.

Ultimately, however, the trial court correctly found that Oracle was not prejudiced by this or any other alleged error, due to Oracle's inability to meet Sub-factor 1.2. Sub-factor 1.2 would not have changed in the absence of the alleged errors and, thus, Oracle would not have been eligible for the JEDI contract, even if the procurement provided for multiple awards.

Additionally, the trial court correctly rejected Oracle's conflict of interest arguments. The CO rationally concluded that any conflicts involving former Government employees and AWS do not impact the procurement. In any event, the Court need not reach Oracle's conflict of interest arguments, because the trial court correctly found that Oracle was not prejudiced by the alleged conflicts.

JURISDICTIONAL STATEMENT

We agree with Oracle that this Court possesses jurisdiction to entertain most of Oracle's appeal of the trial court's judgment. As demonstrated in Argument Section V.D.1, however, aspects of Oracle's conflict of interest arguments are moot due to the award to Microsoft.

STATEMENT OF THE ISSUES

1. Whether the trial court correctly rejected Oracle's challenges to Sub-factor 1.2 of the JEDI solicitation.

2. Whether the trial court's finding that Oracle was not prejudiced by a violation of 10 U.S.C. § 2304a(d)(3) was clearly erroneous.

3. Alternatively, whether the trial court incorrectly determined that DoD violated 10 U.S.C. § 2304a(d)(3).

4. Whether the trial court correctly rejected Oracle's challenges to the CO's conflict of interest determinations, and whether aspects of those challenges are moot.

STATEMENT OF THE CASE

Oracle's Statement of the Case, App.Br.2-27,[1] contains inaccuracies and omits relevant information. Accordingly, we are providing a statement regarding the facts and course of proceedings below.

I. The JEDI Initiative

To maintain its military advantage, DoD needs "an extensible and secure cloud environment that spans the homeland to the global tactical edge[.]" Appx100607. A "cloud" is "a collection of hardware and software that allows easy scaling of information technology infrastructure through virtualization of physical hardware," *e.g.*, servers. Appx100327. DoD lacks a "coordinated enterprise-level approach to cloud infrastructure and platforms," which "prevents warfighters and leaders from making critical data-driven decisions at 'mission speed', negatively affecting outcomes." Appx100607.

To remedy this problem, in September 2017, the Deputy Secretary of Defense directed that DoD accelerate the adoption of a modern enterprise cloud services solution, through a tailored acquisition process, *i.e.*, the JEDI procurement. Appx105955-105956.

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[1] "App.Br.__" refers to Oracle's brief.

In the JEDI procurement, DoD is seeking commercial infrastructure as a service (IaaS) and platform as a service (PaaS) offerings to support DoD operations. Appx100607.[2]

II. Initial Acquisition Planning

The early stages of the JEDI procurement involved initial market research and initial discussions regarding the potential acquisition strategies. One of the early members of the acquisition team was Defense Digital Service (DDS) product manager Deap Ubhi. *See, e.g.*, Appx102777-102778, Appx105431. Mr. Ubhi was employed by AWS until January 2016, and he left DDS to return to AWS in November 2017, shortly after his October 31, 2017 recusal from the JEDI procurement. Appx100686, Appx158702. DDS legal counsel vetted Mr. Ubhi for potential financial conflicts of interest, including any AWS stock ownership, stock options, and outstanding bonuses. *See* Appx58700.

With other DoD representatives, Mr. Ubhi participated in early meetings with cloud vendors, industry thought leaders, and the military services. *See, e.g.*, Appx100368, Appx100390, Appx158699. Mr. Ubhi contributed minor edits to DoD's October 30, 2017 request for information (RFI) from industry and to a draft "requirements document" that was substantially revised after his recusal. *See* Appx158720, Appx158722.

[2] IaaS and PaaS are defined at Appx100327 and Appx100649-100651.

He also helped draft a "problem statement," which was considered to be an early outline of the JEDI Business Case Analysis. *See* Appx158720, Appx160089-160091. This draft problem statement was abandoned after Mr. Ubhi recused himself, and his replacement started a new outline. *See* Appx100397-100422, Appx158708, Appx160089-160091.

While he was participating in the JEDI procurement, Mr. Ubhi (and others) advocated for a single IDIQ contract, rather than multiple contracts, *see* Appx105742, but the decision to use a single-award strategy was not made until July 2018, *see* Appx100318-100320, 100455-100467, many months after Mr. Ubhi left DoD. Appx158699. And the single-award versus multiple-award strategy was still being vigorously debated in April 2018. *See* Appx158721.

III. RFI Responses, Warfighting Requirements, And Draft Solicitations

The bulk of the JEDI procurement activity began in November 2017, after Mr. Ubhi's recusal. For example, in November 2017, DoD received 64 responses to its RFI, and subsequently began drafting its market research report. Appx100368, Appx158721.

In December 2017, the Joint Requirements Oversight Council (JROC), led by the Vice Chairman of the Joint Chiefs of Staff, established the Defense Cloud Warfighting Requirements. Appx100321-100335. The JROC recognized that accelerating to the cloud is critical to our national security. *See* Appx100321.

DoD began drafting its Business Case Analysis, in earnest, in approximately November 2017. *See* Appx105406-105407, Appx160777-160779. DoD began drafting its Acquisition Strategy document in January 2018. Appx105407, Appx158722. And DoD did not begin drafting the solicitation until January 2018. Appx105405, Appx105570-105571, Appx158722.

In March 2018, DoD held an Industry Day and issued a draft solicitation, while noting that "the Department will continue to assess its overall requirement." *See* Appx105995. DoD issued a second draft solicitation in April 2018, along with answers to more than 1,000 questions and comments received in response to the first draft solicitation. *See* Appx106144. Prior to the solicitation release, solicitation terms were reviewed in detail by DoD's Defense Procurement and Acquisition Policy (DPAP) group, the DoD Chief Information Officer (CIO), other components of DoD, and numerous members of the JEDI acquisition team. *See* Appx106690-106716, Appx108702-108737, Appx158700, Appx158722.

IV. Single-Award Justifications

On July 17, 2018, the contracting officer signed a memorandum explaining the rationale for using a single-award IDIQ contract for the JEDI requirement. Appx100455-100467. The CO identified three reasons why multiple JEDI contracts were *prohibited*, pursuant to Federal Acquisition Regulation (FAR)

§ 16.504(c)(1)(ii)(B),[3] Appx100457-100464, which implements 10 U.S.C. § 2304a(d)(4)(B).

First, the CO determined that more favorable terms and conditions, including pricing, will be provided if a single award is made. Appx100457-59. Second, the CO determined that the expected cost of administrating multiple contracts outweighs the expected benefits of making multiple awards. Appx100459-100461. Third, and most importantly, the CO determined that multiple awards would not be in the best interests of the Government because they would: a) increase security risks; b) create impediments to operationalizing data for the benefit of the warfighter; and c) exponentially increase the technical complexity required to realize the benefits of cloud technology. Appx100461-100464. DDS deputy director, Tim Van Name, also signed the memorandum, attesting to the technical findings in the best interests section. Appx100464.

Additionally, on July 19, 2018, Ellen Lord, Under Secretary of Defense for Acquisition and Sustainment, issued a determination and findings, pursuant to 10 U.S.C. § 2304a(d)(3), to award the JEDI contract to a single source, based upon her finding that the contract will provide for only firm-fixed-price task orders for services for which prices are established in the contract for specific tasks

[3] The FAR is located in Title 48 of the United States Code of Federal Regulations.

performed, Appx100318-100320, which is one of the exceptions to the general prohibition on large single-award IDIQ contracts. 10 U.S.C. § 2304a(d)(3)(B).

V. The CO's July 2018 No Impact Determinations

On July 23, 2018, the CO signed a determination analyzing whether the actions of five current or former DoD employees, with financial or other ties to AWS, negatively impacted the integrity of the JEDI procurement. Appx100683-100687. The CO determined that none of the five individuals, including Deap Ubhi and Anthony DeMartino, negatively impacted the integrity of the procurement. *Id.*

Before joining DoD in January 2017, Mr. DeMartino was a consultant for AWS. Appx100685. While at DoD, Mr. DeMartino worked in chief of staff roles for the Secretary of Defense and Deputy Secretary of Defense, until he resigned in July 2018. Appx105231-105232, Appx123973. In April 2017, DoD's Standards of Conduct Office advised him that he should "consult with our office before participating in any matters involving" AWS, and that "[p]ossible solutions" included avoiding "personal and substantial participation" in matters involving AWS or seeking a waiver. *See* Appx104345.

The CO essentially found that Mr. DeMartino's involvement in JEDI was limited to acting as a liaison for the Secretary and Deputy Secretary, and he had no input or involvement in drafting the solicitation or acquisition strategy documents.

See Appx100685. Accordingly, the CO determined that Mr. DeMartino's involvement in the JEDI procurement was "ministerial and perfunctory in nature" and did not negatively impact the integrity of the JEDI procurement. *Id.*

With regard to Mr. Ubhi, the CO determined that no restrictions attached to his participation because his prior employment with AWS ended in January 2016 and that Mr. Ubhi had promptly recused himself, on October 31, 2017, once Amazon had expressed an interest in purchasing his company, Tablehero. *See* Appx100686-100687. The CO also determined that Mr. Ubhi's participation was limited to market research activities. Appx100687. Accordingly, she determined that his involvement in the JEDI procurement did not negatively impact the integrity of the procurement. *See id.*

VI. JEDI Solicitation

On July 26, 2018, DoD issued the JEDI solicitation. Appx1. At the trial court, Oracle challenged three evaluation criteria, only two of which are relevant to this appeal, Sub-factors 1.1 and 1.2. *See* Appx1485-1489, Appx1492-1496. These are two of the seven Gate Criteria, *i.e.*, pass/fail criteria that offerors must meet in order to proceed to the rest of the evaluation. *See* Appx100805-100807.

Sub-factor 1.1, Elastic Usage, required that an offeror demonstrate that "the addition of DoD unclassified usage will not represent a majority of all unclassified

usage," in accordance with specific requirements in Section L of the solicitation. Appx100806; *see also* Appx100791.

Sub-factor 1.2, High Availability and Failover, required that an offeror demonstrate that its commercial cloud offering "data centers are sufficiently dispersed and can continue supporting the same level of DoD usage in the case of catastrophic data center loss," in accordance with specific requirements in Section L. Appx100806. As part of this requirement, the offeror was required to demonstrate that it had three existing unclassified data centers within the Customs Territory of the United States, each at least 150 miles from the others, that are all supporting at least one IaaS offering and at least one PaaS offering that are "FedRAMP Moderate 'Authorized[.]'" Appx100792.

In a July 23, 2018 memorandum, Mr. Van Name explained why each of the seven Gate Criteria was a minimum requirement, including Sub-factor 1.2. Appx100944-100952. Mr. Van Name explained that the FedRAMP Moderate authorization requirement was necessary to give DoD confidence that the offeror had the underlying physical data center security requirements to be able to meet the more stringent requirements of the JEDI Cyber Security Plan for unclassified services within 30 days after the post-award kickoff event, *see* Appx100947, as required by the solicitation. *See* Appx100610.

VII. Oracle's Government Accountability Office (GAO) Protest

In August 2018, Oracle protested the JEDI procurement at GAO. *See* Appx104442. Oracle's GAO protest included challenges to the single-award determinations, Sub-factors 1.1 and 1.2. *See* Appx105909-105916. In November 2018, GAO denied Oracle's protest. Appx105900-105918.

GAO determined that Under Secretary Lord correctly found that the JEDI contract will provide for only firm-fixed-price task orders for services for which prices are established in the contract for specific tasks performed, so the solicitation does not violate 10 U.S.C. § 2304a(d)(3). Appx105909-105911. And GAO found the CO's justification for a single award to be reasonable. Appx105912.

GAO also rejected Oracle's challenges to the Gate Criteria, stating that DoD had "clearly articulated a reasonable basis for the Sub-factor 1.2 gate criteria prior to award" and finding "no merit" to Oracle's challenge to Sub-factor 1.1. *See* Appx105913-16.

VIII. CO's Additional Conflicts Determinations

In October 2018, seven offerors submitted proposals in response to the JEDI solicitation, AWS, Microsoft, Oracle, and four others. *See* Appx158758. In its proposal, AWS identified two potential perceived organizational conflicts of

interest (OCIs) due to its hiring of Mr. Ubhi in November 2017 and its hiring of Victor Gavin in June 2018. *See* Appx124536-124554.

In February 2019, while the CO was performing her OCI investigation and this case was pending, AWS sent her an unsolicited letter that called into question some of her earlier conclusions regarding Mr. Ubhi's recusal from the JEDI procurement. *See* Appx160702-160704. Specifically, AWS indicated that Mr. Ubhi did not engage in Tablehero discussions with AWS or its affiliates after December 2016, but Mr. Ubhi was engaged in employment discussions with AWS beginning in late September 2017, and he accepted an offer of employment with AWS on October 27, 2017. Appx160702-160703. In light of this new information, the CO re-opened her investigation regarding whether Mr. Ubhi had any conflicts while working on the JEDI procurement to reconsider her earlier no impact determination. Appx158704.

On April 9, 2019, the CO determined that Mr. Ubhi violated FAR § 3.101-1 by failing to strictly avoid conflicts of interest and conduct himself in a manner above reproach, but his unethical behavior does not impact the procurement. *See* Appx158696-158723. Based upon a thorough investigation, the CO also determined that Mr. Ubhi did not introduce bias in favor of AWS during the procurement, and, even if he did, Mr. Ubhi's bias has no impact on the procurement for "three independent reasons": 1) a lack of engineering expertise; 2)

limited attempts to influence the JEDI Cloud requirement; and 3) "most importantly, all the key decisions for the JEDI Cloud procurement, such as the actual [solicitation] 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 [solicitation] truly reflects DoD's requirement." Appx158716-158723.

The CO also determined that Mr. Ubhi did not provide AWS with any non-public JEDI-related information and, in any event, none of the non-public information Mr. Ubhi learned while working on JEDI was competitively useful. Appx158709-158716.

In a separate April 9, 2019 memorandum, the CO determined that Mr. Gavin violated FAR § 3.101-1 by participating in an April 2018 meeting to discuss the draft JEDI Acquisition Strategy, after he had accepted employment with AWS, but also determined that there is no impact on the procurement from Mr. Gavin's conflict. Appx158744-158748. The CO determined that Mr. Gavin did not impact any acquisition decisions or documents. Appx158746-158747. Mr. Gavin did not provide any edits to the draft Acquisition Strategy, and the multiple-award approach for which he advocated at the April 2018 meeting was not adopted. *Id.* The CO also determined that, although the non-public draft Acquisition Strategy

may be competitively useful, Mr. Gavin did not share any non-public JEDI information with AWS. Appx158747.

