No.

In the Supreme Court of the United States

ORACLE AMERICA, INC.,
PETITIONER,

v.

UNITED STATES AND AMAZON WEB SERVICES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Department of Defense structured its procurement for cloud-computing services, worth up to $10 billion, for award to a single bidder. Petitioner Oracle America, Inc. filed a bid protest, arguing that the single-bidder award violated federal law, which requires agencies to choose multiple bidders for contracts of this size and type. The Federal Circuit agreed with Oracle that the procurement violated federal law, yet declined to remand the issue to the agency as required by *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). Instead, the court applied its own "harmless error" exception to conclude that even if the agency were to conduct the procurement as a multiple-award solicitation, Oracle would not stand a better chance of winning the contract.

During the bid protest, the Defense Department uncovered serious conflicts of interest between several of its employees and a leading bidder. The Federal Circuit acknowledged that one or more conflicts may have violated 18 U.S.C. § 208, the criminal conflict-of-interest prohibition. It nevertheless upheld the procurement, deferring to the Department's view that the conflicts had not "tainted" the solicitation.

The questions presented are:

1. Whether a bid protest that establishes a violation of federal law may be denied for "harmless error" based on a rationale not present in the administrative record.

2. Whether, in resolving a bid protest that establishes a violation of the criminal conflict-of-interest statute, 18 U.S.C. § 208, the Federal Circuit can enforce the contract based on deference to an agency's assessment that the criminal violation did not taint the procurement.

PARTIES TO THE PROCEEDINGS

Petitioner Oracle America, Inc. was plaintiff in the U.S. Court of Federal Claims and appellant in the Federal Circuit.

Respondent the United States was defendant in the U.S. Court of Federal Claims and appellee in the Federal Circuit. Respondent Amazon Web Services, Inc. was defendant-intervenor in the U.S. Court of Federal Claims and appellee in the Federal Circuit.

RULE 29.6 STATEMENT

Oracle America, Inc. is wholly owned by Oracle Corporation, through one or more non-publicly held wholly owned subsidiaries. Oracle Corporation is a publicly held corporation. No other publicly held corporation owns 10% or more of Oracle America, Inc.'s stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Oracle America, Inc.* v. *United States*, No. 2019-2326 (Fed. Cir.), judgment entered on September 2, 2020; and
- *Oracle America, Inc.* v. *United States*, No. 18-1880C (Fed. Cl.), judgment entered on July 19, 2019.

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PETITION FOR A WRIT OF CERTIORARI

What happens to a $10 billion federal procurement contract that is structured in violation of federal law and mired in the criminal misconduct of its chief architects? One might reasonably presume that the award would be set aside, so that the procurement can be reconsidered by the agency, in the first instance, in accordance with legal requirements. Certainly that is the route required by this Court's precedents.

But the Federal Circuit has charted a very different course. Despite *agreeing* with Oracle that the Defense Department's 10-year, $10 billion JEDI cloud-computing procurement violates Congress's statutory restriction on single-source awards, the court rejected Oracle's bid protest and left the unlawful procurement in place. Rather than remanding so that the agency could structure the procurement lawfully, the Federal Circuit deemed the statutory violation "harmless," based on speculation about requirements the agency *would have* imposed if the matter were remanded. The result: Despite a judicial determination that federal law forbids the agency from awarding the procurement to a single source, that violation remains uncorrected; JEDI is still a single-source contract.

The Federal Circuit's harmless-error doctrine runs counter to this Court's instruction that "[t]he grounds upon which an

administrative order must be judged are those upon which the record discloses that its action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). This simple but fundamental principle of administrative law—that agency "action must be measured by what the [agency] did, not by what it might have done," *id.* at 93-94—means that agencies, not courts, must determine how best to respond to administrative errors. The Federal Circuit's repeated violation of the *Chenery* principle in its procurement decisions warrants this Court's review.

But there is more. The same Defense Department officials who led the agency to structure the JEDI procurement as a single-source award also violated 18 U.S.C. § 208, the federal criminal conflict-of-interest prohibition. The Federal Circuit again accepted that agency officials likely had broken the law, yet declined to heed this Court's instruction that such criminal misconduct "renders the contract unenforceable." *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961). Instead, the court upheld, as not "clearly erroneous," a determination by the Defense Department that its own criminal ethics violations did not taint the procurement. According to the Federal Circuit, Congress implicitly gave contracting officers, rather than courts, primary responsibility to decide whether a Section 208 violation requires setting aside a procurement.

Both issues are recurring and important. The Federal Circuit frequently upholds illegally structured or corrupted contracts on the basis of "harmless error"—a practice that abdicates judicial responsibility to check agency misconduct, usurps administrative prerogatives, and undermines public confidence in government spending. The decision below signals that agencies can flout congressional safeguards established to maintain the integrity of the procurement process, confident

that rule-breaking will later be excused through after-the-fact justifications offered to deferential courts.

This petition is an ideal vehicle to address both questions presented. The legal issues are dispositive; the material facts in the administrative record are undisputed; and the questions are timely. And unlike many government-contract disputes that come before this Court, the underlying JEDI contract has not yet gone into effect. *Amazon Web Services, Inc.* v. *United States*, 147 Fed. Cl. 146, 150 (2020). Because the Federal Circuit has exclusive jurisdiction over bid protests, only this Court can restore an evenhanded commitment to fair competition and reestablish the balance of power among the three branches of government.

OPINIONS BELOW

The opinion of the Court of Federal Claims (App. 40a-120a) is reported at 144 Fed. Cl. 88. The opinion of the Federal Circuit (App. 1a-39a) is reported at 975 F.3d 1279.

JURISDICTION

The Federal Circuit entered judgment on September 2, 2020. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App. 121a-125a.

STATEMENT

A. The JEDI Cloud Solicitation

In 2018, the Department of Defense issued a request for proposals to provide worldwide cloud-computing services for the entire agency over a ten-year period. Valued at up to $10 billion, the contract—known as the Joint Enterprise Defense Infrastructure (JEDI) Cloud contract—is among the largest information-technology contracts in the history of the federal government.

1. The Department structured the JEDI Cloud procurement as an "indefinite delivery, indefinite quantity" (IDIQ) contract, sometimes called a "task order" contract. Unlike contracts that identify in advance a firm quantity of desired goods or services, IDIQ contracts create an open-ended agreement for the awardee to supply an agency's needs over time within broadly stated parameters. "The [agency] then places orders through the indefinite-delivery contract when it knows the timing and quantity of its needs." Gov't Accountability Office, GAO-18-412R, *Use by the Department of Defense of Indefinite-Delivery Contracts* 1 (2018). Indefinite delivery contracts (roughly 80% of which are IDIQ) are the federal government's most frequently used contract type, accounting for over $130 billion in annual spending. *Id.* at 6.

Congress has recognized that IDIQ contracts create substantial risks by locking an agency into long-term commitments to pay for "broad categories of ill-defined services," which "unnecessarily diminishes competition and results in the waste of taxpayer dollars." S. Rep. No. 258, 103d Cong., 2d Sess. 15 (1994). To promote innovation, flexibility, competition, and cost-savings—and to prevent favoritism and corruption—Congress has instructed agencies to prefer "multiple awards," *ibid.*, which give winning bidders "a fair

chance to compete" to fulfill the agency's needs as they arise over the life of the contract, *id.* at 2.

Federal law restricts awarding large IDIQ contracts to a single vendor. Congress has specified that "no task … order contract in an amount estimated to exceed [$112 million] may be awarded to a single source unless the head of the agency determines in writing that" one of four statutory exceptions applies. 10 U.S.C. § 2304a(d)(3)(A); see 80 Fed. Reg. 38,293, 38,997 (July 2, 2015) (adjusting for inflation). Despite Congress's strong "preference for making multiple awards of IDIQ contracts," agencies still routinely make single awards, including for large, long-term procurements. GAO-18-412R at 1, 5. The Department of Defense is among the worst offenders: It uses single-award IDIQ contracts *more than 60% of the time*. *Id.* at 6.