In another April 9, 2019 memorandum, the CO determined that AWS does not have any unmitigated OCIs. Appx158749-158757. The CO determined that Mr. Ubhi was effectively firewalled from the AWS JEDI proposal team since he was hired in November 2017, he has not shared any non-public JEDI information with the AWS JEDI proposal team, and, in any event, none of the non-public information Mr. Ubhi learned while working on JEDI was competitively useful. *See* Appx158709-158716, Appx158750-158753. The CO also determined that Mr. Gavin had not provided any non-public JEDI information to AWS. Appx158753-158754. Additionally, the CO found AWS's formal firewalls to be effective in preventing Messrs. Ubhi and Gavin from influencing AWS's JEDI proposal going forward. *See* Appx158750-158754.

IX. Oracle's Exclusion From The Competitive Range And Microsoft Award

On April 10, 2019, the CO formed a competitive range of AWS and Microsoft, the only two offerors to pass all seven Gate Criteria. Appx158758-158762, Appx158777. The solicitation provided that "Offerors who receive a rating of 'Unacceptable' under any of the Gate Criteria Sub-factors will not be further evaluated . . . and will not be considered for award." Appx100805.

Oracle was eliminated from the competition because it was found Unacceptable under Sub-factor 1.1, and the rest of Oracle's proposal was not evaluated. Appx158759, Appx158762. DoD found several deficiencies in Oracle's proposal with regard to Sub-factor 1.1, Appx157845-157850, Appx159235-159242, and Oracle admits that it failed at least one aspect of Sub-factor 1.1. *See* Appx1490. Oracle also admits that it could not meet all the requirements of Sub-factor 1.2. *See* Appx1493.

After forming the competitive range, DoD engaged in discussions with Microsoft and AWS, resulting in revised proposals from these offerors. *See* Appx158789-158790, Appx159906-159907. On October 25, 2019, DoD awarded the JEDI contract to Microsoft.[4]

X. Trial Court Proceedings

In December 2018, Oracle filed its initial complaint in the Court of Federal Claims. Appx65. After it was eliminated from the JEDI competition, Oracle supplemented its complaint, and the parties cross-moved for judgment on the administrative record. *See id.*

In July 2019, the trial court granted the Government and AWS judgment on the administrative record, denying Oracle's protest. Appx63; *Oracle Am., Inc. v.*

[4] https://www.defense.gov/Newsroom/Contracts/Contract/Article/1999639/

United States, 144 Fed. Cl. 88, 126 (2019); *Oracle Am., Inc. v. United States*, 143 Fed. Cl. 341 (2019).

The trial court rejected Oracle's arguments that the FedRAMP Moderate authorization requirement in Sub-factor 1.2 was irrational and illegal. Like GAO, the trial court rejected Oracle's contention that Sub-factor 1.2 exceeded DoD's legitimate needs. *See* Appx108-109. The trial court also rejected Oracle's argument that DoD failed to justify the use of "other than competitive procedures" because it recognized that the solicitation, in fact, provided for "full and open competition." Appx111-113. Additionally, the trial court rejected Oracle's argument that Sub-factor 1.2 contained a "qualification requirement" in violation of 10 U.S.C. § 2319, and determined that, in any event, Oracle waived this protest ground by failing to raise it prior to the close of bidding. Appx109-111.

The trial court determined that its holding that Sub-factor 1.2 was enforceable was sufficient to dispose of the rest of Oracle's protest grounds because Oracle could not demonstrate prejudice as a result of its other alleged errors. *E.g.*, Appx123. The trial court found that Sub-factor 1.2 represents DoD's minimum needs for data security, and, thus, it would not change if DoD decided to award multiple JEDI contracts. Appx107. Accordingly, the trial court determined that Oracle would not have a better chance of award in a multiple-award procurement, because it conceded that it did not satisfy Sub-factor 1.2. *Id.*

Notwithstanding its ruling on prejudice, the trial court addressed the merits of Oracle's protest grounds regarding the alleged conflicts of interest, the competitive range determination, and the single-award decisions. Appx100-106, Appx113-123.[5] The trial court rejected Oracle's arguments regarding conflicts of interest, concluding that the CO's "work was thorough and even-handed," Appx115, she "understood the legal and factual questions and considered the relevant evidence," *id.*, and her ultimate conclusions of no impact and no unmitigated OCIs were rational. *See* Appx 115-123.

The trial court also determined that DoD's decision to exclude Oracle from the competitive range was rational and in accordance with the solicitation's evaluation criteria. *See* Appx113-114. With regard to the single-award decisions, the trial court held that the CO's determination that she was prohibited from awarding multiple JEDI contracts was "completely reasonable[.]" Appx100-103. In contrast, the trial court determined that the exception to the 10 U.S.C. § 2304a(d)(3) large single-award prohibition invoked by Under Secretary Lord was not applicable to the JEDI procurement. Appx103-106. As described above, however, the court found that Oracle was not prejudiced by this error and,

[5] The trial court did not decide Oracle's challenges to Sub-factors 1.1 and 1.6. Appx107.

accordingly, granted the Government and AWS judgment on the administrative record. Appx106-107, Appx123.

SUMMARY OF THE ARGUMENT

It is undisputed that Oracle could not meet two of the JEDI solicitation's Gate Criteria, Sub-factors 1.1 and 1.2, and DoD determined that satisfying these criteria was necessary to meet its minimum requirements. The trial court correctly rejected Oracle's arguments that Sub-factor 1.2 was irrational and illegal and, thus, correctly determined that Oracle was not prejudiced by any of its other alleged errors.

Oracle erroneously alleges that the Sub-factor 1.2 requirement that certain cloud offerings be FedRAMP Moderate Authorized at the time of proposal submission exceeds DoD's legitimate needs. Mr. Van Name explained in a pre-solicitation memorandum why this requirement was necessary, and the trial court properly rejected Oracle's attempt to second guess his technical judgment.

The trial court also correctly rejected Oracle's argument that Sub-factor 1.2 results in other than full and open competition, because the solicitation permitted all responsible sources to submit proposals, which is the definition of full and open competition.

And the trial court correctly rejected Oracle's argument that Sub-factor 1.2 contains an illegal "qualification requirement" in violation of 10 U.S.C. § 2319.

The requirement to be FedRAMP Moderate Authorized at the time of proposal submission was a JEDI-specific requirement, not a qualification requirement, such as a qualified bidders list. In any event, the trial court correctly concluded that Oracle waived this solicitation objection by failing to raise it before the close of bidding.

The trial court correctly found that Oracle was not prejudiced by any of its other alleged errors because the court determined that Sub-factor 1.2 was enforceable, Oracle admitted that it could not meet this requirement, and, accordingly, Oracle was ineligible for award. For example, although the trial court determined that DoD violated 10 U.S.C. § 2304a(d)(3) by invoking an inapplicable exception to the general prohibition on large single-award IDIQ contracts, the trial court correctly concluded that Sub-factor 1.2 would not have been any different if DoD had solicited multiple JEDI contracts instead. This is because the trial court correctly determined, based upon the administrative record, that DoD's minimum data security requirements would not have changed in a multiple-award environment.

Moreover, Oracle's assertion that it could meet the requirements of Sub-factor 1.2 in a *future* JEDI competition is irrelevant to the prejudice inquiry in this case. Under this Court's precedent, the relevant inquiry is what *would have* happened if the error had not occurred, not what might happen as a result of an

injunction. The trial court correctly found that, if DoD had not invoked the allegedly inapplicable exception in Section 2304a(d)(3), but instead solicited multiple JEDI contracts, Oracle still would have been required to meet the same Sub-factor 1.2 requirements at the same time, which Oracle could not do.

In any event, if the Court were to disagree with the trial court's prejudice finding, it should affirm on the alternative ground that DoD did not violate Section 2304a(d)(3). The trial court's determination that DoD violated Section 2304a(d)(3) was based upon an incorrect interpretation of the statute, which improperly added a non-existent requirement.

Also, although Oracle argues at length about conflicts of interest in the procurement, the Court need not reach these issues, because the trial court correctly determined that Oracle was not prejudiced by the alleged errors in light of its failure to meet the requirements of Sub-factor 1.2. Oracle has identified no record evidence that Messrs. Ubhi, DeMartino, or Gavin were involved with the FedRAMP Moderate requirement in Sub-factor 1.2.

Additionally, although the trial court did not need to reach Oracle's conflicts of interest arguments, it correctly rejected them. "There is no such thing as a perfect procurement," *FMS Inv. Corp. v. United States*, 144 Fed. Cl. 140, 142 (2019), and JEDI is no exception. Contrary to Oracle's argument, a violation of 18 U.S.C. § 208, a criminal conflict of interest statute, would not automatically

invalidate the procurement. Rather, the relevant regulations and case law grant the CO authority to determine, in the first instance, whether conflicts or Procurement Integrity Act (PIA) violations *impact* the procurement.

In this case, the CO's no impact determinations were rational and based upon reasonable investigations. Messrs. DeMartino and Gavin played minor, inconsequential roles in the procurement, and Mr. Ubhi had left DoD by the time the solicitation was drafted and finalized, after being vetted by numerous stakeholders within DoD to ensure that the contract will serve the needs of the warfighter.

Likewise, the CO rationally concluded that AWS did not receive an unfair competitive advantage by hiring Messrs. Ubhi and Gavin. And, in any event, this argument is moot now that Microsoft, not AWS, has been awarded the JEDI contract.

ARGUMENT

I. Standards Of Review

A. Standards Of Appellate Review

We agree with Oracle that this Court reviews the trial court's grant of judgment on the administrative record *de novo*. App.Br.31-32. Accordingly, in reviewing the propriety of agency decisions, this Court "appl[ies] the 'arbitrary and capricious' standard of [5 U.S.C.] § 706 anew, conducting the same analysis as the

Court of Federal Claims." *Centech v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (citation omitted).

In contrast, for issues that the trial court decides *de novo*, such as prejudice, this Court reviews the trial court's factual findings for clear error. *Bannum, Inc. v. United States*, 404 F.3d 1346, 1354 (Fed. Cir. 2005). The Court may only reverse such a factual finding if "left with a definite and firm conviction that a mistake has been committed." *Advanced Ground Info. Sys., Inc. v. Life360, Inc.*, 830 F.3d 1341, 1347 (Fed. Cir. 2016) (citation omitted).

B. Standards For Procurement Challenges

The standard of review in a bid protest is whether the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(A); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 n.5 (Fed. Cir. 2001). To prevail, a plaintiff must demonstrate: 1) that the procurement decision "lacked a rational basis"; or 2) "a clear and prejudicial violation of applicable statutes or regulations." *Impresa*, 238 F.3d at 1332-33 (citation omitted).

In reviewing the agency's procurement decisions, the Court should apply a "presumption of regularity," *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1382 (Fed. Cir. 2018), and should not substitute its judgment for that of the agency. *E.g., R & W Flammann GmbH v. United States*, 339 F.3d 1320, 1322

(Fed. Cir. 2003). COs are "entitled to exercise discretion upon a broad range of issues confronting them," *Impresa*, 238 F.3d at 1332 (citation omitted), and "procurement decisions 'invoke[ ] 'highly deferential' rational basis review.'" *Savantage Fin. Servs., Inc. v. United States*, 595 F.3d 1282, 1286 (Fed. Cir. 2010) (citation omitted). Also, the Court is required to give the procuring agency considerable deference in matters requiring technical judgment. *See, e.g.*, *Benchmade Knife Co. v. United States*, 79 Fed. Cl. 731, 740 (2007).

We agree with Oracle that the Court is generally not permitted to consider information outside the administrative record for purposes of reviewing the merits of an agency's procurement decisions. *See* App.Br.32; *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009). Accordingly, the Court should ignore the multitude of extra-record Internet articles upon which Oracle frequently relies. *See* App.Br.5, 10, 16, 25, 38, 42, 48.

Additionally, if the protestor can show any errors in the procurement process, the protestor must then demonstrate that it was prejudiced by those errors. *Bannum*, 404 F.3d at 1353.

II. The Trial Court Correctly Rejected Oracle's Arguments That Sub-factor 1.2 Is Irrational And Illegal

Oracle's challenges to Sub-factor 1.2 are without merit. Oracle's argument that Sub-factor 1.2 unduly restricted competition merely second guesses DoD's technical judgment. Also, the solicitation provided for full and open competition,

so DoD did not need to execute justification and approval for other than full and open competition (J&A). And Oracle's argument that Sub-factor 1.2 contained an illegal "qualification requirement" is both meritless and untimely.

A. Standard Of Review For Allegations That Solicitation Requirements Unduly Restrict Competition

When a plaintiff alleges that a solicitation term unduly restricts competition, the Court exercises "highly deferential" rational basis review, and the plaintiff must demonstrate that the term is "so plainly unjustified as to lack a rational basis." *Savantage*, 595 F.3d at 1285-87 (citation omitted).

Agencies have broad discretion to determine their minimum needs and the criteria used to evaluate whether offerors will meet those needs. *See id.* at 1286; *Armstrong Elevator Co.*, 2018 CPD ¶ 120, 2018 WL 1542123, at *2 (Comp. Gen. 2018). Moreover, where the agency's requirements relate to the national defense, it has the discretion to define solicitation requirements to achieve "not just reasonable results, but the highest possible reliability and effectiveness." *E.g.*, *Persistent Sys., LLC*, 2018 CPD ¶ 32, 2018 WL 525833, at *3 (Comp. Gen. 2018).

B. The Trial Court Correctly Determined That Sub-factor 1.2 Does Not Unduly Restrict Competition

Oracle challenges the Sub-factor 1.2 requirement that offerors demonstrate, in their October 2018 proposal, that they have three unclassified data centers

within the United States that are each supporting at least one IaaS offering and one PaaS offering that are FedRAMP Moderate Authorized. *See* App.Br.40. Oracle erroneously alleges that requiring offerings to be FedRAMP Moderate Authorized unduly restricted competition because DoD has no need for security verification until data is actually placed in the cloud. *See id.* at 46-47. Oracle is merely second guessing DoD's determination of how to meet its minimum needs.

Agencies may require offerors to meet requirements at the time of proposal submission, if they have a reasonable basis for doing so. *See, e.g.*, *Apogee Eng'g, Inc.*, 2018 CPD ¶ 150, 2018 WL 2085660 (Comp. Gen. 2018); *Erickson Aero Tanker*, 2015 CPD ¶ 226, 2015 WL 4572443 (Comp. Gen. 2015). For example, in *Apogee*, GAO determined that the agency articulated a reasonable basis for its requirement that a subcontractor have a facility clearance at the time of proposal submission, because the requirement was "reasonably necessary to 'avoid any delay in transitioning current contract employees and start-up of the new contract, once it has been awarded.'" 2018 WL 2085660, at *2-3.

Here, like in *Apogee*, DoD reasonably determined that the FedRAMP Moderate authorization was necessary at the time of proposal submission. FedRAMP Moderate represents DoD's minimum security requirements for processing or storing its *least sensitive* information in a cloud. Appx100947. In his pre-solicitation memorandum justifying Sub-factor 1.2, Mr. Van Name

explained that the contractor will be required to meet the *more stringent* security requirements of the JEDI Cyber Security Plan for unclassified services within 30 days after the post-award kickoff event. *See id.*; *see also* Appx105496-105497, Appx100610.

Mr. Van Name further explained that "being able to meet the[se] more stringent requirements are contingent on the underlying physical data center security requirements that are approved during the FedRAMP Moderate review process." Appx100947. Accordingly, FedRAMP Moderate authorization was necessary for DoD to have confidence that the offeror could successfully meet the JEDI contract's security requirements. *Id.*

The record demonstrates that DoD thoroughly considered the input of security experts and industry to ensure that Sub-factor 1.2 was no more restrictive than necessary. *See* Appx100955-100956. For example, although some DoD security experts wanted a higher standard than FedRAMP Moderate in the Gate Criteria, DoD determined that FedRAMP Moderate would be sufficient. Appx100955. And, in response to a suggestion from Oracle, DoD amended the solicitation to allow the FedRAMP Moderate authorization to be done by a Federal agency, not just the FedRAMP Joint Authorization Board. *See* Appx100075, Appx100583, Appx100955-100956, Appx108879, Appx108883.

Oracle also erroneously relies upon a "FedRAMP Tips & Cues Compilation" to argue that FedRAMP prohibits DoD from requiring authorization before award. *See* App.Br.3, 11; Appx105291-105292. This document, which compiled tips and answers to FedRAMP questions from 2015-2017, *see* Appx105291-105292, https://www.fedramp.gov/tips-cues/, is not a binding regulation. *See Hamlet v. United States*, 63 F.3d 1097, 1103-05 (Fed. Cir. 1995). And the FedRAMP program does not dictate DoD's minimum needs for the JEDI procurement.

Accordingly, Oracle has not demonstrated that Sub-factor 1.2 lacks a rational basis, and, thus, Oracle has not demonstrated that it is unduly restricts competition.

C. The Trial Court Correctly Determined That Sub-factor 1.2 Did Not Violate 10 U.S.C. § 2304 Because The JEDI Solicitation Provided For Full And Open Competition

Oracle's argument that the DoD was required to execute a J&A for Sub-factor 1.2 is also meritless.

DoD was not required to execute a J&A simply because the number of companies who can meet DoD's minimum requirements is limited. A J&A is only required when the solicitation provides for "other than competitive procedures," 10 U.S.C. § 2304(f)(1), which means other than "full and open competition." 10 U.S.C. § 2302(2). "[F]ull and open competition" means that "all responsible

sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. § 107; 10 U.S.C. § 2302(3)(D). An entity is not a "responsible source" for a particular procurement if it cannot meet the agency's minimum capability and experience requirements. *See* FAR § 9.104-1; *Fabirtech, Inc.*, 2006 CPD ¶ 112, 2006 WL 2098680, at *2 (Comp. Gen. 2006).

An agency is not required to execute a J&A where it permits all offerors to submit proposals, but its minimum capability and experience requirements for the procurement have the *effect* of limiting competition. *See CHE Consulting, Inc. v. United States*, 552 F.3d 1351 (Fed. Cir. 2008); *Maersk Line, Ltd.*, 2012 CPD ¶ 200, 2012 WL 2833687, at *6 n.14 (Comp. Gen. 2012). Indeed, in *National Government Services, Inc. v. United States* (*NGS*), this Court reaffirmed the "proposition that a solicitation requirement (such as a past experience requirement) is not necessarily objectionable simply because that requirement has the *effect* of excluding certain offerors who cannot satisfy that requirement." 923 F.3d 977, 985 (Fed. Cir. 2019) (emphasis added). The *NGS* Court also distinguished cases such as *CHE*, *Maersk*, and *Armstrong*, which all stand for this proposition, from the provision at issue in *NGS*, because the *NGS* provision, which limited an offeror's ability to win award if it was already performing a certain percentage of the relevant agency workload, was not a "capability or experience requirement" that

was "tailored to meet [the agency's] needs for a particular procurement." *NGS*, 923 F.3d. at 986.

Unlike the provision at issue in *NGS*, Sub-factor 1.2 is a capability and experience requirement that is tailored to meet DoD's particular needs for the JEDI procurement, *i.e.*, information security and availability. *See* Appx100792, Appx100806, Appx100947-100948, Appx100955-100956.

Oracle's argument that a J&A was required misstates the law. For example, Oracle erroneously asserts that the FAR § 6.302-1 provides that "where 'there is a reasonable basis to conclude that the agency's minimum needs can only be satisfied by . . . (ii) . . . a limited number of sources. . .,' full and open competition does not exist and DoD must follow the J&A process." App.Br.42-43 (quoting FAR § 6.302-1(b)). FAR § 6.302-1 provides an "authority" for other than full and open competition; it does not *define* full and open competition. FAR § 6.302-1(a)-(b). Indeed, Oracle misleadingly leaves out key language from the regulation, which states that "[u]se of this *authority may be appropriate* in situations such as the following . . ." FAR § 6.302-1(b) (emphasis added). DoD did not invoke this "authority" because DoD did not prohibit any responsible sources from submitting proposals. Oracle simply could not meet DoD's minimum capability and experience requirements.

Also, whether DoD knew that only AWS and Microsoft could meet Sub-factor 1.2 is irrelevant. As demonstrated above, DoD is not *required* to rely upon the *authority* in 10 U.S.C. § 2304(c)(1) and FAR § 6.302-1 anytime there are a limited number of sources that can meet its needs. Rather, it may provide for full and open competition with solicitation requirements that reflect its minimum needs, like it did in the JEDI solicitation. *See, e.g.*, Appx100718.

Additionally, as the trial court correctly found, there was no "nefarious purpose" behind the Gate Criteria. Appx109. DoD crafted the Gate Criteria to meet its minimum needs. Appx100944-100952. DoD reasonably and properly put the evaluation of the Gate Criteria first to avoid wasting time evaluating thousands of proposal pages from offerors, like Oracle, that could not meet one of DoD's basic minimum needs. *See* Appx100422. An agency is not required to "understate its minimum needs merely to increase competition[.]" *Aqua-Trol Corp.*, B-246473, 1992 WL 55051, at *3 (Comp. Gen. Mar. 5, 1992).[6]

[6] Also, the Slack messages referenced by Oracle on page 41 of its brief do not reference the Gate Criteria. Appx103123, Appx103053. The reference to the problem statement as a "gating factor" in Appx103053 had nothing to do with the Gate Criteria in the solicitation, which were not drafted until months after the September 2017 Slack message. *See* Appx158718, Appx158722. Additionally, a comparison of the "metrics" referenced in the October 2017 Slack message at Appx103123 to the later developed Gate Criteria demonstrates their dissimilarity. *See* Appx1706-1707, Appx100791-100794.

Accordingly, the JEDI solicitation provided for full and open competition, and DoD was not required to execute a J&A.

D. The Trial Court Correctly Rejected Oracle's Argument That Sub-factor 1.2 Violated 10 U.S.C. § 2319

Contrary to Oracle's argument, App.Br.43-46, Sub-factor 1.2 does not contain a "qualification requirement," and, in any event, Oracle waived this objection by failing to raise it prior to the close of bidding.

1. The Trial Court Correctly Determined That Oracle Waived Its Argument That DoD Violated Section 2319

As an initial matter, the trial court correctly determined that Oracle waived its argument that Sub-factor 1.2 contains an illegal qualification requirement, in violation of Section 2319, by failing to raise this objection prior to the close of bidding. *See* Appx109.

A plaintiff who "has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." *Blue & Gold Fleet, LP v. United States,* 492 F.3d 1308, 1313 (Fed. Cir. 2007); *accord Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1313 (Fed. Cir. 2016).

Oracle does not dispute that it is alleging a patent error in Sub-factor 1.2. S*ee* App.Br.45-46; *Per Aarsleff*, 829 F.3d at 1312. Indeed, the JEDI solicitation

did not contain FAR clause 52.209-1, "Qualification Requirements," Appx100750-100756, which facially demonstrates that DoD did not treat any of its evaluation criteria as "qualification requirements" under Section 2319. *See* FAR § 9.206-2. Oracle also does not dispute that it had ample opportunity to raise this objection before the close of bidding on October 12, 2018. *See* App.Br.45-46; Appx104303.

Instead, Oracle erroneously argues that it alleged a violation of Section 2319 in a September 6, 2018 GAO filing. App.Br.45-46. The trial court found that Oracle did not allege a violation of Section 2319 until after the close of bidding, Appx109, and this factual finding was not clearly erroneous. Oracle's references to "prequalification" in its September 6, 2018 filing were in the context of an argument that Sub-factor 1.2 exceeded DoD's legitimate needs (*i.e.*, unduly restricted competition), not that Sub-factor 1.2 was an illegal "qualification requirement" in violation of Section 2319. *See* Appx104939-104943. At GAO, Oracle was represented by experienced protest counsel. Appx104878. If Oracle intended to allege a violation of Section 2319 in its September 6, 2018 filing, it presumably would have cited the statute, like it belatedly did at the trial court. *E.g.*, Appx142.

In any event, Oracle waived its argument that its references to "prequalification" were sufficient to allege a violation of Section 2319, because it failed to raise this argument in its trial court briefing. *See* Appx2010-2012;

Novosteel SA v. United States, 284 F.3d 1261, 1273-74 (Fed. Cir. 2002). In its trial court briefing, Oracle argued that, by raising *other* challenges to Sub-factor 1.2 before the close of bidding, it preserved its 10 U.S.C. § 2319 objection. *See* Appx2010-2012. The trial court correctly rejected Oracle's interpretation of *Blue & Gold*, *see* Appx109, and, in any event, Oracle did not advance this argument in its opening brief on appeal, App.Br.45-46, so Oracle waived it here as well. *See, e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006).

In sum, Oracle has waived all its arguments regarding a waiver under *Blue & Gold*, and they are incorrect anyway.

2. The Trial Court Correctly Determined That Sub-factor 1.2 Does Not Contain A Qualification Requirement

Even if Oracle's Section 2319 argument were not waived, the trial court correctly determined that Sub-factor 1.2 does not contain a qualification requirement. Appx109-111.

A qualification requirement is "a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract." 10 U.S.C. § 2319(a). Section 2319 "was not intended to apply to any individual specification of any one solicitation." *California Indus. Facilities Res., Inc. v. United States*, 80 Fed. Cl. 633, 642 (2008) (quoting *Aydin Corp.—Reconsideration*, 87-1 CPD ¶ 141, 1987 WL 101411, *2 (Comp. Gen. 1987)).

Rather, "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.'" *Id.* (quoting *Aydin—Reconsideration*, 1987 WL 101411, *2).

This Court's decision in *W.G. Yates & Sons Construction Co. v. Caldera*, 192 F.3d 987 (Fed. Cir. 1999), is consistent with *California Industrial* and *Aydin*. *See California Indus.*, 80 Fed. Cl. at 642-43 (analyzing *W.G. Yates*). In *W.G. Yates*, the Court held that a solicitation contained a qualification requirement where the solicitation provided that certain hanger doors could only be manufactured by: 1) certain "prequalified manufacturers" named in the solicitation; or 2) other manufacturers who submitted certain written evidence of their previous experience. 192 F.3d at 989, 993-94. The listing of "prequalified manufacturers" in the *W.G. Yates* solicitation suggests a "qualified manufacturers list" existing outside the procurement at issue in that case, rather than procurement-specific requirements.

Offerors are not required to be FedRAMP Moderate Authorized on a continuing basis to be eligible for cloud computing awards, and, contrary to Oracle's argument, App.Br.45 (emphasis omitted), the FedRAMP Marketplace does not "serve[] as a qualified offeror list[.]" As Oracle acknowledges, offerors

are not typically required to have FedRAMP authorization prior to award. *See* App.Br.36-37. As demonstrated in Section II.B, above, the FedRAMP Moderate authorization requirement in Sub-factor 1.2 is a JEDI-specific evaluation criterion designed to ensure that offerors will be able to meet DoD's JEDI-specific minimum needs.

If Oracle's interpretation of Section 2319 were accepted, and procurement-specific evaluation criteria like Sub-factors 1.1 and 1.2 were considered to be qualification requirements, then any pass/fail evaluation criteria designed to ensure that the awardee can meet the agency's needs would be considered a qualification requirement, which would nullify, at a minimum, the regulations requiring that agencies perform a responsibility determination before award. *See* FAR §§ 9.103(a), 9.104-1; *Fabirtech*, 2006 WL 2098680, at *2 ("'responsibility' refers to a firm's apparent ability and capacity to perform contract requirements.").

Accordingly, the trial court correctly determined that Sub-factor 1.2 does not contain a qualification requirement and is enforceable.

III. The Trial Court's Finding That Oracle Was Not Prejudiced By A Violation Of 10 U.S.C. § 2304a(d)(3) Was Not Clearly Erroneous

The trial court correctly found that Oracle was not prejudiced by DoD invoking what the court held to be an inapplicable exception to the large single-award IDIQ prohibition in 10 U.S.C. § 2304a(d)(3), because Sub-factor 1.2 is enforceable, Oracle admits that it could not meet all the requirements Sub-factor

1.2, and Sub-factor 1.2 would not have been different in a multiple-award JEDI procurement. Appx106-107. This Court reviews the trial court's findings regarding prejudice for clear error, *e.g.*, *Bannum*, 404 F.3d at 1354, and Oracle has not demonstrated anything erroneous about the trial court's finding.

A. The Trial Court Correctly Applied The "Substantial Chance" Prejudice Test, And The "Non-Trivial Competitive Injury" Test Would Still Require Oracle To Demonstrate That It Could Have Competed In A Multiple-Award JEDI Procurement

Oracle incorrectly alleges that the trial court erred by applying the "substantial chance" prejudice test, rather than the "non-trivial competitive injury" test. App.Br.33-35. The trial court applied the correct test, and, in any event, this argument is a red herring. Even if the trial court should have applied the non-trivial competitive injury test, Oracle was still required to demonstrate that it could have competed in a multiple-award JEDI procurement, and the trial court correctly found that it could not.

To demonstrate prejudice in a bid protest, the plaintiff must typically show that "there was a substantial chance it would have received the contract award but for the" agency's error. *E.g.*, *Glenn Def. Marine (ASIA), PTE Ltd. v. United States*, 720 F.3d 901, 912 (Fed. Cir. 2013). Oracle asserts that, in "pre-award protests, a 'non-trivial competitive injury which can be redressed by judicial relief' establishes prejudice." App.Br.33 (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1361-62 (Fed. Cir. 2009)). But this Court has clarified that *not all*

pre-award protests are subject to the *Weeks Marine* exception. *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1348-49 (Fed. Cir. 2013).