2. a. From the outset, the Defense Department made clear that it intended to award the decade-long JEDI Cloud contract to a single provider. App. 44a-47a. Numerous industry stakeholders expressed concerns with that approach, observing that it contravened best practices in cloud computing; would stifle competition and innovation; and could reduce the agency's flexibility and increase security risks. *E.g.*, App. 48a; H.R. Rep. No. 84, 116th Cong., 1st Sess. 12 (2019) (House Appropriations Committee expressing concern that Department "is deviating from established OMB policy and industry best practices, and may be failing to implement a strategy that lowers costs and fully supports data innovation").

Nevertheless, the Department announced that it would award the JEDI Cloud contract to a single provider, App. 60a, prompting media observers to comment that "the Pentagon seems hell bent on going forward with the single vendor idea."

Ron Miller, *Why the Pentagon's $10 billion JEDI deal has cloud companies going nuts*, Tech Crunch (Sept. 15, 2018).[1]

In a written determination justifying the agency's decision, the Under Secretary of Defense concluded that one of the statutory exceptions to § 2304a(d)(3)'s single-award prohibition applied. App. 57a. Specifically, she determined that the JEDI Cloud contract "provides only for firm, fixed price (FFP) task orders or delivery orders for services for which prices are established in the contract for the specific tasks to be performed." *Ibid.*; see 10 U.S.C. § 2304a(d)(3)(A)(ii). The Under Secretary so concluded even though the contract contemplated the "incorporation of … new services into the contract" after award, at prices to be determined at a later date. App. 57a-60a. The Under Secretary did not invoke any other statutory exception under § 2304a(d)(3).

b. The JEDI Cloud solicitation was unusual in other ways. The request for proposals included several "gate" provisions that prospective bidders were required to satisfy. A bidder's failure to satisfy any gate provision meant that, regardless of its other qualities, the bid "w[ould] not be further evaluated." App. 61a.

One of the gate provisions (Gate 1.1) required the contractor to demonstrate, prior to proposal submission, that JEDI Cloud usage would represent less than 50% of the contractor's total commercial cloud usage. App. 61a-62a. Oracle satisfied this gate at the time proposals were due.

Another gate provision (Gate 1.2) required the contractor to have at least three geographically separated commercial cloud datacenters, each of which must hold a "FedRAMP Moderate" certification. C.A. App. 100792. FedRAMP is a government-wide program that provides broad security

[1] https://tcrn.ch/38u2pfA.

standards for cloud-computing.[2] The JEDI Cloud contract itself did not rely on or incorporate FedRAMP protocols, however; to perform the contract, the winning bidder would instead need to satisfy an entirely separate, contract-specific set of security standards. C.A. App. 105495-96.

When it issued the JEDI Cloud solicitation in July 2018, the Department knew that only two prospective bidders had the requisite FedRAMP certification: Amazon Web Services and Microsoft. See App. 105a. The Department nevertheless required all bidders to obtain FedRAMP certification by the date of *proposal submission*, due only two months later. App. 63a. The Department thus intended, by imposing a pre-submission certification requirement, to limit the universe of potential bidders to Amazon and Microsoft. Even so, Oracle expected to meet (and exceed) the Gate 1.2 requirement by the time an award was made—and in fact did so.

B. Oracle's Protest

Oracle filed a pre-award bid protest with the Government Accountability Office to challenge the single-source decision and other flaws in the JEDI Cloud solicitation. After the challenge was denied, Oracle filed its protest in the Court of Federal Claims in December 2018. App. 64a.

1. While the case was pending in the Claims Court—and as a direct result of Oracle's protest—the Department discovered that several of its employees working on the JEDI Cloud procurement had serious conflicts of interest involving Amazon.

One conflict involved Deap Ubhi, an employee who had engaged in "loud advocacy for a single award approach."

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[2] Frequently Asked Questions, https://www.fedramp.gov/faqs. FedRAMP stands for the Federal Risk and Authorization Management Program.

App. 115a. Ubhi pushed this position at key meetings with Department decision-makers, and he "participated in drafting and editing some of the first documents shaping the procurement." App. 28a. Unbeknownst to the Department, however, Ubhi had been negotiating for employment with Amazon *while still working on the procurement*. App. 69a-73a. Ubhi eventually recused himself, but lied to the Department about the reason: Rather than disclose his months-long employment negotiations, he falsely represented that Amazon had only recently expressed interest in purchasing a start-up that he owned. App. 69a-70a.

Another employee, Tony DeMartino, worked on the JEDI Cloud procurement despite having consulted for Amazon before joining the Department. DeMartino reviewed and commented on documents even after receiving a verbal warning from the Department's Standards of Conduct Office that he should consider recusing himself from anything to do with Amazon. App. 66a-68a.

A third employee, Victor Gavin, accepted a job with Amazon but subsequently attended meetings about the JEDI Cloud procurement. And after he began working at Amazon, Gavin spoke with a colleague there about the procurement. App. 79a-81a.

Once these improprieties came to light, proceedings in the Court of Federal Claims were stayed while a Department contracting officer reviewed the conflicts. App. 70a-71a. The contracting officer concluded that these employees had acted unethically, even unlawfully: The officer found that Gavin and Ubhi had potentially violated 18 U.S.C. § 208, the criminal conflict-of-interest prohibition for federal officials. App. 79a, 81a. Nevertheless, in the contracting officer's opinion, the employees' conflicts ultimately did not "taint" the procurement process. App. 107a.

2. While Oracle's protest was pending in the Claims Court, the Department of Defense continued to evaluate JEDI Cloud bids. Four companies submitted proposals: Oracle, Amazon, IBM, and Microsoft. App. 64a-65a. The Department eliminated Oracle's proposal under Gate 1.1, based on a measurement of Oracle's cloud capacity during an arbitrarily selected period eight-to-nine months *before* proposal submission. The Department did not consider whether Oracle met the other gate criteria. App. 65a. The Department also removed IBM from consideration, finding IBM's proposal unacceptable under Gate 1.2. *Ibid.*

The Department ultimately awarded the JEDI Cloud contract to Microsoft in October 2019. Amazon filed a bid protest, prompting the Department to revise and reconsider parts of the procurement. The Department re-awarded the contract to Microsoft in September 2020. Amazon then renewed its bid protest, and the contract award is presently enjoined pending resolution of Amazon's lawsuit. See *Amazon Web Services, Inc.* v. *United States*, 147 Fed. Cl. 146, 150 (2020).

3. The Court of Federal Claims denied Oracle's bid protest. App. 40a-120a.

At the outset, the Claims Court *agreed* with Oracle that the Department's decision to award the JEDI Cloud contract to a single vendor violated federal law. As the court explained, § 2304a(d)(3) generally "prohibits awarding such large task order contracts to a single vendor," and none of the exceptions to that statutory prohibition on single-vendor awards applied. App. 92a. The Department had attempted to invoke the exception for "firm fixed-price task or delivery orders," 10 U.S.C. § 2304a(d)(3)(A)(ii), but the court rejected that argument as "tortured." App. 95a. The contract called for the vendor to provide "new, additional services to be identified and

priced in the future," and those services "are not, by definition, fixed or established at the time of contracting." *Ibid.*

Despite finding the JEDI Cloud procurement contrary to congressional command, the Claims Court held that this statutory violation did *not* require setting aside the solicitation. The court reasoned that even if the agency had sought multiple providers, "Oracle would not stand a better chance of being awarded [the JEDI Cloud] contract." App. 97a. To reach that conclusion, the court did not point to any statement from the Department regarding how it might structure a multiple-award solicitation—because no such statement existed in the record.

Instead, the Claims Court relied on the speculation of William Rayel, counsel for the government. Rayel argued that even if the agency changed the procurement to a multiple-award solicitation, the agency would still insist on the Gate 1.2 requirement for each award (which, the Department argued, Oracle could not meet). The following remarkable exchange occurred at oral argument, with the court invoking "Rayel on the facts"—shorthand for counsel's representations:

> THE COURT: I understand that we're on Rayel on the facts as opposed to the administrative record.
>
> MR. RAYEL: Well, yeah, you asked me, Your Honor. So yes, I mean, this isn't all—
>
> THE COURT: No, I understand.
>
> MR. RAYEL: Because, I mean, this was a single award. So the agency didn't—I'll admit it doesn't say in [the deputy director's] memorandum ["]and my decision would be the same if there were multiple awards.["]

C.A. App. 2296 (115:16-25). The Claims Court stated that it had "no reason to doubt" the agency's assertion "that the Gate Criteria 1.2 security requirements are the minimum that will be necessary to perform even the least sensitive aspects of the

JEDI Cloud project." App. 97a. The court accordingly concluded that "if multiple awards were made, the security concerns would ratchet up, not down," and "Oracle would not stand a better chance of being awarded this contract." *Ibid.*

The Claims Court also rejected Oracle's arguments that conflicts of interest between Defense Department employees and Amazon required setting aside the procurement. The court again *agreed* with Oracle that the law had been broken, including potential criminal violations of 18 U.S.C. § 208 by Ubhi and Gavin. App. 110a-112a. The facts were more than merely "sufficient to raise eyebrows," the court explained; they revealed "lax oversight" and the "constant gravitational pull on agency employees by technology behemoths." App. 107a. The court noted that "one would hope the agency would be more alert to the possibilities of an erosion of public confidence, particularly given the risk to the agency in having to redo procurements of this size." *Ibid.*

Ultimately, however, the Claims Court viewed its mandate narrowly: The court limited its review to whether the contracting officer had a "rational basis" for asserting that these conflicts of interest had not "tainted" the procurement. App. 108a, 109a. And the court found "nothing irrational" in the contracting officer's decision to overlook the agency's ethical lapses. App. 112a, 118a.

C. The Federal Circuit's Decision

The Federal Circuit affirmed. App. 1a-39a.

Like the Claims Court, the Federal Circuit agreed with Oracle that the Department of Defense's decision to structure the JEDI Cloud contract as a single-award procurement violated 10 U.S.C. § 2304a(d)(3)(A), and was thus "legally improper." App. 16a. The Federal Circuit also acknowledged the "foundational principle of administrative law," articulated by

this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that judicial review of agency action "is limited to 'the grounds that the agency invoked when it took the action.'" App. 15a. The Federal Circuit nevertheless declined to send the case back for the agency to reconsider, in the first instance, how to structure the solicitation in a manner consistent with federal law.

Instead, the Federal Circuit asked a different question: whether the agency's violation of § 2304a(d)(3)(A) was "harmless error." App. 16a. To answer that question, the Federal Circuit stated it would defer to the Claims Court's speculation that the statutory violation did not "prejudice" Oracle. App. 17a. Such a determination, the Federal Circuit said, was a factual finding reviewable "under the clearly erroneous standard." *Ibid.* In other words, the Federal Circuit stated that it would uphold the procurement unless the Claims Court had "clearly" erred in its view—which itself was based on post hoc speculation from agency counsel—that upon remand, the agency would ratchet up its security requirements, such that Oracle would not fare better in a multiple-award competition.

Like the Claims Court, the Federal Circuit identified no statement by the Department regarding how it might structure a multiple-award procurement for the JEDI Cloud contract. The Federal Circuit nevertheless left the legally improper procurement in place:

> [T]he [Claims] [C]ourt's conclusion that the Defense Department would have included Gate 1.2 even if it had modified the solicitation to allow for multiple awards, and that Oracle therefore would not have had a substantial chance of securing the contract, is not clearly erroneous. We therefore will not disturb the Claims Court's determination that the case did not need to be remanded

> to the Defense Department for a further determination whether a single-source award is appropriate.

App. 18a.

The Federal Circuit also rejected Oracle's argument based on the conflicts of interest between Defense Department employees and Amazon. Like the Claims Court, the Federal Circuit did not dispute that the record reflected "conflicts of interest that violate the federal criminal conflict-of-interest statute, 18 U.S.C. § 208." App. 25a. But even such egregious ethical lapses do not suffice to overturn an award, the Federal Circuit stated, absent proof of a "causal link between the illegality and the contract provisions." *Ibid.*

For that inquiry, too, the Federal Circuit stated it would defer: The Department's own contracting officer—rather than the court itself—would determine whether such a causal link existed, subject only to "highly deferential" judicial review. App. 26a. Despite finding the conduct of agency employees "troubling," the court nevertheless upheld, as sufficiently "rational," the contracting officer's assessment that the procurement should be left in place. App. 27a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit has crafted two significant "exceptions" to this Court's precedents regarding judicial review of agency decision-making. The combined effect here led the Federal Circuit to uphold agency action—a $10 billion Defense procurement—that all agree violates federal law. The court's consistent use of these exceptions abdicates its exclusive responsibility to scrutinize and remedy unlawful government contracting.

Both questions call out for review. These issues have arisen routinely and with increasing frequency in bid-protest disputes; without this Court's intervention, contracting

agencies will become further emboldened to skirt statutory guardrails, confident that their decisions can later be rationalized or excused by deferential courts. Waiting would only magnify the waste and fraud exemplified by this case, which presents an ideal vehicle to address both questions presented. Because the Federal Circuit has exclusive appellate oversight of bid protests, only this Court can provide the necessary corrective review. *E.g.*, *Peter* v. *Nantkwest, Inc.*, 140 S. Ct. 365 (2019); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969 (2016).

I. The Federal Circuit's Harmless-Error Approach to Procurement Warrants Review

Congress has vested administrative agencies with authority to commit billions of taxpayer dollars through the federal procurement process—but only if the agency abides by statutory constraints. Here, the Federal Circuit agreed with Oracle that the JEDI Cloud procurement violates one such constraint, 10 U.S.C. § 2304a(d)(3)(A). The court nevertheless left the "legally improper" procurement in place, under "principles of harmless error." App. 16a. Worse still, in applying those principles, the court deferred to agency counsel's post hoc speculation about the criteria that the agency *might apply* if it conducts the procurement as federal law requires.

The Federal Circuit's harmless-error approach creates a perfect storm of governmental unaccountability: Congress's commands go unheeded, the agency is never forced to commit fully to a position, and the judiciary cloaks its abdication in the language of modesty. Only this Court can restore balance and accountability to federal procurement law.

A. The Federal Circuit's Approach to Agency Error Is Irreconcilable with This Court's Precedents

Federal procurements are, at bottom, exercises of agency decision-making. They are governed not only by a matrix of procurement statutes and regulations, but also by the strictures of the Administrative Procedure Act and principles of administrative law. See 28 U.S.C. § 1491(b)(4) (in procurement challenges, "the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5"). One such principle—which predates even the APA's enactment—is that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

1. At issue in *Chenery* was an order of the Securities and Exchange Commission approving a stock reorganization plan. *Id.* at 83. In evaluating the plan, the Commission thought itself bound to rule "as it assumed a court of equity would have acted in a similar case," *id.* at 87, but this Court determined that the agency was not so constrained, *id.* at 88-90. Despite that legal error, the Commission argued "that [its] order should nevertheless be sustained" on other grounds, *id.* at 90, which this Court indicated were likely sufficient to support it, *id.* at 90-91.