The *Weeks Marine* exception was created in a "pre-bid" protest because, "at that stage it is difficult, if not impossible, to establish a substantial chance of winning the contract prior to the submission of any bids[.]" *Orion*, 704 F.3d at 1348. In contrast, where an "adequate factual predicate" exists to apply the substantial chance test, such as a pre-award protest where offers have been evaluated and a competitive range established, the substantial chance test continues to apply. *See id.* at 1348-49.

In this case, at the time of the trial court's decision, DoD had evaluated proposals, established a competitive range, and eliminated Oracle from the competition. *See* Appx158758-158762, Appx158777. Accordingly, there was an "adequate factual predicate" to apply the substantial chance test.[7]

In any event, even if the non-trivial competitive injury test applies, Oracle must still demonstrate that it could have competed for the contract in the absence

[7] Oracle's assertion that the Court assesses standing at the time of the complaint, *see* App. Br. 34, is irrelevant because the trial court did not dismiss Oracle's complaint for lack of standing. Appx100. Rather, it granted the Government and AWS judgment on the merits, based, in part, upon its determination that Oracle was not prejudiced by sole error the court found. *See* Appx106-107, Appx123. In determining prejudice on the merits, the trial court should consider the full administrative record. *Digitalis Educ. Solutions, Inc. v. United States*, 97 Fed. Cl. 89, 93 (2011), *aff'd*, 664 F.3d 1380 (Fed. Cir. 2012).

of the error. *See CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1360 (Fed. Cir. 2018); *Ultra Elecs. Ocean Sys., Inc. v. United States*, 139 Fed. Cl. 517, 526 (2018). Accordingly, if Sub-factor 1.2 would have likely been the same in a multiple-award procurement, and Oracle could not meet all the requirements of Sub-factor 1.2, then it has not suffered a non-trivial competitive injury.

B. The Trial Court's Finding That Sub-factor 1.2 Would Not Have Changed In A Multiple-Award Procurement Was Not Clearly Erroneous

The trial court correctly found that Sub-factor 1.2 would not have changed in a multiple-award procurement. Appx107. Contrary to Oracle's argument, App.Br.35-36, the trial court's finding was not based upon "[G]overnment counsel's supposition"; rather, it was based upon the administrative record.

The FedRAMP Moderate requirement was included to ensure that offerors' "proposed data centers have met the underlying physical security requirements necessary to successfully perform the contract." Appx100947. The trial court correctly concluded that DoD's minimum security requirements would not have changed in a multiple-award environment. Appx107. Consistent with the technical findings made by the CO and Mr. Van Name, Appx100462, the trial court logically determined that, "if multiple awards were made, the security concerns would ratchet up, not down." Appx107.

Nothing in Oracle's brief suggests that DoD's minimum data security requirements for the JEDI procurement would change in a multiple-award environment. Rather, Oracle's references to other cloud solicitations and a non-binding FedRAMP document reflect mere disagreement with the technical judgments that DoD has already made regarding its security requirements for *this particular procurement*. *See* App.Br.36-37; Appx105291-105292; *Aqua-Trol*, 1992 WL 55051, at *2 n.2 ("each procurement stands on its own").

Contrary to Oracle's allegations, App.Br.35, the trial court did not improperly intrude upon DoD's decision making. Rather, it performed the precise analysis this Court requires in a bid protest, considering whether the plaintiff would have had a "substantial chance" of award "but for" the alleged error. *E.g.*, *Glenn Def.*, 720 F.3d at 912. Because the record demonstrates that Sub-factor 1.2 would not have been different in a multiple-award solicitation, Oracle still would have been ineligible for award.

Oracle's reliance upon the trial court's passing reference at oral argument to "Rayel on the facts" is misplaced. App.Br.35-36. The court questioned the Government's argument that *Sub-factor 1.1* would not have changed in a multiple-award procurement, not Sub-factor 1.2. Appx2296. Oracle's argument is also improper because a judicial opinion "stands as the sole expression of the court,"

not the court's comments at oral argument. *United States v. Board of Educ. of Chicago*, 799 F.2d 281, 284 n.3 (7th Cir. 1986).

Here, the trial court correctly found that Sub-factor 1.2 would not have changed in a multiple-award environment. This finding was well-reasoned, well-supported, and not clearly erroneous.

C. The Trial Court's Finding That Oracle Could Not Meet Sub-factor 1.2 Was Not Clearly Erroneous

The trial court's finding that Oracle could not meet Sub-factor 1.2 was also not clearly erroneous. *See* Appx106-107. Indeed, Oracle admits that it could not meet Sub-factor 1.2 at the time of proposal submission. *See* Appx1493. Contrary to Oracle's arguments, *see* App.Br.34, 38-39, this is dispositive.

The Court's standard for prejudice is whether "there *was* a 'substantial chance' [the plaintiff] *would have* received the contract award *but for* the [agency's] errors in the bid process." *Bannum*, 404 F.3d at 1358 (emphasis added) (citation omitted). In other words, the plaintiff must demonstrate that it would have had a substantial chance of award, *if the error had not occurred*. Even under the "non-trivial competitive injury" test, the plaintiff must still demonstrate that it "*could have* likely competed for the contract" in the absence of any errors found. *See Ultra*, 139 Fed. Cl. at 526 (emphasis added).

Oracle incorrectly argues that the relevant question is whether Oracle would meet Sub-factor 1.2 under a *future* multiple-award solicitation that might result

from corrective action. *See* App.Br.34, 38. In support of its argument, Oracle relies upon three cases that are all inapposite: *Impresa, COMINT Systems Corp. v. United States*, 700 F.3d 1377 (Fed. Cir. 2012), and *CGI Federal Inc. v. United States*, 779 F.3d 1346 (Fed. Cir. 2015). *See* App.Br.34, 38.

In *Impresa*, the plaintiff challenged the eligibility of the awardee, and all of the other offerors had been eliminated from the competition. 238 F.3d at 1329, 1334. Under these circumstances, the Court found that the agency would be obligated to rebid the contract if the award was improper and that the plaintiff had a substantial chance of award in the new competition. *See Impresa*, 238 F.3d at 1329, 1334.

In other words, in *Impresa*, if the alleged error had not occurred, the agency *would have* presumably needed to restart the competition, and, the plaintiff *would have* had a substantial chance of obtaining an award in the new competition. In contrast, in this case, if DoD had not invoked the allegedly inapplicable exception to Section 2304a(d)(3) and instead provided for multiple JEDI awards, Oracle still would not have been eligible for award under Sub-factor 1.2.

Indeed, in *Labatt Food Service, Inc. v. United States*, 577 F.3d 1375 (Fed. Cir. 2009), the Court distinguished *Impresa* and clarified that, to demonstrate prejudice, a plaintiff must show that it was *actually harmed* by the errors in the procurement, not simply that it could compete in a re-procurement. *See* 577 F.3d

at 1379-80. Like the plaintiff in *Labatt*, Oracle has not shown that the error found by the trial court "interfered with its ability to receive the contract award." *Id.* The requirement to have FedRAMP Moderate authorization in October 2018, which the trial court correctly determined to be enforceable, prevented Oracle from being eligible to compete, not the decision to award a single JEDI contract.

Impresa is also inapposite because DoD would *not* be obligated to re-solicit the JEDI contract if Oracle's protest were successful due to a violation of Section 2304a(d)(3). Rather, DoD would likely re-open the procurement, invoke another exception to Section 2304a(d)(3), and re-award the contract to Microsoft. A separate exception to Section 2304a(d)(3) applies when, "because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source." 10 U.S.C. § 2304a(d)(3)(D). Because the CO has determined that multiple JEDI contracts would not be in the Government's best interest, Appx461-464, DoD would likely invoke the public interest exception, if it were necessary in order to proceed with a single award.

COMINT is also inapposite. In *COMINT*, the plaintiff alleged that an amendment to a solicitation was substantial enough that cancellation and re-solicitation was required. *See* 700 F.3d at 1381. In *dicta*, the Court noted that "the standing question with respect to a claim that the agency had an obligation to rebid the contract turns on whether the bidder *had* a substantial chance of securing the

award on the rebid[.]" *Id.* at 1382 n.4 (emphasis added). Here, the error found by the trial court was not the failure to cancel and re-solicit, but the failure to issue a multiple-award solicitation or invoke an applicable exception to the single-award prohibition in Section 2304a(d)(3). Appx103-106. Thus, the relevant question is whether Oracle *had* a substantial chance of award if DoD had not invoked the inapplicable exception. As demonstrated above, it did not.

CGI is inapposite as well. In *CGI*, the plaintiff would have submitted quotes if the solicitations had not contained the allegedly illegal payment terms, and, unlike in this case, there is nothing in the *CGI* opinion suggesting that the plaintiff, an incumbent, would not have been qualified to compete in the procurements at issue. *See* 779 F.3d at 1348, 1351.

In any event, the trial court record does not demonstrate that Oracle could meet Sub-factor 1.2 in the near future. Oracle alleges that, in its proposal, it showed that it "expected to have FedRAMP High IaaS and PaaS authorized offerings running in five data centers by the anticipated award date," App.Br.13, which, at the time, was April 2019. *See* Appx100734. As of May 2019, however, Oracle had still not met the Sub-factor 1.2 requirement. *See* Appx1495.

Oracle improperly attempts to introduce new evidence on appeal, *i.e.*, the current FedRAMP Marketplace website, to supposedly demonstrate that it would meet Sub-factor 1.2 today. App.Br.39. Even if it were appropriate to introduce

new evidence on appeal, which it is not, *e.g.*, *Ballard Med. Prods. v. White*, 821 F.2d 642, 643 (Fed. Cir. 1987), the webpage provided by Oracle, App.Br.39 n.25, does not actually demonstrate that Oracle would meet Sub-factor 1.2 today, because it does not show which data centers are currently supporting the Oracle offering that recently received FedRAMP Moderate authorization.

In any event, as demonstrated above, Oracle's concession that it could not pass Sub-factor 1.2 at the time of proposal submission is dispositive on the question of prejudice, and the trial court's finding was not clearly erroneous.

IV. If The Court Were To Disagree With The Trial Court's Prejudice Finding, It Should Still Affirm On The Alternative Ground That DoD Did Not Violate Section 2304a(d)(3)

Although the Court need not reach this question if it agrees with the trial court's prejudice analysis, if it disagrees, the Court should affirm on the alternative basis that DoD did not violate 10 U.S.C. § 2304a(d)(3). *See Orion*, 704 F.3d at 1350.

The trial court erred in finding that DoD invoked an inapplicable exception to Section 2304a(d)(3) because the court misinterpreted that exception. Section 2304a(d)(3) permits DoD to award a large single-award IDIQ contract like JEDI if DoD determines in writing that "the contract provides only for firm, fixed price task orders or delivery orders for . . . services for which prices are established in the contract for the specific tasks to be performed[.]" 10 U.S.C. § 2304a(d)(3)(B).

The trial court correctly concluded that the JEDI solicitation "provides only for firm, fixed price task orders." Appx104; *see also* Appx100730. And the court did not dispute that the JEDI contract would include, from its inception, specific tasks with associated prices, upon which task orders would be based. *See* Appx104; *see also, e.g.*, Appx100144, Appx100168, Appx100719-100731, Appx100757, Appx154131-154140, Appx154177-154182. The court, however, incorrectly determined that Section 2304a(d)(3)(B) does not apply because of clause H2 in the JEDI contract. *See* Appx104-106.

Clause H2 primarily requires the JEDI contractor to notify the contracting officer when new or improved IaaS, PaaS, or Cloud Support Package services are made publicly available to the commercial marketplace, so that the contracting officer may determine whether they should be added to JEDI catalogs, and clause H2 provides parameters for establishing the fixed prices for the new services. *See* Appx100740-100741. Accordingly, clause H2 does not alter the scope of the JEDI contract. Rather, any offerings added to the contract will need to be within scope, and any out-of-scope changes may be protested. *See, e.g.*, *AT&T Commc'ns, Inc. v. Wiltel*, 1 F.3d 1201 (Fed. Cir. 1993); Appx105910 n.25.

Therefore, under the trial court's interpretation of Section 2304a(d)(3)(B), it is not really clause H2 that brings the JEDI contract outside the exception. Rather, it is the fact that the contract includes a standard changes clause that allows

in-scope modifications. *See* FAR § 52.212-4(c) (incorporated by Appx100750). Indeed, the trial court stated that, for Section 2304a(d)(3)(B)(ii) to apply, "the contractor and agency cannot add new tasks at new prices after entering the contract." Appx105-106. This holding essentially writes the exception at Section 2304a(d)(3)(B)(ii) out of existence, unless the agency creates a "bespoke" clause *prohibiting* the addition of new *in-scope* tasks. Indeed, in denying Oracle's protest, GAO correctly recognized that Oracle's interpretation of the statute would preclude any modification to prices and tasks in IDIQ contracts that are justified under this exception. *See* Appx105910.

Contrary to the trial court's interpretation, nothing in the statute requires that all tasks that will ever be included in the JEDI contract be included "at the time of award." Appx105. The trial court improperly added a requirement to the relevant exception. *See Adam Sommerrock Holzbau, GmbH v. United States*, 866 F.2d 427, 429 (Fed. Cir. 1989).

The primary flaw in the trial court's reasoning is its failure to give sufficient effect to the following emphasized language: "the contract provides only for *firm, fixed price task orders or delivery orders for* . . . services for which prices are established in the contract for the specific tasks to be performed[.]" 10 U.S.C. § 2304a(d)(3)(B) (emphasis added). This exception provides that the *task orders* must be for services that have prices "established in the contract," not that all

tasks/prices must be established "at the time of award." Not all task orders are issued and performed "at the time of award." *See* Appx100754.

For example, under the trial court's interpretation, if a task order was placed in year five of an IDIQ contract, based upon tasks/prices included in the contract at the time of award, then the order would be for tasks/prices "established in the contract," *but* if the *same* order was placed in year nine of the contract, and the tasks/prices had been added to the underlying IDIQ contract in year two, then the order would *not* be for tasks/prices "established in the contract." This nonsensical result finds no support in the language of the statute.

The trial court also erroneously relied upon the "may be awarded" language in Section 2304a(d)(3). Appx105. This language addresses when the exceptions in Section 2304a(d)(3) may be invoked, *i.e.*, before award. It does not address when the tasks and prices upon which future orders will be based must be "established." Indeed, tasks/prices ordinarily cannot be "established in the contract" at the time of a pre-award decision to invoke the exception at Section 2304a(d)(3)(B)(ii) because the contract does not yet exist.

Accordingly, the court should affirm the trial court's decision upon the alternative ground that DoD did not violate Section 2304a.