Yet the Commission's order still could not stand. As this Court explained, "the considerations urged here in support of the Commission's order were not those upon which its action was based." *Id.* at 92. That flaw required vacatur of the agency's decision, because agency "action must be measured by what the [agency] did, not by what it might have done." *Id.* at 93-94. The Court accordingly remanded to the Commission, so the agency could decide in the first instance whether and how to "exercis[e] its powers" in a manner "upon which its action can be sustained." *Id.* at 95.

Eight decades later, *Chenery* stands for the "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan* v. *EPA*, 576 U.S. 743, 758 (2015) (citation omitted). Courts reviewing agency action accordingly "may not affirm on a basis containing any element of discretion—including discretion to find facts and interpret statutory ambiguities—that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court." *I.C.C.* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). Nor may the court accept "post hoc rationalizations" offered in litigation by the agency or its counsel. *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020).

The *Chenery* rule reinforces "important values of administrative law." *Id.* at 1901. In requiring courts to remand (rather than to rewrite) flawed agency decisions, the rule serves "not to deprecate, but to vindicate the administrative process, for the purpose of the rule is to avoid propelling the court into the domain which Congress has set aside exclusively for the administrative agency." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 169 (1962) (punctuation omitted). The rule also "promotes agency accountability by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority," and it "instills confidence that the reasons given are not simply convenient litigating positions." *Regents*, 140 S. Ct. at 1901 (citations omitted). In short, *Chenery* ensures a process *worthy* of public trust—grounded in the simple truth that "when so much is at stake, … 'the Government should turn square corners in dealing with the people.'" *Id.* at 1909 (citation omitted).

2. The decision below diverged sharply from *Chenery*'s "simple but fundamental rule of administrative law." *SEC* v.

Chenery Corp., 332 U.S. 194, 196 (1947). As the Federal Circuit held, the Defense Department's decision to structure the JEDI Cloud contract as a single-source procurement was based on a legal error: The agency had invoked an exception to § 2304a(d)(3)'s prohibition on large single-source awards, but the exception did not apply. App. 14a. Under *Chenery*, that should have been the end of the matter; the court should have remanded for the Department to consider, in the first instance, how to structure the JEDI Cloud solicitation as a multiple-award procurement.

Instead, the Federal Circuit applied what it called "principles of harmless error." App. 16a. According to the Federal Circuit, those principles involved *two layers* of judicial deference. First, the Court of Claims deferred to speculation from agency counsel regarding whether "the agency would have reached the same decision if it had been aware that the ground it invoked was legally unavailable." *Ibid.* Second, the Federal Circuit said it would affirm the Claims Court's harmless-error finding unless "clearly erroneous." App. 17a.

Both layers of that analysis are flawed. *Chenery* forbids reliance on "*post hoc* justifications [that] are raised in court by those appearing on behalf of the agency." *Regents*, 140 S. Ct. at 1909. Because the Department of Defense never stated on the record what requirements or qualifications it would impose if the JEDI Cloud contract were structured as a multiple-source procurement, the Claims Court could not accept agency counsel's assertions on that issue—aptly called "Rayel on the facts," C.A. App. 2296. And the Federal Circuit compounded that error by treating the Claims Court's ruling as if it were a factual finding, to be upheld unless "clearly erroneous." The combination of these errors turned *Chenery* on its head: The Federal Circuit applied deferential appellate review to a discretionary decision that the agency never even made.

3. The Federal Circuit justified its harmless-error approach as fulfilling this Court's instruction that "[a] remand is unnecessary when the error in question 'clearly had no bearing on the procedure used or the substance of decision reached.'" App. 16a (quoting *Mass. Trs. of E. Gas & Fuel Assocs.* v. *United States*, 377 U.S. 235, 248 (1964)). But that principle has no application here, because the Federal Circuit *agreed* with Oracle that the agency's decision to structure the JEDI Cloud contract as a single-source procurement was "legally improper." App. 16a. A legal error of that caliber—structuring a $10 billion procurement in direct violation of a federal statute—plainly spoke to "the substance of [the] decision reached."

To be sure, *Chenery* does not demand that courts engage in "idle and useless formalit[ies]." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). Courts need not reverse and remand when doing so would be truly "meaningless" because there is "not the slightest uncertainty as to the outcome of a proceeding" on remand. *Ibid.* But the circumstances in which courts may affirm notwithstanding agency error are narrow and closely drawn. See Henry J. Friendly, Chenery *Revisited*, 1969 Duke L.J. 199, 222-224 (1969) (describing these categories). They do not include a situation like this one, where—as in *Chenery* itself—the agency's decision was based solely on a legally impermissible rationale. See *id.* at 222 (cases "[w]here the agency has rested decision on an unsustainable reason" implicate "the *Chenery* doctrine *propremen*t *dit*").

Here, numerous aspects of the case show that a remand would not have been "meaningless." *NLRB*, 394 U.S. at 766 n.6. First and foremost, the *only* stated ground for the agency's decision was shown to be legally erroneous. That alone distinguishes this case from the out-of-circuit precedents cited by the Federal Circuit, App. 16a, in which the agency erred in

making a "subsidiary finding" of fact that was "essentially irrelevant" to the ultimate finding, *Kurzon* v. *U.S. Postal Serv.*, 539 F.2d 788, 796-97 (1st Cir. 1976); or where the asserted legal error was "unnecessary" to the decision, which was equally supported by an alternative ground "specifically" stated in the agency's opinion, *NLRB* v. *Am. Geri-Care, Inc.*, 697 F.2d 56, 63-64 (2d Cir. 1982) (citing Friendly, *supra*). Other courts of appeals consistently remand where, as here, the agency's legal error vitiated the single ground upon which the agency's decision rested. *E.g.*, *Sierra Club, Inc.* v. *U.S. Forest Serv.*, 897 F.3d 582, 605 (4th Cir. 2018); *Safe Air for Everyone* v. *EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007); *NLRB* v. *CNN Am., Inc.*, 865 F.3d 740, 751 (D.C. Cir. 2017); *Prill* v. *NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985) ("[B]ecause the Board's decision stands on a faulty legal premise and without adequate rationale, we must remand the case for reconsideration.").

Additional features of the case call out for a remand. An error can be "harmless" only if the agency's policy would have been formulated the same way absent the error. But extensive record evidence—including directives from the Defense Department—show that the agency in fact structures multiple-award procurements differently from single-award ones. See, *e.g.*, C.A. App. 105363, 105377, 105383.

The Federal Circuit (like the Claims Court) relied on speculation from agency counsel that the Department would require FedRAMP certification at proposal submission (rather than at performance) even in a multiple-award procurement because "if multiple awards were made, the security concerns would ratchet up, not down." App. 17a. But the agency itself never said it would impose FedRAMP in any multiple-award procurement, and for good reason: FedRAMP is not synonymous with cloud security; it is just one of many possible ways to demonstrate that a cloud meets minimum needs. The JEDI

Cloud contract contains a totally separate set of security protocols that a FedRAMP-authorized provider might not meet—but a *non*-FedRAMP-authorized provider might. See C.A. App. 105495-96.

And even if the Department would choose to retain FedRAMP certification as a qualification for winning bidders, that hardly rules Oracle out. A multi-source procurement might require certification prior to *contract performance*, rather than prior to *bid submission*, as the agency has repeatedly done for other cloud-computing procurements, *e.g.*, C.A. App. 123432 (Defense Department solicitation required FedRAMP certification six months *after* award); *id.* at 123506 (requiring FedRAMP authorization "[w]ithin 180 days" of award). Indeed, Oracle met the FedRAMP standard when the JEDI contract was awarded in 2019 and continues to exceed those standards today. Or maybe the Department would apply different security strata to each of multiple awards, for instance by requiring FedRAMP certification for certain security operations but not for routine administrative cloud services.