V. The Trial Court Correctly Rejected Oracle's Conflict Of Interest Allegations

COs have broad discretion in making decisions related to conflicts of interest, and Oracle has not demonstrated anything irrational about the CO's determinations regarding the involvement of Messrs. Ubhi, DeMartino, and Gavin in the JEDI procurement and AWS's hiring of Messrs. Ubhi and Gavin. *See* App.Br.54-64.

The Court need not reach these issues, however, because the alleged conflicts did not prejudice Oracle. Moreover, Oracle's arguments that AWS obtained an unfair competitive advantage in the JEDI competition by hiring Messrs. Ubhi and Gavin are moot because *Microsoft*, not AWS, won the JEDI contract.

A. The Trial Court Correctly Concluded That Oracle Was Not Prejudiced By The Alleged Conflicts

As an initial matter, the trial court correctly found that, once it determined that Sub-factor 1.2 was enforceable, Oracle was not prejudiced by any of its other alleged errors, including those related to conflicts of interest. *See, e.g.*, Appx123. Oracle has not demonstrated that Sub-factor 1.2 would have been any different without the involvement of Messrs. Ubhi, DeMartino, and Gavin in the JEDI procurement.

Oracle does not allege that Messrs. DeMartino or Gavin had any involvement in drafting the Gate Criteria. *See* App.Br.22-26, 59-64. As for Mr. Ubhi, the FedRAMP Moderate authorization requirement that Oracle challenges was added to the solicitation *after* the first public draft was released in March 2018, Appx106083-84, several months after Mr. Ubhi left DoD. Appx158699.

Also, even if AWS should have been eliminated from the competition because it hired Messrs. Ubhi and Gavin, that does not change the fact that Oracle did not meet DoD's minimum needs.

Accordingly, Oracle has no basis to question the trial court's finding that Oracle was not prejudiced by the alleged conflicts of interest.

B. The CO Has Broad Discretion In Making Conflict Of Interest Determinations, And Violations Of 18 U.S.C. § 208 Do Not Automatically Invalidate A Procurement

Several procurement statutes and regulations include provisions designed to ensure that contractors do not obtain an unfair competitive advantage. For example, the PIA includes prohibitions against unlawfully disclosing or receiving contractor proposal information or source selection information before award. *See* 41 U.S.C. § 2102; FAR § 3.104-3(a)-(b).

Also, FAR Subpart 9.5 requires the CO to identify and evaluate potential OCIs and avoid, neutralize, or mitigate significant OCIs before contract award. FAR § 9.504(a). OCIs include situations where an offeror has an unfair

competitive advantage due to having created the Government specification (biased ground rules) or having obtained certain information in a manner that may provide an unfair competitive advantage (unequal access to information). *See* FAR §§ 9.505(b), 9.505-2, 9.505-4.

Additionally, FAR § 3.101-1 provides a "general rule" to "avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships," but does not describe particular conflicts of interest. Accordingly, the Court of Federal Claims and GAO have looked to FAR Subpart 9.5 for guidance when reviewing allegations of conflicts under FAR § 3.101-1. *See, e.g.*, *JWK Int'l Corp. v. United States*, 52 Fed. Cl. 650, 655 n.10 (2002), *aff'd*, 56 F. App'x 474 (Fed. Cir. 2013); *Battelle Memorial Institute*, 98-1 CPD ¶ 107, 1998 WL 165898, at *4 (Comp. Gen. 1998).

COs have broad discretion in fulfilling their obligations to protect the integrity of the procurement system and avoid the appearance of impropriety. FAR § 1.602-2 provides that "contracting officers should be allowed wide latitude to exercise business judgment" in "ensuring performance of all necessary actions for effective contracting[.]" More specifically, the FAR recognizes that the "exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it." FAR § 9.505; *see also,*

e.g., *Axiom*, 564 F.3d at 1382; *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 217 (2011). And the FAR expressly grants COs discretion to determine whether a "reported violation or possible violation [of the PIA] has any impact on the pending award or selection of the contractor." FAR § 3.104-7(a).

Accordingly, in investigating potential conflicts and PIA violations, COs have wide discretion to determine how much information they need. *See* FAR § 1.602-2; *cf. John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999). And the FAR cautions that, in "fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should *avoid creating unnecessary delays, burdensome information requirements, and excessive documentation*." FAR § 9.504(d) (emphasis added).

These authorities demonstrate the fallacy of Oracle's argument that a contract is tainted *per se* anytime a violation of Section 208, a criminal statute prohibiting certain conflicts of interest by Government employees, occurred in connection with the procurement. Rather, as demonstrated above, the FAR gives the CO discretion to determine whether any conflicts *impact* the procurement.

Moreover, this Court has explained that "[i]llegal acts by a Government contracting agent **do not alone taint a contract** and invoke the void *ab initio* rule. Rather, the record must show some **causal link** between the illegality and the contract provisions." *Godley v. United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993)

(bolding added). Indeed, in *Godley*, this Court explained that the holdings of two cases relied upon Oracle, *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), and *K&R Engineering Co., Inc. v. United States*, 616 F.2d 469 (1980), only void contracts when the contracts *result* from illegal activity. 5 F.3d at 1475-76 & n.1.

Additionally, the award to *Microsoft* demonstrates the absurdity of Oracle's argument. Under Oracle's nonsensical theory, conflicts of interest involving *AWS* must necessarily void a contract with *AWS's competitor, Microsoft*.

The trial court applied the correct standard by determining whether the CO's no impact and OCI determinations were rational and consistent with the FAR. *See* Appx114-115 & n.11.

C. The CO Rationally Determined That Messrs. Ubhi, DeMartino, And Gavin Did Not Impact The Solicitation

1. Deap Ubhi

The CO rationally determined that Mr. Ubhi's unethical behavior had no impact on the solicitation that was issued many months after his departure from the Government, after reviews by numerous stakeholders within DoD.[8]

[8] As demonstrated in Section I.A, above, review of the trial court's decision that DoD's conflicts determinations were rational is *de novo*, meaning that this Court defers to DoD's decisions, not the trial court's decision. Accordingly, we primarily defend DoD conclusions, and any inconsistency between the trial court's and DoD's conclusions is irrelevant to this *de novo* review.

The CO reached this conclusion for "three independent reasons," the "most important[]" being that "all the key decisions for the JEDI Cloud procurement, such as the actual [solicitation] 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 [solicitation] truly reflects DoD's requirement." Appx158719. This conclusion is rational and well-supported by the record.

When Mr. Ubhi recused himself from the JEDI procurement on October 31, 2017, Appx102777, DoD had not yet received any responses to its RFI, nor had it begun drafting the solicitation (including the Gate Criteria), the Market Research Report, or the Acquisition Strategy. Appx105405, Appx105407, Appx105438, Appx158721-Appx158722. Moreover, the JROC had not yet issued the warfighter's requirements. Appx100321-100335.

Also, the "problem statement" that Mr. Ubhi helped draft was abandoned after he recused himself. *See* Appx158708; s*ee also* Appx105442-105443, Appx105615-Appx105616. Oracle's assertion that Mr. Ubhi "edited material in October 2017 that DoD ultimately included in the solicitation" is unsupported. App.Br.57. The "storage provisioning time" and "Virtual Machine Provisioning Plan" targets referenced by Oracle, *id.* at 20-21 & n.20, were part of the problem

statement "metrics" that Mr. Ubhi did not draft or edit. Appx2130-2133.[9] Also, the draft JROC memorandum to which Mr. Ubhi contributed minor edits was substantially revised after he recused himself. Appx100321-100324, Appx158722, Appx160346-160347. And the "differentiators" Mr. Ubhi proposed in a Slack message were high-level ideas, not specific technical requirements. App.Br.21, 57 (quoting Appx160237).

Mr. Ubhi advocated for a single-award strategy, but the final decision was made in July 2018, *see* Appx100318-100320, Appx100455-100464, many months after he left DoD. *See* Appx158699. And Mr. Ubhi did not drive the single-award decision, as alleged by Oracle. App.Br.18. Others, such as DDS Director Chris Lynch, and Mr. Van Name, were more influential. Appx158721. Indeed, Mr. Ubhi ultimately considered the single-award versus multiple-award discussion "[l]argely . . . a total red herring[.]" Appx103181, Appx158742.

Oracle erroneously argues that the single-award decision was effectively made in October 2017, based upon some Slack messages and a document dated November 6, 2017. *See* App.Br.4, 56; Appx105957. In February 2018, DoD explained that this document was a "draft," and, importantly, DoD was "still in the analysis and fact finding phase of this process to determine how many contracts

[9] Devon MacKay added the metrics to the problem statement, Jordan Kasper deleted them, and only Sharon Woods also edited the document in the meantime. *Id.*

will best meet DoD's needs." Appx105984, Appx105986-105987; *see also* Appx104352 (November 10, 2017 internal DoD e-mail stating that the Deputy Secretary was "[o]pen to the first cloud contract being single source OR multiple source"). Indeed, the single-award versus multiple-award question was still being "vigorously debated" within DoD in April 2018. Appx158721. In any event, regardless of Mr. Ubhi's involvement, the trial court correctly found no prejudice to Oracle from the single-award decision. *See* Appx106-107, Appx123.

Additionally, after Mr. Ubhi left DoD, draft solicitations were reviewed in detail by DPAP procurement experts, the DoD CIO, other components of DoD, and numerous members of the JEDI acquisition team. *See* Appx106690-106716, Appx108702-108737, Appx158700, Appx158722. The CO reasonably concluded that any influence Mr. Ubhi had during his early involvement in JEDI was negated by numerous subsequent reviews. *See* Appx158722.

Oracle erroneously criticizes the CO for not obtaining a determination from the inspector general, before making her decision, regarding whether Mr. Ubhi violated Section 208. App.Br.54. The CO was well aware that Mr. Ubhi had acted improperly and violated FAR § 3.101-1. Appx158707-158709. She rationally concluded that whether this same conduct also violated Section 208 does not affect her no *impact* determination. Appx158709.

Accordingly, the CO's conclusion that Mr. Ubhi did not impact the JEDI solicitation was rational.[10]

2. Anthony DeMartino

Contrary to Oracle's arguments, App.Br.60-62, the CO reasonably determined that Mr. DeMartino's involvement in the JEDI procurement was "ministerial and perfunctory in nature and he provided no input into the JEDI Cloud acquisition documents[.]" Appx100685. The administrative record supports this assessment.

Mr. DeMartino did not participate in drafting the solicitation or the various acquisition strategy documents. *Id.* Rather, consistent with his roles for the Secretary and Deputy Secretary, Mr. DeMartino essentially acted as a liaison between the Secretary/Deputy Secretary and the JEDI team, scheduling meetings and routing documents through high-level DoD officials.

For example, Mr. DeMartino prepared notes from a November 2018 meeting between DoD personnel involved in the procurement and the Deputy Secretary to

[10] The contracting officer found two additional, independent reasons why Mr. Ubhi did not impact the procurement: 1) a lack of engineering expertise; and 2) limited attempts to influence the JEDI requirement. *See* Appx158719. The contracting officer reached these reasonable conclusions through a detailed review of Slack messages and Google Drive documents Mr. Ubhi worked on, as well as interviews with his colleagues. *See* Appx158719-158721. Nevertheless, the Court need not address these bases, in light of the independent, rational basis for her no impact determination discussed at length above.

keep everyone aware of the Deputy Secretary's taskers from the meeting. Appx104390-104391. Likewise, Mr. DeMartino met with DDS personnel to transmit information to or from the Deputy Secretary. *See, e.g.*, Appx102926. Similarly, in April 2018, Mr. DeMartino provided edits to a two-page briefing for the Secretary that was prepared by the DDS Director. Appx104366-104368.

Oracle exaggerates Mr. DeMartino's role in the procurement. For example, Oracle erroneously alleges that he "directed efforts and strategy about the best way to garner external approval for the acquisition approach." App.Br.61. In the briefing Oracle cites, Mr. DeMartino actually asked the DDS Director to include "some specifics the [Secretary] is going to need" regarding JEDI. Appx104366, Appx104368. Likewise, Oracle erroneously claims that Mr. DeMartino "revised the JEDI industry day briefing[.]" App.Br.61. The record indicates that he intended to edit a two-page "Industry Day Announcement" with logistical information for Industry Day, but the announcement was postponed before he could do so. Appx104356-104357, Appx104374-104376.

The CO was personally aware of the limited nature of Mr. DeMartino's involvement with the procurement, and she discussed the matter with others on the JEDI team. *See* Appx105239, Appx105663-105665. Conducting a detailed review of all Mr. DeMartino's e-mails and documents related to the JEDI procurement

under these circumstances, as Oracle suggests was necessary, *see* App.Br 60, would have been contrary to FAR § 9.504(d).

Accordingly, the CO rationally determined, based upon a reasonable investigation, that Mr. DeMartino's did not negatively impact the integrity of the JEDI procurement.

3. Victor Gavin

Oracle does not explain how Mr. Gavin allegedly impacted the JEDI solicitation. *See* App.Br.62-64. Indeed, Mr. Gavin's most notable contribution to the JEDI procurement was his failed advocacy for a multiple-award strategy. *See* Appx158746. The CO reasonably concluded that Mr. Gavin did not impact the solicitation. *See* Appx158746-158747.

Oracle erroneously alleges that the CO should have obtained a determination regarding whether Mr. Gavin violated Section 208. App.Br.54. Whether Mr. Gavin's admittedly improper conduct violated Section 208, as opposed to just FAR § 3.101-1, does not affect whether he *impacted* the JEDI procurement.

D. The CO Rationally Determined That AWS's Hiring Of Messrs. Ubhi And Gavin Did Not Give AWS An Unfair Competitive Advantage, And, In Any Event, This Issue Is Moot Due To The Award To Microsoft

1. Mootness

As an initial matter, Microsoft winning the JEDI contract has mooted Oracle's allegations that AWS obtained an unfair competitive advantage in the competition by hiring former Government employees.

Mootness is "a threshold jurisdictional issue." *Myers Investigative and Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (2002). Mootness generally means that "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (citation omitted).

An actual case or controversy must exist at all stages of review, not simply when the action was filed. *DeFunis v. Odegaard*, 416 U.S. 312, 316-20 (1974). Three requirements for a case or controversy are: 1) an "injury in fact"; 2) "a causal connection between the injury and the conduct complained of"; and 3) it "must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).[11]

[11] A heavier burden to demonstrate mootness applies when there has been a "voluntary cessation of allegedly illegal conduct," but that burden does not apply

Oracle's arguments that AWS hiring Messrs. Ubhi and Gavin created an unfair competitive advantage are moot. If AWS hiring Messrs. Ubhi and Gavin created an unmitigated OCI, then the proper remedy would be for DoD to eliminate AWS from the competition, *see* FAR § 9.504(e), absent a waiver pursuant to FAR § 9.503. Indeed, Oracle requested that AWS be eliminated from the JEDI competition, *see* Appx1520, and DoD has effectively granted this relief, albeit for different reasons, by the award to Microsoft. Accordingly, the Court could not presently grant relief that would redress the alleged errors.