The point is, we cannot know how the agency would have proceeded on remand, and neither did the Federal Circuit. These complexities demonstrate the peril of allowing courts to guess what an agency *might* do once the erroneous basis for its decision has been exposed. William Rayel's speculation could prove right or he could be wrong. But either way, the decision how to structure the JEDI Cloud solicitation as a multi-source procurement must be made, in the first instance, by the agency itself.

B. This Recurring Issue Goes to the Heart of Executive Accountability

Notably, the decision below is not an outlier. In recent years, the Federal Circuit has repeatedly upheld unlawful procurement decisions based on post hoc speculation about

what the agency might do on remand. As a result, multi-million (or as here, multi-billion) dollar procurements have been left in place even when shown to be structured in violation of federal law.

Congress has given the Federal Circuit exclusive jurisdiction to review bid protests, 28 U.S.C. § 1295(a)(3), in order "to prevent forum shopping and to promote uniformity in government procurement award law." *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001). But the Federal Circuit's sole appellate oversight over bid protests also amplifies any deviations from sound practice. Only this Court's intervention can return administrative accountability to the federal procurement process.

1. The "harmless error" ruling in this case reflects a trend that began decades ago. An early example is *Advanced Data Concepts, Inc.* v. *United States*, 216 F.3d 1054 (Fed. Cir. 2000), where a bidder's proposal was rejected—despite offering the cheapest price—due to a low technical-evaluation score. *Id.* at 1056-57. The bidder showed that flaws in the agency's decision-making process had artificially depressed its score, but the Federal Circuit nonetheless left the procurement in place: It reasoned that the protestor's corrected score was still lower than the winning bidder's score, and the agency had expressed a general preference for technical proficiency over cost. *Id.* at 1058. Though the agency itself never said how it would balance those two considerations once the protestor's score was corrected, the Federal Circuit nevertheless concluded that the agency would not have selected the protestor's bid anyway, and thus the protestor "suffered no prejudice from any [agency] evaluation errors." *Ibid.*

Following that decision, the Federal Circuit became increasingly bold in its harmless-error predictions. See, *e.g.*, *H.G. Props. A, L.P.* v. *United States*, 68 F. App'x 192, 195 (Fed.

Cir. 2003) (errors identified by protestor "not sufficient to show that [the protestor] would likely be awarded a contract under the revised requirements"); *JWK Int'l Corp.* v. *United States*, 279 F.3d 985, 988-89 (Fed. Cir. 2002) (similar). As one commenter has described the pattern:

> [T]he Federal Circuit has shown an unfortunate tendency to prejudge how the agency would act if the agency reviewed the matter on remand. In so doing, the Federal Circuit has overstepped its authority and violated well-established principles under the APA.

Frederick W. Claybrook Jr., *Standing, Prejudice, and Prejudging in Bid Protest Cases*, 33 Pub. Cont. L.J. 535, 536 (2004). And the trend has only escalated since. See, *e.g.*, *WellPoint Military Care Corp.* v. *United States*, 953 F.3d 1373, 1382 (Fed. Cir. 2020); *Am. Relocation Connections, L.L.C.* v. *United States*, 789 F. App'x 221, 228 (Fed. Cir. 2019); *Bannum, Inc.* v. *United States*, 404 F.3d 1346, 1358 (Fed. Cir. 2005).

The Federal Circuit's misguided approach to harmless error has even affected the Court of Federal Claims. In upholding unlawful agency actions by invoking alternative rationales never endorsed by the agency itself, the Federal Circuit has "sent an improper signal that crystal-ball prejudice determinations not only would be tolerated, but also would be given minimalist appellate review." Frederick W. Claybrook Jr., *Please Check Your Crystal Ball at the Courtroom Door*, 38 Pub. Cont. L.J. 375, 378 (2009). The Claims Court accordingly "has fallen victim to the misconception that it should prognosticate what an agency likely would do on remand after it corrected error in its initial procurement action." *Ibid.*; see *id.* at 385-98 (discussing six recent "divinations" from the Court of Federal Claims). This case is yet another prime example—and the most consequential to date. App. 96a-98a.

2. This case underscores another damaging feature of the Federal Circuit's approach to harmless error: The court's refusal to remand means that a judicially identified statutory violation remains uncorrected—not just as to Oracle, but for everyone, including the American public footing the bill. Although the Court of Federal Claims and the Federal Circuit both *agreed* with Oracle that the Defense Department was not statutorily authorized to award the $10 billion JEDI Cloud contract to a single source, that is precisely how the contract is structured to this day.

How could that happen? As the Claims Court explained, there is "no connection" between the statutory error (structuring JEDI Cloud as a single-award procurement) and the ground on which the error was held to be harmless (Oracle's purported inability to satisfy Gate 1.2). App. 96a-98a. Thus, even though Oracle—a party with standing and within the zone of interests protected by § 2304a—has shown to judicial satisfaction that the procurement violates a federal statute, the unlawful contract remains in place. The Federal Circuit's prejudice doctrine thus allows issues unconnected to the agency's legal error to insulate the agency from accountability for its unlawful decision-making.

3. The federal procurement system relies on the bid-protest process as a meaningful check on executive power. The Federal Circuit's willingness to uphold legally flawed procurement decisions on the basis of post hoc speculation removes important safeguards against administrative overreach. And it threatens to erode taxpayer confidence in governmental management of the public fisc.

The federal government is the world's largest buyer of goods and services. In 2019, federal-contract spending exceeded $586 billion—a sum roughly the size of Sweden's economy. See Gov't Accountability Office, *A Snapshot of Government-wide*

Contracting for FY 2019, WatchBlog (May 26, 2020).[3] That figure, which accounts for nearly 3% of the U.S. gross domestic product, has risen steadily over the years and is set to increase further. See Frank Konkel, *Federal Government to Conclude Fiscal 2020 With Record Spending*, Nextgov (Sept. 30, 2020).[4] The Defense Department *alone* accounts for approximately 65% of the federal government's massive annual contract spending. See *A Snapshot*, *supra*.

Given the vast taxpayer funds at stake, accountability in government contracting is imperative. The bid protest is a critical tool: "[T]he suit itself is brought in the public interest by one acting essentially as a 'private attorney general.'" *Scanwell Labs., Inc.* v. *Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970). Bid protests are thus "part of a large body of regulatory safeguards that are deemed necessary to deter and punish ineptitude, sloth, or corruption of public purchasing officials." William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 Admin. L.J. Am. Univ. 461, 469 (1996).

Although Oracle has the resources to pursue its protest all the way to the Supreme Court, other prospective government contractors may not. Nor are many bidders willing to spend years litigating over a contract that may be partially or even fully performed by the time the case reaches resolution. See *Kingdomware*, 136 S. Ct. at 1976 (relying on exception to mootness where "the procurements were fully performed in less than two years after they were awarded"). This case is an ideal opportunity to return judicial guardrails to the federal procurement process, by instructing federal courts to leave

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[3] https://bit.ly/3mIyGor; *GDP (Current US$)—Sweden*, World Bank, https://bit.ly/3pgnL75.

[4] https://bit.ly/3r9b8MK.

congressionally delegated agency decision-making to the agencies.