AWS's protest of the award to Microsoft does not keep these issues live. The Government intends to defend its award to Microsoft. Accordingly, the possibility of AWS's protest resulting in the procurement being re-opened is speculative at best, and "speculative contingencies" do not keep a case live absent evidence that they are of "immediacy and reality." *DeFunis*, 416 U.S. at 320 n.5 (citations omitted).

2. Deap Ubhi

The CO reasonably determined that AWS hiring Mr. Ubhi did not provide AWS with any competitively-useful, non-public information relevant to JEDI, and,

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here, where mootness is not based upon corrective action. *See, e.g.*, *DeFunis*, 416 U.S. at 318 (citation omitted).

thus, AWS did not violate the PIA or have an unmitigated OCI due to hiring Mr. Ubhi. Appx158709-158716, Appx158749-158753.

COs have considerable discretion in determining whether an OCI exists and whether it has been reasonably mitigated. *E.g.*, FAR § 9.505; *Axiom*, 564 F.3d at 1382. In determining whether an offeror's hiring of a former Government employee creates a conflict, it is appropriate to consider his access to non-public, competitively-useful information, "as well as whether [his] activities with the firm were likely to have resulted in a disclosure of such information." *Interactive Info. Sols., Inc.*, 2018 CPD ¶ 115, 2018 WL 1536746, at *5 (Comp. Gen. 2018); *accord, e.g.*, *Liquidity Servs., Inc.*, 2014 CPD ¶ 221, 2014 WL 3748241, at *9 (Comp. Gen. 2014).

Here, the CO reasonably determined that: 1) Mr. Ubhi was effectively firewalled from the AWS JEDI proposal team from the time he was hired; and 2) he was not provided access to non-public, competitively-useful JEDI information while working for DDS. Appx158712-158716, Appx158749-158753. On appeal, Oracle does not question the CO's first conclusion and improperly second guesses the CO's second conclusion. *See* App.Br.57-58.

By not raising it in its opening brief, Oracle waived any challenge to the CO's conclusion that Mr. Ubhi was effectively firewalled from the AWS JEDI proposal team from the time he was hired by AWS. *See, e.g.*, *SmithKline*, 439

F.3d at 1320. For this reason alone, Oracle's entire challenge to the CO's determination regarding AWS hiring Mr. Ubhi must fail.

Oracle cannot merely demonstrate that Mr. Ubhi had *access* to non-public, competitively-useful information (which it has not done). Rather, Oracle must also demonstrate that the CO irrationally determined that: 1) Mr. Ubhi did not *disclose* non-public, competitively-useful information to AWS in violation of the PIA, 41 U.S.C. § 2102; or 2) any OCI created by AWS hiring Mr. Ubhi was not sufficiently *mitigated*. FAR § 9.504(e). Because Oracle does not challenge the CO's conclusions regarding the effective firewall, *see* App.Br.57-58, its entire argument regarding AWS hiring Mr. Ubhi must fail.

In any event, the CO's determinations that Mr. Ubhi was effectively firewalled from the AWS JEDI proposal team since his hiring in November 2017 because he was functionally, organizationally, and geographically separated from the proposal team and that he did not, in fact, provide any non-public, competitively-useful information to AWS are well supported by the administrative record. *See* Appx158711-158712, Appx158749-158752; *see also, e.g.*, Appx124537-124539, Appx160783-160788, Appx160797-160800, Appx160807-160813.

Moreover, Oracle's brief provides no basis to second guess DoD's conclusion that Mr. Ubhi did not have access to non-public, competitively-useful

information as a result of his early involvement in JEDI. *See* App.Br.57-58. DoD conducted a detailed investigation to determine whether Mr. Ubhi obtained any non-public, competitively-useful information from AWS's competitors while conducting market research. *See, e.g.*, Appx158713-158716, Appx158725-158735. Although the CO recognized that some documents were marked proprietary, DoD reasonably concluded that the information to which Mr. Ubhi had access was either publicly available or not competitively useful. *See id.*

Likewise, the CO reasonably concluded that information learned in internal Government meetings related to JEDI did not provide Mr. Ubhi with competitively-useful information. Appx158715-16. The CO recognized that this information might provide insight into "DoD users' individual needs, problems, and lessons learned from working on the cloud prior to the JEDI Cloud requirements development," but reasonably found that this information does not represent DoD's enterprise-wide needs, which are reflected in the public JROC memorandum and solicitation. *See id.*

Oracle also erroneously argues that the CO's investigation was inadequate because she "only considered a handful of documents on the Google drive[.]" App.Br.58. In fact, the CO considered numerous documents she determined to be most relevant, including vendor meeting notes, vendor presentations, e-mails, Slack messages, and other documents that might have contained competitively-

useful information. *See, e.g.*, Appx158707, Appx158713-158716, Appx158724-158743. A review of every document on the JEDI Google Drives as of October 31, 2017 would have been contrary to FAR § 9.504(d).

Accordingly, the CO reasonably determined that AWS hiring Mr. Ubhi did not create an unmitigated OCI and that AWS did not violate the PIA by obtaining non-public, competitively-useful JEDI information.

3. Victor Gavin

The CO also reasonably determined that AWS's employment of Mr. Gavin did not provide AWS with any non-public, competitively-useful JEDI-related information and, thus, did not create an unmitigated OCI. Appx158747-158748, Appx158753-158754. The CO reasonably determined that, given Mr. Gavin's limited involvement in the JEDI procurement, his access to competitively-useful information was limited to a draft Acquisition Strategy that had since been revised. *See* Appx158747, Appx158754. The CO also reasonably determined that Mr. Gavin did not provide this information to anyone at AWS. *See id.*

Mr. Gavin and two people primarily responsible for AWS's JEDI proposal all declared that Mr. Gavin did not have any input into AWS's proposal. Appx160803, Appx160809-160810, Appx160813-160814. Additionally, five days after the solicitation was issued, AWS implemented a formal firewall directing Mr. Gavin and the JEDI proposal team not to interact regarding AWS's JEDI proposal.

Appx124544-124545. AWS submitted declarations stating that every member of the JEDI proposal team confirmed receipt of the firewall e-mail and confirmed that they had not received any information from Mr. Gavin. Appx160809, Appx160813.

Mr. Gavin and a member of AWS's JEDI proposal team both acknowledged that, after Mr. Gavin joined AWS, but before the firewall was implemented, they had a few informal conversations in which JEDI came up, but both averred that Mr. Gavin did not provide any non-public information regarding JEDI. Appx124550-124554.

The CO reasonably accepted these representations from multiple sources, Appx158747, Appx158754, and was not required to inquire further. *See* FAR § 9.504(d). Accordingly, the CO rationally determined that AWS hiring Mr. Gavin did not provide AWS with an unfair competitive advantage, based upon a reasonable investigation.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the judgment of the Court of Federal Claims.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of December 2019, a copy of the foregoing BRIEF FOR DEFENDANT-APPELLEE UNITED STATES was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ William P. Rayel

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 32(a) of this Court's rules. The brief contains 13,929 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Rule 32(b) of this Court's rules. In making this certification, I have relied upon the word count function in Microsoft Word.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

/s/ William P. Rayel
December 26, 2019

2019-2326

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORACLE AMERICA, INC.,
Plaintiff-Appellant,
v.
UNITED STATES, AMAZON WEB SERVICES, INC.,
Defendant-Appellees,

Appeal from the United States Court of Federal Claims
in Case No. 18-1880C (Senior Judge Bruggink)

ADDENDUM TO BRIEF FOR DEFENDANT-APPELLEE UNITED STATES

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 10. Armed Forces (Refs & Annos)
Subtitle A. General Military Law (Refs & Annos)
Part IV. Service, Supply, and Procurement (Refs & Annos)
Chapter 137. Procurement Generally (Refs & Annos)

10 U.S.C.A. § 2302

§ 2302. Definitions

Effective: December 12, 2017
Currentness

In this chapter:

(1) The term "head of an agency" means the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Homeland Security, and the Administrator of the National Aeronautics and Space Administration.

(2) The term "competitive procedures" means procedures under which the head of an agency enters into a contract pursuant to full and open competition. Such term also includes--

(A) procurement of architectural or engineering services conducted in accordance with chapter 11 of title 40;

(B) the competitive selection for award of science and technology proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals;

(C) the procedures established by the Administrator of General Services for the multiple award schedule program of the General Services Administration if--

(i) participation in the program has been open to all responsible sources; and

(ii) orders and contracts under such program result in the lowest overall cost alternative to meet the needs of the United States;

(D) procurements conducted in furtherance of section 15 of the Small Business Act (15 U.S.C. 644) as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete; and

(E) a competitive selection of research proposals resulting from a general solicitation and peer review or scientific review (as appropriate) solicited pursuant to section 9 of the Small Business Act (15 U.S.C. 638).

(3) The following terms have the meanings provided such terms in chapter 1 of title 41:

(A) The term “procurement”.

(B) The term “procurement system”.

(C) The term “standards”.

(D) The term “full and open competition”.

(E) The term “responsible source”.

(F) The term “item”.

(G) The term “item of supply”.

(H) The term “supplies”.

(I) The term “commercial item”.

(J) The term “nondevelopmental item”.

(K) The term “commercial component”.

(L) The term “component”.

(4) The term “technical data” means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

(5) The term “major system” means a combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property. A system shall be considered a major system if (A) the conditions of

section 2302d of this title are satisfied, or (B) the system is designated a "major system" by the head of the agency responsible for the system.

(6) The term "Federal Acquisition Regulation" means the Federal Acquisition Regulation issued pursuant to section 1303(a)(1) of title 41.

(7) The term "simplified acquisition threshold" has the meaning provided that term in section 134 of title 41, except that, in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation or a humanitarian or peacekeeping operation, the term means an amount equal to two times the amount specified for that term in such section.

(8) The term "humanitarian or peacekeeping operation" means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing.

(9) The term "nontraditional defense contractor", with respect to a procurement or with respect to a transaction authorized under section 2371(a) or 2371b of this title, means an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section.

CREDIT(S)

(Aug. 10, 1956, c. 1041, 70A Stat. 127; Pub.L. 85-568, Title III, § 301(b), July 29, 1958, 72 Stat. 432; Pub.L. 85-861, § 1(43A), Sept. 2, 1958, 72 Stat. 1457; Pub.L. 96-513, Title V, § 511(74), Dec. 12, 1980, 94 Stat. 2926; Pub.L. 98-369, Div. B, Title VII, § 2722(a), July 18, 1984, 98 Stat. 1186; Pub.L. 98-525, Title XII, § 1211, Oct. 19, 1984, 98 Stat. 2589; Pub.L. 98-577, Title V, § 504(b)(3), Oct. 30, 1984, 98 Stat. 3087; Pub.L. 99-661, Div. A, Title XIII, § 1343(a)(13), Nov. 14, 1986, 100 Stat. 3993; Pub.L. 100-26, § 7(k)(2), Apr. 21, 1987, 101 Stat. 284; Pub.L. 101-189, Div. A, Title VIII, § 853(b)(1), Nov. 29, 1989, 103 Stat. 1518; Pub.L. 102-25, Title VII, § 701(d)(1), Apr. 6, 1991, 105 Stat. 113; Pub.L. 102-190, Div. A, Title VIII, § 805, Dec. 5, 1991, 105 Stat. 1417; Pub.L. 103-355, Title I, § 1502, Oct. 13, 1994, 108 Stat. 3296; Pub.L. 104-106, Div. D, Title XLIII, § 4321(b)(3), Feb. 10, 1996, 110 Stat. 672; Pub.L. 104-201, Div. A, Title VIII, §§ 805(a)(1), 807(a), Sept. 23, 1996, 110 Stat. 2605, 2606; Pub.L. 105-85, Div. A, Title VIII, § 803(b), Nov. 18, 1997, 111 Stat. 1832; Pub.L. 107-217, § 3(b)(2), Aug. 21, 2002, 116 Stat. 1295; Pub.L. 107-296, Title XVII, § 1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub.L. 111-350, § 5(b)(8), Jan. 4, 2011, 124 Stat. 3842; Pub.L. 111-383, Div. A, Title VIII, § 866(g)(1), Jan. 7, 2011, 124 Stat. 4298; Pub.L. 113-291, Div. A, Title X, § 1071(a)(2), Dec. 19, 2014, 128 Stat. 3504; Pub.L. 114-92, Div. A, Title VIII, § 815(b), Nov. 25, 2015, 129 Stat. 896; Pub.L. 115-91, Div. A, Title II, § 221, Dec. 12, 2017, 131 Stat. 1333.)

10 U.S.C.A. § 2302, 10 USCA § 2302
Current through P.L. 116-90.

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Proposed Legislation

10 U.S.C.A. § 2304

§ 2304. Contracts: competition requirements

Effective: August 13, 2018
Currentness

(a)(1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services--

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedure appropriate under the circumstances, the head of an agency--

(A) shall solicit sealed bids if--

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

(b)(1) The head of an agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service if the head of the agency determines that to do so--

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization;

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(D) would ensure the continuous availability of a reliable source of supply of such property or service;

(E) would satisfy projected needs for such property or service determined on the basis of a history of high demand for the property or service; or

(F) in the case of medical supplies, safety supplies, or emergency supplies, would satisfy a critical need for such supplies.

(2) The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644).

(3) A contract awarded pursuant to the competitive procedures referred to in paragraphs (1) and (2) shall not be subject to the justification and approval required by subsection (f)(1).

(4) A determination under paragraph (1) may not be made for a class of purchases or contracts.

(c) The head of an agency may use procedures other than competitive procedures only when--

(1) the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency;

(2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;

(4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to subsection (k), a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the agency--

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(d)(1) For the purposes of applying subsection (c)(1)--

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a concept--

(i) that is unique and innovative or, in the case of a service, for which the source demonstrates a unique capability of the source to provide the service; and

(ii) the substance of which is not otherwise available to the United States, and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, or the continued provision of highly specialized services, such property or services may be

deemed to be available only from the original source and may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in--

(i) substantial duplication of cost to the United States which is not expected to be recovered through competition; or

(ii) unacceptable delays in fulfilling the agency's needs.

(2) The authority of the head of an agency under subsection (c)(7) may not be delegated.

(3)(A) The contract period of a contract described in subparagraph (B) that is entered into by an agency pursuant to the authority provided under subsection (c)(2)--

(i) may not exceed the time necessary--

(I) to meet the unusual and compelling requirements of the work to be performed under the contract; and

(II) for the agency to enter into another contract for the required goods or services through the use of competitive procedures; and

(ii) may not exceed one year unless the head of the agency entering into such contract determines that exceptional circumstances apply.