II. The Federal Circuit's Approach to Criminal Conflicts of Interest Warrants Review

The most serious conflicts of interest by government officials constitute criminal offenses under federal law, 18 U.S.C. § 208. Although an offender may himself be prosecuted for violating Section 208, Congress did not leave "merely a criminal prosecution" as the only protection for the public fisc. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961). In order to prevent the public from "be[ing] forced to bear the burden of complying with the very sort of contract which the statute sought to prevent," an official's "illegal conduct renders the contract unenforceable." *Ibid.*

Yet the Federal Circuit has once again charted a different course. Despite accepting that Defense Department employees "personally and substantially" participated in the JEDI Cloud solicitation while pursuing employment with a leading bidder, 18 U.S.C. § 208(a), the court nonetheless declared that nothing could be done. It deferred to the agency's view—asserted by the same contracting officer who failed to screen for the conflicts in the first place—that the conflicted individuals' participation did not "taint" the procurement. The Federal Circuit's approach to criminal conflicts of interest ignores precedent and reason, and abdicates the court's congressionally mandated responsibility to safeguard the integrity of the government procurement process.

A. The Federal Circuit's Enforcement of Government Contracts Infected by Criminal Misconduct Conflicts with This Court's Precedent

Six decades ago, this Court held that in order "to guarantee the integrity of the federal contracting process and

to protect the public from … corruption," government contracts marred by criminal conflict-of-interest violations must be set aside. *Mississippi Valley*, 364 U.S. at 565. The Federal Circuit's ruling in this case, which left the JEDI Cloud contract in place on the ground that the ethical violations here had not sufficiently "tainted" the procurement, runs counter to that mandate.

1. *Mississippi Valley* involved a $100 million contract to construct and operate a power plant. *Id.* at 523. In negotiating the contract, the government relied on the guidance of Adolphe Wenzell, the director of a private bank. *Id.* at 532-40. The government eventually became aware that the bank (and thus Wenzell) had a financial interest in the transaction—a conflict that potentially violated the predecessor statute to Section 208. *Id.* at 540-44. And once a court confirms that such a criminal conflict exists, this Court held, "that fact alone" suffices to invalidate a government contract. *Id.* at 525.

First, the Court examined the history of the contract, and Wenzell's conduct in relation to it, and concluded that "each of the elements of the statutory prohibition was violated." *Id.* at 550-51 (punctuation omitted). Wenzell had acted as an "'officer or agent of the United States,'" in relation to a contract in which he had been "'directly or indirectly interested.'" *Id.* at 551, 555 (quoting Section 208's predecessor).

Second, the Court considered "whether Wenzell's illegal conduct render[ed] the contract unenforceable." *Id.* at 563. The Court said yes. Congress enacted the criminal prohibition "to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government." *Id.* at 563. For a court to enforce a government contract despite a violation of that prohibition, therefore, would be to "affirmatively sanction[]

the type of infected bargain which the statute outlaws," thereby "depriving the public of the protection which Congress has conferred." *Ibid.* Instead, the Court explained, Congress wants the judiciary to employ an established "remedy" for violations of the criminal conflict-of-interest prohibition—namely, "[n]onenforcement of contracts made in violation of" the provision. *Id.* at 564.

2. *Mississippi Valley* should control the outcome here. Section 208 applies to any "employee of the executive branch" who "participates personally and substantially" in a "contract" in which an "organization with whom he is negotiating or has any arrangement concerning prospective employment[] has a financial interest." 18 U.S.C. § 208(a). No one who evaluated the conflicts at issue in this case—not the contracting officer, not the reviewing courts, and not even the government—contested that Defense Department officials violated that criminal prohibition. App. 29a-30a.

Deap Ubhi's ethical conflicts were particularly egregious. Ubhi participated on the five-person team charged with leading the JEDI Cloud solicitation. App. 44a. In that capacity, Ubhi pushed hard for the single-award approach, acting as the Department's lead advocate on this issue. App. 115a. But throughout this period, Ubhi was actively engaged in employment discussions with Amazon. App. 69a-73a. Given that blatant statutory violation, "nonenforcement" of the contract "is required in order to extend to the public the full protection which Congress decreed by enacting Section [208]." *Mississippi Valley*, 364 U.S. at 566.

3. The Federal Circuit nevertheless held that it was required to leave the contract undisturbed unless the criminal misconduct "tainted the procurement." App. 24a. The court had previously deemed *Mississippi Valley* as "best read" to mean that "conflicts of interest invalidate government contracts *only*

if the conflicts materially affect the contracts." App. 25a (emphasis added); see *Godley* v. *United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993) ("[T]he record must show some causal link between the illegality and the contract provisions."). Based on that reading, the Federal Circuit rejected Oracle's argument that the pervasive criminal conflicts of interest in this case rendered the JEDI Cloud solicitation unenforceable. App. 27a.

The Federal Circuit's approach contravenes key aspects of *Mississippi Valley*'s second holding. This Court stressed that Section 208's predecessor created "an objective standard of conduct," under which contract validity does *not* turn on the impact of conflicts on the procurement process. 364 U.S. at 549; see *id.* at 548-51. Indeed, one of the parties had pressed the Court to interpret the statute as turning on "the actual consequences of proscribed action." *Id.* at 550. But the Court rejected that argument, holding that "the statute is more concerned with what *might* have happened in a given situation than with what *actually* happened." *Ibid.* (emphases added); see *id.* at 550 n.14 (statute's "preventive nature" does not care "what was done in the particular case" (citation omitted)).

The Federal Circuit's interpretation also ignores that Section 208 seeks to combat not only actual corruption, but also the appearance and risk of corruption. Even serious "suspicions" of impropriety can rob governmental actions of legitimacy. *Id.* at 562. Congress recognized that a prophylactically broad prohibition is necessary to protect "the public from the corruption which might lie undetectable beneath the surface." *Id.* at 565. "It is this inherent difficulty in detecting corruption which requires that contracts made in violation of Section [208] be held unenforceable." *Ibid.*

B. Congress Did Not Delegate Discretion to Agencies to Police Their Own Criminal Ethics Violations

Even if, contrary to *Mississippi Valley*, the Federal Circuit were correct to require a "causal link" between the Section 208 violation and the challenged contract provision, App. 25a, the court's approach to that materiality inquiry is flawed: The Federal Circuit allows the agency's *own* contracting officer to decide whether a contract has been tainted by a criminal violation, subject only to "highly deferential" arbitrary-and-capricious review. App. 26a. But if anyone is to perform that materiality inquiry, it should be a court, not an agency official—and certainly not the very official who approved the contract in the first place.

1. Judicial deference to administrative decision-making is "rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving" certain questions. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2412 (2019). Congress's express grant of rulemaking power to an agency, for instance, is thought to come along with "implicit" authority to issue reasonable interpretations of ambiguous statutes that the agency administers. *Chevron U.S.A. Inc.* v. *Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984). But even accepting the "fiction" that Congress does sometimes silently delegate such substantial powers to administrative agencies, *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring), there are ample reasons to doubt that Congress implicitly delegated to contracting officers the power at issue here: authority to determine whether a Section 208 violation has "tainted" a procurement.

First, no agency has been "charged with administering" Section 208, *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), nor does the statutory text provide any administrative role in identifying

or punishing violations. Indeed, Section 208 is a *criminal* prohibition—a field where the usual dynamic supporting administrative deference is reversed: Judicial judgment predominates, while administrative views are "not relevant." *Abramski* v. *United States*, 573 U.S. 169, 191 (2014).

Second, given the subject matter of Section 208, Congress is particularly unlikely to have implicitly given agencies primary authority to ascertain the effect of a violation. The statute is "designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents." *Mississippi Valley*, 364 U.S. at 561. This Court accordingly rejected an argument that the contract at issue there could be saved, despite Wenzell's criminal violation, by proving the "knowledge of Wenzell's [agency] superiors and their approval of his activities." *Ibid.* Just as Section 208's predecessor had not "empowered his superiors to exempt him from the statute," *ibid.*, neither does Section 208 silently authorize agency officials to decide that a violation should be without effect.