(B) This paragraph applies to any contract in an amount greater than the simplified acquisition threshold.

(e) The head of an agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) shall request offers from as many potential sources as is practicable under the circumstances.

(f)(1) Except as provided in paragraph (2) and paragraph (6), the head of an agency may not award a contract using procedures other than competitive procedures unless--

(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved--

(i) in the case of a contract for an amount exceeding $500,000 (but equal to or less than $10,000,000), by the competition advocate for the procuring activity (without further delegation) or by an official referred to in clause (ii) or (iii);

(ii) in the case of a contract for an amount exceeding $10,000,000 (but equal to or less than $75,000,000), by the head of the procuring activity (or the head of the procuring activity's delegate designated pursuant to paragraph (6)(A)); or

(iii) in the case of a contract for an amount exceeding $75,000,000, by the senior procurement executive of the agency designated pursuant to section 1702(c) of title 41 (without further delegation) or in the case of the Under Secretary of Defense for Acquisition, Technology, and Logistics, acting in his capacity as the senior procurement executive for the Department of Defense, the Under Secretary's delegate designated pursuant to paragraph (6)(B); and

(C) any required notice has been published with respect to such contract pursuant to section 1708 of title 41 and all bids or proposals received in response to that notice have been considered by the head of the agency.

(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required--

(A) when a statute expressly requires that the procurement be made from a specified source;

(B) when the agency's need is for a brand-name commercial item for authorized resale;

(C) in the case of a procurement permitted by subsection (c)(7);

(D) in the case of a procurement conducted under (i) chapter 85 of title 41, or (ii) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(E) in the case of a procurement permitted by subsection (c)(4), but only if the head of the contracting activity prepares a document in connection with such procurement that describes the terms of an agreement or treaty, or the written directions, referred to in that subsection that have the effect of requiring the use of procedures other than competitive procedures.

(3) The justification required by paragraph (1)(A) shall include--

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

(F) a statement of the actions, if any, the agency may take to remove or overcome any barrier to competition before a subsequent procurement for such needs.

(4) In no case may the head of an agency--

(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure property or services from another agency unless such other agency complies fully with the requirements of this chapter in its procurement of such property or services.

The restriction contained in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

(5)(A) The authority of the head of a procuring activity under paragraph (1)(B)(ii) may be delegated only to an officer or employee who--

(i) if a member of the armed forces, is a general or flag officer; or

(ii) if a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of brigadier general or rear admiral (lower half).

(B) The authority of the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (1)(B)(iii) may be delegated only to--

(i) an Assistant Secretary of Defense; or

(ii) with respect to the element of the Department of Defense (as specified in section 111(b) of this title), other than a military department, carrying out the procurement action concerned, an officer or employee serving in or assigned or detailed to that element who--

(I) if a member of the armed forces, is serving in a grade above brigadier general or rear admiral (lower half); or

(II) if a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of major general or rear admiral.

(6) The justification and approval required by paragraph (1) is not required in the case of a Phase III award made pursuant to section 9(r)(4) of the Small Business Act (15 U.S.C. 638(r)(4)).

(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for--

(A) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and

(B) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than $5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.

(2) A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified procedures required by paragraph (1).

(3) In using simplified procedures, the head of an agency shall promote competition to the maximum extent practicable.

(4) The head of an agency shall comply with the Federal Acquisition Regulation provisions referred to in section 1901(e) of title 41.

(h) For the purposes of the following, purchases or contracts awarded after using procedures other than sealed-bid procedures shall be treated as if they were made with sealed-bid procedures:

(1) Chapter 65 of title 41.

(2) Sections 3141-3144, 3146, and 3147 of title 40.

(i)(1) The Secretary of Defense shall prescribe by regulation the manner in which the Department of Defense negotiates prices for supplies to be obtained through the use of procedures other than competitive procedures, as defined in section 2302(2) of this title.

(2) The regulations required by paragraph (1) shall--

(A) specify the incurred overhead a contractor may appropriately allocate to supplies referred to in that paragraph; and

(B) require the contractor to identify those supplies which it did not manufacture or to which it did not contribute significant value.

(3) Such regulations shall not apply to an item of supply included in a contract or subcontract for which the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.

(j) The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements.

(k)(1) It is the policy of Congress that an agency named in section 2303(a) of this title should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.

(2) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law--

(A) specifically refers to this subsection;

(B) specifically identifies the particular non-Federal Government entity involved; and

(C) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in paragraph (1).

(3) For purposes of this subsection, a contract is a new contract unless the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract.

(4) This subsection shall not apply with respect to any contract that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an agency named in section 2303(a) of this title and to report on such matters to the Congress or any agency of the Federal Government.

(l)(1)(A) Except as provided in subparagraph (B), in the case of a procurement permitted by subsection (c), the head of an agency shall make publicly available, within 14 days after the award of the contract, the documents containing the justification and approval required by subsection (f)(1) with respect to the procurement.

(B) In the case of a procurement permitted by subsection (c)(2), subparagraph (A) shall be applied by substituting “30 days” for “14 days”.

(2) The documents shall be made available on the website of the agency and through a government-wide website selected by the Administrator for Federal Procurement Policy.

(3) This subsection does not require the public availability of information that is exempt from public disclosure under section 552(b) of title 5.

CREDIT(S)

(Aug. 10, 1956, c. 1041, 70A Stat. 128; Pub.L. 85-800, § 8, Aug. 28, 1958, 72 Stat. 967; Pub.L. 85-861, § 33(a)(12), Sept. 2, 1958, 72 Stat. 1565; Pub.L. 87-653, § 1(a) to (c), Sept. 10, 1962, 76 Stat. 528; Pub.L. 90-268, § 5, Mar. 16, 1968, 82 Stat. 50; Pub.L. 90-500, Title IV, § 405, Sept. 20, 1968, 82 Stat. 851; Pub.L. 93-356, § 4, July 25, 1974, 88 Stat. 390; Pub.L. 96-513, Title V, § 511(76), Dec. 12, 1980, 94 Stat. 2926; Pub.L. 97-86, Title IX, § 907(a), Dec. 1, 1981, 95 Stat. 1117; Pub.L. 97-295, § 1(24), Oct. 12, 1982, 96 Stat. 1290; Pub.L. 97-375, Title I, § 114, Dec. 21, 1982, 96 Stat. 1821; Pub.L. 98-369, Div. B, Title VII, §§ 2723(a), 2727(b), July 18, 1984, 98 Stat. 1187, 1194; Pub.L. 98-577, Title V, § 504(b)(1), (2), Oct. 30, 1984, 98 Stat. 3086; Pub.L. 99-145, Title IX, § 961(a)(1), Title XIII, § 1303(a)(13), Nov. 8, 1985, 99 Stat. 703, 739; Pub.L. 99-500, Title I, § 101(c) [Title X, §§ 923(a) to (c), 927(a)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-152, 1783-155; Pub.L. 99-591, Title I, § 101(c) [Title X, §§ 923(a) to (c), 927(a)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-152, 3341-155; Pub.L. 99-661, Div. A, Title IX, formerly Title IV, §§ 923(a) to (c), 927(a), Title XIII, § 1343(a)(14), Nov. 14, 1986, 100 Stat. 3932, 3935, 3993; renumbered Title IX and amended Pub.L. 100-26, §§ 3(5), 7(d)(3), Apr. 21, 1987, 101 Stat. 273, 281; Pub.L. 100-456, Div. A, Title VIII, § 803, Sept. 29, 1988, 102 Stat. 2008; Pub.L. 101-189, Div. A, Title VIII, §§ 812, 817, 818, 853(d), Nov. 29, 1989, 103 Stat. 1493, 1501, 1502, 1519; Pub.L. 101-510, Div. A, Title VIII, § 806(b), Nov. 5, 1990, 104 Stat. 1592; Pub.L. 102-25, Title VII, § 701(d)(2), Apr. 6, 1991, 105 Stat. 114; Pub.L. 102-484, Div. A, Title VIII, §§ 801(h)(2), 816, Title X, § 1052(23), Oct. 23, 1992, 106 Stat. 2445, 2454, 2500; Pub.L. 103-160, Div. A, Title IX, § 904(d)(1), Nov. 30, 1993, 107 Stat. 1728; Pub.L. 103-355, Title I, §§ 1001 to 1003, 1004(b), 1005, Title IV, § 4401(a), Title VII, § 7203(a)(1), Oct. 13, 1994, 108 Stat. 3249, 3253, 3254, 3347, 3379; Pub.L. 104-106, Div. D, Title XLI, §§ 4101(a), 4102(a), Title XLII, § 4202(a)(1), Title XLIII, § 4321(b)(4), (5), Feb. 10, 1996, 110 Stat. 642, 643, 652, 672; Pub.L. 104-320, §§ 7(a)(1), 11(c)(1), Oct. 19, 1996, 110 Stat. 3871, 3873; Pub.L. 105-85, Div. A, Title VIII, §§ 841(b), 850(f)(3)(B), Title X, § 1073(a)(42), (43), Nov. 18, 1997, 111 Stat. 1843, 1850, 1902; Pub.L. 107-107, Div. A, Title X, § 1048(b)(2), Dec. 28, 2001, 115 Stat. 1225; Pub.L. 107-217, § 3(b)(3), Aug. 21, 2002, 116 Stat. 1295; Pub.L. 108-375, Div. A, Title VIII, § 815, Oct. 28, 2004, 118 Stat. 2015; Pub.L. 109-364, Div. A, Title X, § 1071(a)(2), Oct. 17, 2006, 120 Stat. 2398; Pub.L. 110-181, Div. A, Title VIII, § 844(b), Jan. 28, 2008, 122 Stat. 239; Pub.L. 110-417, [Div. A], Title VIII, § 862(b), Oct. 14, 2008, 122 Stat. 4546; Pub.L. 111-350, § 5(b)(12), Jan. 4, 2011, 124 Stat. 3843; Pub.L. 115-91, Div. A, Title XVII, § 1709(b)(2), Dec. 12, 2017, 131 Stat. 1809; Pub.L. 115-232, Div. A, Title VIII, § 812(a)(2)(C)(v), Aug. 13, 2018, 132 Stat. 1847.)

10 U.S.C.A. § 2304, 10 USCA § 2304
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Proposed Legislation

United States Code Annotated
Title 10. Armed Forces (Refs & Annos)
Subtitle A. General Military Law (Refs & Annos)
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Chapter 137. Procurement Generally (Refs & Annos)

10 U.S.C.A. § 2304a

§ 2304a. Task and delivery order contracts: general authority

Effective: August 13, 2018
Currentness

(a) Authority to award.--Subject to the requirements of this section, section 2304c of this title, and other applicable law, the head of an agency may enter into a task or delivery order contract (as defined in section 2304d of this title) for procurement of services or property.

(b) Solicitation.--The solicitation for a task or delivery order contract shall include the following:

(1) The period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any.

(2) The maximum quantity or dollar value of the services or property to be procured under the contract.

(3) A statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.

(c) Applicability of restriction on use of noncompetitive procedures.--The head of an agency may use procedures other than competitive procedures to enter into a task or delivery order contract under this section only if an exception in subsection (c) of section 2304 of this title applies to the contract and the use of such procedures is approved in accordance with subsection (f) of such section.

(d) Single and multiple contract awards.--(1) The head of an agency may exercise the authority provided in this section--

(A) to award a single task or delivery order contract; or

(B) if the solicitation states that the head of the agency has the option to do so, to award separate task or delivery order contracts for the same or similar services or property to two or more sources.

(2) No determination under section 2304(b) of this title is required for award of multiple task or delivery order contracts under paragraph (1)(B).

(3) No task or delivery order contract in an amount estimated to exceed $100,000,000 (including all options) may be awarded to a single source unless the head of the agency determines in writing that--

(A) the task or delivery orders expected under the contract are so integrally related that only a single source can efficiently perform the work;

(B) the contract provides only for firm, fixed price task orders or delivery orders for--

(i) products for which unit prices are established in the contract; or

(ii) services for which prices are established in the contract for the specific tasks to be performed;

(C) only one source is qualified and capable of performing the work at a reasonable price to the government; or

(D) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

(4) The regulations implementing this subsection shall--

(A) establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under the authority of paragraph (1)(B); and

(B) establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.

(e) Contract modifications.--A task or delivery order may not increase the scope, period, or maximum value of the task or delivery order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

(f) Contract period.--The head of an agency entering into a task or delivery order contract under this section may provide for the contract to cover any period up to five years and may extend the contract period for one or more successive periods pursuant to an option provided in the contract or a modification of the contract. The total contract period as extended may not exceed 10 years unless such head of an agency determines in writing that exceptional circumstances necessitate a longer contract period.

(g) Inapplicability to contracts for advisory and assistance services.--Except as otherwise specifically provided in section 2304b of this title, this section does not apply to a task or delivery order contract for the procurement of advisory and assistance services (as defined in section 1105(g) of title 31).

(h) Relationship to other contracting authority.--Nothing in this section may be construed to limit or expand any authority of the head of an agency or the Administrator of General Services to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law.

CREDIT(S)

(Added Pub.L. 103-355, Title I, § 1004(a)(1), Oct. 13, 1994, 108 Stat. 3249; amended Pub.L. 108-136, Div. A, Title VIII, § 843(b), Nov. 24, 2003, 117 Stat. 1553; Pub.L. 108-375, Div. A, Title VIII, § 813(a), Oct. 28, 2004, 118 Stat. 2014; Pub.L. 110-181, Div. A, Title VIII, § 843(a)(1), Jan. 28, 2008, 122 Stat. 236; Pub.L. 111-84, Div. A, Title VIII, § 814(a), Oct. 28, 2009, 123 Stat. 2407; Pub.L. 112-81, Div. A, Title VIII, § 809(b), Dec. 31, 2011, 125 Stat. 1490; Pub.L. 115-232, Div. A, Title VIII, § 816, Aug. 13, 2018, 132 Stat. 1852.)

10 U.S.C.A. § 2304a, 10 USCA § 2304a
Current through P.L. 115-281. Also includes P.L. 115-283 to 115-333, 115-335 to 115-389, 115-391 to 115-396, 115-398, 115-401 and 115-403. Title 26 current through P.L. 115-442.

End of Document

United States Code Annotated
Title 10. Armed Forces (Refs & Annos)
Subtitle A. General Military Law (Refs & Annos)
Part IV. Service, Supply, and Procurement (Refs & Annos)
Chapter 137. Procurement Generally (Refs & Annos)

10 U.S.C.A. § 2319

§ 2319. Encouragement of new competitors

Effective: October 17, 2006
Currentness

(a) In this section, the term "qualification requirement" means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

(b) Except as provided in subsection (c), the head of the agency shall, before establishing a qualification requirement--

(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

(4) ensure that a potential offeror is provided, upon request and on a reimbursable basis, a prompt opportunity to demonstrate its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

(c)(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute or administrative action before October 19, 1984, unless such requirement is a qualified products list.

(2)(A) Except as provided in subparagraph (B), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the purchasing office may waive the requirements of clauses (2) through (6) of subsection (b) for up to two years with respect to the item subject to the qualification requirement.

(B) The waiver authority provided in this paragraph does not apply with respect to a qualified products list.

(3) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror (A) is not on a qualified bidders list, qualified manufacturers list, or qualified products list, or (B) has not been identified as meeting a qualification requirement established after October 19, 1984, if the potential offeror can demonstrate to the satisfaction of the contracting officer (or, in the case of a contract for the procurement of an aviation critical safety item or ship critical safety item, the head of the design control activity for such item) that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

(4) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)) if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(5) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(6) The requirements of subsection (b) also apply before enforcement of any qualified products list, qualified manufacturers list, or qualified bidders list.

(d)(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall--

(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne

only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time considering the duration and dollar value of anticipated future requirements.

(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 3 of the Small Business Act (15 U.S.C. 632).

(e) Within seven years after the establishment of a qualification requirement under subsection (b) or within seven years following an agency's enforcement of a qualified products list, qualified manufacturers list, or qualified bidders list, any such qualification requirement shall be examined and revalidated in accordance with the requirements of subsection (b). The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

(f) Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b).

(g) Definitions.--In this section:

(1) The term "aviation critical safety item" means a part, an assembly, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system if the part, assembly, or equipment contains a characteristic any failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system, an unacceptable risk of personal injury or loss of life, or an uncommanded engine shutdown that jeopardizes safety.

(2) The term "ship critical safety item" means any ship part, assembly, or support equipment containing a characteristic the failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in loss of or serious damage to the ship or unacceptable risk of personal injury or loss of life.

(3) The term "design control activity", with respect to an aviation critical safety item or ship critical safety item, means the systems command of a military department that is specifically responsible for ensuring the airworthiness of an aviation system or equipment, or the seaworthiness of a ship or ship equipment, in which such item is to be used.

CREDIT(S)

(Added Pub.L. 98-525, Title XII, § 1216(a), Oct. 19, 1984, 98 Stat. 2593; amended Pub.L. 100-26, § 7(d)(5), (i)(4), (k)(3), Apr. 21, 1987, 101 Stat. 281, 282, 284; Pub.L. 108-136, Div. A, Title VIII, § 802(d), Nov. 24, 2003, 117 Stat. 1540; Pub.L. 109-364, Div. A, Title I, § 130(d), Oct. 17, 2006, 120 Stat. 2110.)

10 U.S.C.A. § 2319, 10 USCA § 2319
Current through P.L. 116-21. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 41. Public Contracts (Refs & Annos)
Subtitle I. Federal Procurement Policy (Refs & Annos)
Division a. General
Chapter 1. Definitions
Subchapter I. Subtitle Definitions

41 U.S.C.A. § 107
Formerly cited as 41 USCA § 259;41 USCA § 403

§ 107. Full and open competition

Effective: January 4, 2011
Currentness

In this subtitle, the term "full and open competition", when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.

CREDIT(S)

(Pub.L. 111-350, § 3, Jan. 4, 2011, 124 Stat. 3680.)

41 U.S.C.A. § 107, 41 USCA § 107
Current through P.L. 115-122. Also includes P.L. 115-125 to 115-129. Title 26 current through 115-129.

End of Document

48 C.F.R. 1.602–2

1.602–2 Responsibilities.

Effective: July 22, 2013
Currentness

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall—

(a) Ensure that the requirements of 1.602–1(b) have been met, and that sufficient funds are available for obligation;

(b) Ensure that contractors receive impartial, fair, and equitable treatment;

(c) Request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate; and

(d) Designate and authorize, in writing and in accordance with agency procedures, a contracting officer's representative (COR) on all contracts and orders other than those that are firm-fixed price, and for firm-fixed-price contracts and orders as appropriate, unless the contracting officer retains and executes the COR duties. See 7.104(e). A COR—

(1) Shall be a Government employee, unless otherwise authorized in agency regulations;

(2) Shall be certified and maintain certification in accordance with the current Office of Management and Budget memorandum on the Federal Acquisition Certification for Contracting Officer Representatives (FAC–COR) guidance, or for DoD, in accordance with the current applicable DoD policy guidance;

(3) Shall be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with agency procedures;

(4) May not be delegated responsibility to perform functions that have been delegated under 42.202 to a contract administration office, but may be assigned some duties at 42.302 by the contracting officer;

(5) Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions;

(6) Shall be nominated either by the requiring activity or in accordance with agency procedures; and

(7) Shall be designated in writing, with copies furnished to the contractor and the contract administration office—

(i) Specifying the extent of the COR's authority to act on behalf of the contracting officer;

(ii) Identifying the limitations on the COR's authority;

(iii) Specifying the period covered by the designation;

(iv) Stating the authority is not redelegable; and

(v) Stating that the COR may be personally liable for unauthorized acts.

Credits

[70 FR 57451, Sept. 30, 2005; 71 FR 57362, Sept. 28, 2006; 76 FR 14545, March 16, 2011; 77 FR 12926, March 2, 2012; 78 FR 37676, June 21, 2013]

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Notes of Decisions (37)

Current through December 19, 2019; 84 FR 69947.

End of Document

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter A. General
Part 3. Improper Business Practices and Personal Conflicts of Interest (Refs & Annos)
Subpart 3.1. Safeguards
3.104 Procurement Integrity. (Refs & Annos)

48 C.F.R. 3.104–7

3.104–7 Violations or possible violations.

Effective: May 29, 2014
Currentness

(a) A contracting officer who receives or obtains information of a violation or possible violation of 41 U.S.C. 2102, 2103, or 2104 (see 3.104–3) 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.

(ii) If that individual does not concur, the individual must promptly forward the information and documentation to the HCA and advise the contracting officer to withhold award.

(2) If the contracting officer concludes that the violation or possible violation impacts the procurement, the contracting officer must promptly forward the information to the HCA.

(b) The HCA must review all information available and, in accordance with agency procedures, take appropriate action, such as—

(1) Advise the contracting officer to continue with the procurement;

(2) Begin an investigation;

(3) Refer the information disclosed to appropriate criminal investigative agencies;

(4) Conclude that a violation occurred; or

(5) Recommend that the agency head determine that the contractor, or someone acting for the contractor, has engaged in conduct constituting an offense punishable under 41 U.S.C. 2105, for the purpose of voiding or rescinding the contract.

(c) Before concluding that an offeror, contractor, or person has violated 41 U.S.C. chapter 21, the HCA may consider that the interests of the Government are best served by requesting information from appropriate parties regarding the violation or possible violation.

(d) If the HCA concludes that 41 U.S.C. chapter 21 has been violated, the HCA may direct the contracting officer to—

(1) If a contract has not been awarded—

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

(iii) Take any other appropriate actions in the interests of the Government.

(2) If a contract has been awarded—

(i) Effect appropriate contractual remedies, including profit recapture under the clause at 52.203–10, Price or Fee Adjustment for Illegal or Improper Activity, or, if the contract has been rescinded under paragraph (d)(2)(ii) of this subsection, recovery of the amount expended under the contract;

(ii) Void or rescind the contract with respect to which—

(A) The contractor or someone acting for the contractor has been convicted for an offense where the conduct constitutes a violation of 41 U.S.C. 2102 for the purpose of either—

(1) Exchanging the information covered by the subsections for anything of value; or

(2) Obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; or

(B) The agency head has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting an offense punishable under 41 U.S.C. 2105(a); or

(iii) Take any other appropriate actions in the best interests of the Government.

(3) Refer the matter to the agency suspending or debarring official.

(e) The HCA should recommend or direct an administrative or contractual remedy commensurate with the severity and effect of the violation.

(f) If the HCA determines that urgent and compelling circumstances justify an award, or award is otherwise in the interests of the Government, the HCA, in accordance with agency procedures, may authorize the contracting officer to award the contract or execute the contract modification after notifying the agency head.

(g) The HCA may delegate his or her authority under this subsection to an individual at least one organizational level above the contracting officer and of General Officer, Flag, Senior Executive Service, or equivalent rank.

Credits

[55 FR 49854, Nov. 30, 1990; 62 FR 227, 230, Jan. 2, 1997; 67 FR 13059, 13062, March 20, 2002; 79 FR 24196, April 29, 2014]

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Current through December 19, 2019; 84 FR 69947.

End of Document

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter B. Acquisition Planning
Part 6. Competition Requirements (Refs & Annos)
Subpart 6.3. Other than Full and Open Competition

48 C.F.R. 6.302–1

6.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

Effective: May 6, 2019
Currentness

(a) Authority.

(1) Citations: 10 U.S.C. 2304(c)(1) or 41 U.S.C. 3304(a)(1).

(2) When the supplies or services required by the agency are available from only one responsible source, or, for DoD, NASA, and the Coast Guard, from only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements, full and open competition need not be provided for.

(i) Supplies or services may be considered to be available from only one source if the source has submitted an unsolicited research proposal that:

(A) Demonstrates a unique and innovative concept (see definition at 2.101), or, demonstrates a unique capability of the source to provide the particular research services proposed;

(B) Offers a concept or services not otherwise available to the Government; and

(C) Does not resemble the substance of a pending competitive acquisition. (See 10 U.S.C. 2304(d)(1)(A) and 41 U.S.C. 3304(b)(1).)

(ii) Supplies may be deemed to be available only from the original source in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in—

(A) Substantial duplication of cost to the Government that is not expected to be recovered through competition; or

(B) Unacceptable delays in fulfilling the agency's requirements. (See 10 U.S.C. 2304(d)(1)(B) or 41 U.S.C. 3304(b)(2).)

(iii) For DoD, NASA, and the Coast Guard, services may be deemed to be available only from the original source in the case of follow-on contracts for the continued provision of highly specialized services when it is likely that award to any other source would result in—

(A) Substantial duplication of cost to the Government that is not expected to be recovered through competition; or

(B) Unacceptable delays in fulfilling the agency's requirements. (See 10 U.S.C. 2304(d)(1)(B).)

(b) Application. This authority shall be used, if appropriate, in preference to the authority in 6.302–7; it shall not be used when any of the other circumstances is applicable. Use of this authority may be appropriate in situations such as the following (these examples are not intended to be all-inclusive and do not constitute authority in and of themselves):

(1) When there is a reasonable basis to conclude that the agency's minimum needs can only be satisfied by—

(i) Unique supplies or services available from only one source or only one supplier with unique capabilities; or

(ii) For DoD, NASA, and the Coast Guard, unique supplies or services available from only one or a limited number of sources or from only one or a limited number of suppliers with unique capabilities.

(2) The existence of limited rights in data, patent rights, copyrights, or secret processes; the control of basic raw material; or similar circumstances, make the supplies and services available from only one source (however, the mere existence of such rights or circumstances does not in and of itself justify the use of these authorities) (see part 27).

(3) When acquiring utility services (see 41.101), circumstances may dictate that only one supplier can furnish the service (see 41.202); or when the contemplated contract is for construction of a part of a utility system and the utility company itself is the only source available to work on the system.

(4) When the agency head has determined in accordance with the agency's standardization program that only specified makes and models of technical equipment and parts will satisfy the agency's needs for additional units or replacement items, and only one source is available.

(c) Application for brand-name descriptions.

(1) An acquisition or portion of an acquisition that uses a brand-name description or other purchase description to specify a particular brand-name, product, or feature of a product, peculiar to one manufacturer—

(i) Does not provide for full and open competition, regardless of the number of sources solicited; and

(ii) Shall be justified and approved in accordance with 6.303 and 6.304.

(A) If only a portion of the acquisition is for a brand-name product or item peculiar to one manufacturer, the justification and approval is to cover only the portion of the acquisition which is brand-name or peculiar to one manufacturer. The justification should state it is covering only the portion of the acquisition which is brand-name or peculiar to one manufacturer, and the approval level requirements will then only apply to that portion;

(B) The justification should indicate that the use of such descriptions in the acquisition or portion of an acquisition is essential to the Government's requirements, thereby precluding consideration of a product manufactured by another company; and

(C) The justification shall be posted with the solicitation (see 5.102(a)(6)).

(2) Brand-name or equal descriptions, and other purchase descriptions that permit prospective contractors to offer products other than those specifically referenced by brand-name, provide for full and open competition and do not require justifications and approvals to support their use.

(d) Limitations.

(1) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304.

(2) For contracts awarded using this authority, the notices required by 5.201 shall have been published and any bids, proposals, quotations, or capability statements must have been considered.

Credits

[50 FR 4221, Jan. 30, 1985; 50 FR 52431, Dec. 23, 1985; 52 FR 21886, June 9, 1987; 53 FR 27463, July 20, 1988; 56 FR 29127, June 25, 1991; 59 FR 67018, Dec. 28, 1994; 62 FR 51270, Sept. 30, 1997; 66 FR 2128, Jan. 10, 2001; 66 FR 14260, March 9, 2001; 71 FR 57359, Sept. 28, 2006; 73 FR 10962, Feb. 28, 2008; 77 FR 193, Jan. 3, 2012; 79 FR 24198, April 29, 2014; 84 FR 19842, May 6, 2019]

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Notes of Decisions (41)

Current through December 19, 2019; 84 FR 69947.

End of Document

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter B. Acquisition Planning
Part 9. Contractor Qualifications (Refs & Annos)
Subpart 9.5. Organizational and Consultant Conflicts of Interest (Refs & Annos)

48 C.F.R. 9.504

9.504 Contracting officer responsibilities.

Currentness

(a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 9.503. The waiver request and decision shall be included in the contract file.

Credits
[55 FR 42686, Oct. 22, 1990; 56 FR 55377, Oct. 25, 1991]

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Notes of Decisions (51)

Current through Dec. 6, 2018; 83 FR 63036.

End of Document

Code of Federal Regulations
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter B. Acquisition Planning
Part 9. Contractor Qualifications (Refs & Annos)
Subpart 9.5. Organizational and Consultant Conflicts of Interest (Refs & Annos)

48 C.F.R. 9.505

9.505 General rules.

Effective: May 6, 2019
Currentness

The general rules in 9.505–1 through 9.505–4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses—

(1) Proprietary information that was obtained from a Government official without proper authorization; or

(2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

Credits
[55 FR 42686, Oct. 22, 1990; 56 FR 55377, Oct. 25, 1991; 62 FR 232, Jan. 2, 1997; 64 FR 32748, June 17, 1999; 67 FR 13063, March 20, 2002; 84 FR 19845, May 6, 2019]

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Notes of Decisions (16)

Current through December 19, 2019; 84 FR 69947.

9.505 General rules., 48 C.F.R. 9.505

End of Document