Third, the "taint" question—whether an official's criminal conflict of interest affected the procurement—is one in which the implicated agency is "at least usually a little self-interested." *Scenic Am., Inc.* v. *Dep't of Transp.*, 138 S. Ct. 2, 3 (2017) (Gorsuch, J., respecting certiorari). If a "causal link" exists between a Section 208 violation and the procurement, then by definition the agency's decision-making reflects "malfeasance and corruption." *Mississippi Valley*, 364 U.S. at 562. Any agency would be loath to make such an admission about itself.

2. To justify deferring to the contracting officer's materiality assessment, the Federal Circuit pointed to § 3.104-7 of the Federal Acquisition Regulation (FAR), which requires "a contracting officer who receives information about a conflict

of interest on the part of persons involved in a procurement '[to] determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor.'" App. 26a (quoting 48 C.F.R. § 3.104-7(a)). If the contracting officer "determines that there is no impact on the procurement," and a designated agency official agrees, then "the procurement may proceed." *Ibid.* Since the contracting officer for the JEDI Cloud procurement found no impact from the Section 208 violations, the Federal Circuit felt itself bound to uphold the procurement so long as "the contracting officer's findings [we]re rational." App. 27a.

That reasoning conflates distinct questions: (1) whether the contracting officer properly discharged her duties under § 3.104-7 of the FAR; and (2) whether a criminal violation of Section 208 has rendered the contract unenforceable. The "rational[ity]" of the contracting officer's decision under the FAR may suffice for judicial review of the agency's compliance *with that provision*. But it says nothing about how a Section 208 violation should be handled. Still less can an administrative regulation speak to the question whether *Congress* has silently instructed courts to defer to an agency's view that a contract should be enforced notwithstanding a criminal conflict of interest.

In sum, even if (contrary to *Mississippi Valley*) a court must rule on the materiality of a Section 208 violation, the court cannot defer to the agency's assessment of its own criminal violations.

3. The standard of review is often outcome-determinative. It certainly was here: Any court that independently assessed the impact of the pervasive criminal misconduct in this case would have found it to be material.

Space limitations prevent a full treatment, but consider just the influence of Deap Ubhi. In September 2017, he joined

a five-member team charged with designing the JEDI Cloud solicitation. App. 44a. From the start, Ubhi engaged in "loud advocacy for a single award approach" and soon became its foremost champion. App. 115a. He crowed about bringing multiple Pentagon officials to "our side" on the issue. C.A. App. 160107; see C.A. App. 160176 (Ubhi: "if there are people in the building that i need to go see and school [on single v. multiple], or ally, let's do that"); C.A. App. 160096-98. To that end, Ubhi drafted a one-page primer "to crush single vs. multiple," C.A. App. 160151; he distributed it widely to put "multi vs. single to bed once and for all," C.A. App. 160166.

Since the question was not yet settled when the Steering Group met in October 2017 "to tackle [the] question of one versus multiple cloud providers," Ubhi was put in charge of convincing the Group to commit to a single award. C.A. App. 160100. His presentation worked; a teammate reported that "[s]ingle is assumed now," adding: "Really glad you [Ubhi] were here this week." C.A. App. 160229. Two days later, the Deputy Director agreed: "The single [vs.] multiple conversation is done. Everyone that matters is now convinced." C.A. App. 160239. The Deputy Director identified the October meeting as the moment when it became "decidedly clear that we are all in favor of a single award." *Ibid.* One week later, the Deputy Secretary was informed of a "[g]eneral consensus" that the agency "should press forward with a single provider approach." App. 47a.

Throughout this period, Ubhi secretly was in employment negotiations with Amazon, the only major bidder that supported a single-award approach. App. 48a, 69a-73a. Contrary to policy, Pentagon officials failed to screen Ubhi for conflicts. C.A. App. 123983-124126. Only after it became "decidedly clear" that the single-award decision was sewn up did Ubhi recuse himself from the JEDI Cloud project, falsely claiming

that Amazon was considering buying a company he owned. App. 69a-70a. Ubhi then formally resigned to go work for Amazon—roughly three weeks after the pivotal October meeting. App. 73a.

No *de novo* review of these facts could conclude that Ubhi's conduct was immaterial to the single-award structure of JEDI. Even if the contracting officer's internal investigation could be defended as sufficiently "rational" to survive arbitrary-and-capricious review, App. 27a, the materiality inquiry would have come out differently had a court looked at the question with fresh eyes (even assuming a court should be assessing materiality at all).

4. Only this Court can correct the Federal Circuit's hands-off approach to criminal conflicts of interest in government contracting. That approach gives agencies something close to a free pass when policing the misbehavior of their own officials: Once a contracting officer declares that the procurement was unaffected by the conflict—perhaps even based on the officer's "personal knowledge," App. 73a n.9—the Federal Circuit will leave that determination undisturbed if any "rational" basis supports it, App. 27a. That dynamic creates perverse incentives for contracting officers to whitewash their own mistakes.

This is no idle worry. Federal contracting is rife with potential corruption, and nowhere is that truer than in defense procurements. Each year, *billions* of dollars of governmental contracts are tainted by the misconduct of agency personnel, see *Report on Defense Contracting Fraud*, Office of the Under Secretary of Defense for Acquisition and Sustainment 2-3 (Dec. 2018),[5] many of whose crimes involve criminal conflicts of interest, see, *e.g.*, *U.S. Navy Admiral Sentenced to Prison for Lying to Federal Investigators about His Relationship with*

[5] https://bit.ly/3mODSap.

Foreign Defense Contractor in Massive Navy Bribery and Fraud Investigation, Dep't of Justice (May 17, 2017).[6]

Incentives matter: Courts, not agencies, must be the ones policing criminal conflicts of interest.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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[6] http://bit.ly/2WMcmQf.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Argued June 10, 2020 Decided September 2, 2020

No. 19-2326

ORACLE AMERICA, INC.,
PLAINTIFF-APPELLANT

v.

UNITED STATES, AMAZON WEB SERVICES, INC.,
DEFENDANT-APPELLEES

Appeal from the United States Court of Federal Claims
(No. 1:18-cv-01880)

CRAIG HOLMAN, Arnold & Porter Kaye Scholer LLP, Washington, DC, argued for plaintiff-appellant. Also represented by KARA L. DANIELS, NATHANIEL EDWARD CASTELLANO, AMANDA J. SHERWOOD.

WILLIAM PORTER RAYEL, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by ETHAN P. DAVIS, ROBERT EDWARD KIRSCHMAN, JR., PATRICIA M. MCCARTHY.

DANIEL RUBEN FORMAN, Crowell & Moring, LLP, Washington, DC, argued for defendant-appellee Amazon Web Services, Inc. Also represented by ROBERT JOSEPH SNECKENBERG, OLIVIA LOUISE LYNCH, ZACHARY H. SCHROEDER; GABRIELLE TRUJILLO, Los Angeles, CA; MARK ANDREW PERRY, Gibson, Dunn & Crutcher LLP, Washington, DC.

Before NEWMAN, BRYSON, *and* O'MALLEY, *Circuit Judges.*

BRYSON, *Circuit Judge*.

This is a federal contract pre-award protest case. The United States Court of Federal Claims ("the Claims Court") analyzed a number of legal challenges by Oracle America, Inc., to a large Department of Defense procurement. After a thorough treatment of all the issues presented, the Claims Court rejected Oracle's protest. *Oracle Am., Inc. v. United States*, 144 Fed. Cl. 88 (2019). We affirm.

I

The procurement at issue in this case, known as the Joint Enterprise Defense Infrastructure ("JEDI") Cloud procurement, is directed to the long-term provision of enterprise-wide cloud computing services to the Department of Defense. The JEDI Cloud solicitation contemplated a ten-year indefinite delivery, indefinite quantity contract. The Defense Department decided to award the contract to a single provider rather than making awards to multiple providers.

The JEDI Cloud solicitation included several "gate" provisions that prospective bidders would be required to satisfy. One of the gate provisions, referred to as Gate Criteria 1.2 or Gate 1.2, required that the contractor have at least three existing physical commercial cloud offering data centers within the United States, each separated from the others by at least 150 miles. Those data centers were required to provide certain offerings that were "FedRAMP Moderate Authorized" at the time of proposal. The Federal Risk and Authorization Management Program ("FedRAMP") is an approach to security assessment, authorization, and continuous monitoring for cloud products and services. "FedRAMP Moderate Authorized" is a designation given to systems that have

successfully completed the FedRAMP Moderate authorization process. FedRAMP Moderate is the Defense Department's minimum security level for processing or storing the Department's least sensitive information. Oracle did not satisfy the FedRAMP Moderate Authorized requirement as of the time the proposals were to be submitted.

Oracle filed a pre-bid protest challenging the solicitation. Oracle's protest focused on the Department's adoption of Gate 1.2 and on the Department's decision to conduct the procurement on a single-source basis, rather than providing for multi-source contracts.

Following a hearing and briefing, the U.S. Government Accountability Office ("GAO") denied the protest. Oracle then filed suit in the Claims Court challenging the solicitation. The court analyzed Oracle's claims in detail and rejected Oracle's protest in a lengthy opinion.

The court first addressed Oracle's claim that the contracting officer and the Under Secretary of Defense violated separate provisions of 10 U.S.C. § 2304a when they each determined that it was appropriate to structure the JEDI Cloud procurement on a single-award basis rather than providing for multiple awards. Section 2304a sets out the conditions under which the Department may enter into large task and delivery order contracts with a single awardee, as opposed to awarding such contracts to two or more sources.

Section 2304a(d)(3) generally prohibits the award of a task or delivery order contract in excess of $100 million[1] to a single vendor unless the head of the agency determines in writing that one of four exceptions to that general prohibition applies. The exceptions are:

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[1] The statutorily defined threshold amount is subject to an inflation adjustment requirement. *See* 41 U.S.C. § 1908.

> (i) the task or delivery orders expected under the contract are so integrally related that only a single source can efficiently perform the work;
>
> (ii) 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;
>
> (iii) only one source is qualified and capable of performing the work at a reasonable price to the government; or
>
> (iv) 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)(A).

In addition to that provision, section 2304a(d)(4) requires that regulations implementing section 2304a(d) "establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services," and that they "establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government." 10 U.S.C. § 2304a(d)(4). Pursuant to that directive, the Federal Acquisition Regulation ("FAR") provides that, except for indefinite-quantity contracts for advisory and assistance services, "the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources." 48 C.F.R. § 16.504(c)(1)(i) ("FAR 16.504(c)(1)(i)"). The FAR further provides, however, that the contracting officer must not elect to use a multiple-contract award if one or more of several conditions applies:

> (1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;
>
> (2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;
>
> (3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;
>
> (4) The projected orders are so integrally related that only a single contractor can reasonably perform the work;
>
> (5) The total estimated value of the contract is less than the simplified acquisition threshold; or
>
> (6) Multiple awards would not be in the best interests of the Government.

FAR 16.504(c)(1)(ii)(B).[2]

The head of the agency—in this case, Under Secretary of Defense Ellen Lord—made a finding under section 2304a(d)(3)(B)(ii) that a single-source contract was permissible because the solicitation provides exclusively 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. For her part, the contracting officer found that three of the reasons set forth in FAR 16.504(c)(1)(ii)(B) prohibited the use of the multiple-award approach for the JEDI Cloud procurement: (1) more favorable terms and conditions, including pricing, would be provided in the case of a single award; (2) the expected cost of administering multiple contracts

[2] On August 3, 2020, the regulation was amended to replace the phrase "less than" with "at or below." Federal Acquisition Regulation: Evaluation Factors for Multiple-Award Contracts, 85 Fed. Reg. 40068-01 (July 2, 2020).

outweighed the expected benefits of making multiple awards; and (3) multiple awards would not be in the best interests of the government.

Before the Claims Court, Oracle challenged the determinations of both the contracting officer and Under Secretary Lord. As to the contracting officer, Oracle argued that she failed to properly balance the multiple-award preference against a single-award approach. As to Under Secretary Lord, Oracle argued that the JEDI Cloud solicitation contained provisions for future services that were not specifically defined and for which specific prices were not given. For that reason, Oracle contended, the contract did not qualify as one providing only for firm, fixed prices for services for which prices are established in the contract for the specific tasks to be performed.

The Claims Court held that the contracting officer's determination complied with the requirements of section 2304a(d)(4) and FAR 16.504(c). The court concluded that the contracting officer, based on her knowledge of the market, "drew the reasonable conclusion that a single award was more likely to result in favorable terms, including price." *Oracle*, 144 Fed. Cl. at 113. In addition, the court found that it was "completely reasonable" for the contracting officer to find that a multisource award would be more expensive to administer and that a single cloud services provider would be best positioned to provide the necessary security for the agency's data. *Id.* The court concluded that Oracle had pointed to no reason to disturb the contracting officer's determination that multiple awards should not be employed.

With respect to section 2304a(d)(3), however, the Claims Court reached a different conclusion. The court held that the solicitation did not qualify for a single-source award under the exception relied on by Under Secretary Lord to the statutory prohibition against awarding large task order contracts to a single vendor. Specifically, the

court found that the solicitation contemplated that during the life of the contract, services not envisioned at the time of the initial award would likely be needed. New services would likely have to be added to the contract in light of the fact that cloud computing technology was constantly evolving. The solicitation provided that if at some point during the pendency of the contract the cloud services provider created a new service, it would be required to offer that service to the Department at a price no higher than the price publicly available in the commercial marketplace in the continental United States. The solicitation also permitted the Department to obtain services before they were offered on the commercial market, even if those services would never be offered commercially. Those services, the court explained, could not be identified as "specific tasks" much less "priced[] at the time of the award." *Oracle*, 144 Fed. Cl. at 114. Accordingly, the court concluded, "the Under Secretary apparently chose an exception under § 2304a(d)(3) which does not fit the contract." *Id.* at 115.

The Claims Court then turned to the question whether Oracle was prejudiced by the Department's failure to comply with section 2304a(d)(3). Oracle argued that if the Department had employed a multiple-award procurement, Oracle might have had the chance to compete, because the agency's needs, as expressed in the gate criteria, might have been different in that setting. The government responded that the agency's minimum security needs would not have changed in a multiple-award scenario. In a multiple-award procurement, according to the government, the Department still would have insisted on gate criteria in general and Gate 1.2 in particular.

The Claims Court agreed with the government. The court acknowledged that "Oracle may well be correct that some aspects of the gate criteria are driven by the agency's insistence on using a single provider to manage

an immense amount of data." *Oracle*, 144 Fed. Cl. at 115. The court observed, however, that "one critical aspect of the gate criteria is not connected to the choice of a single provider: data security." *Id.* The court pointed in particular to a memorandum prepared by Tim Van Name, Deputy Director of the Defense Digital Service. In that memorandum, Mr. Van Name stated that FedRAMP Moderate, which was incorporated as a requirement in Gate 1.2, represented the Department's minimum level of security required for processing and storing the Department's least sensitive information. That level of security, according to Mr. Van Name's memorandum, was "the minimum criteria necessary for DoD to have confidence that the Offeror's proposed data centers have met the underlying physical security requirements necessary to successfully perform the contract." J.A. 100947.

In addition, the court noted that many of the acquisition documents "bolster the agency's conviction that use of multiple cloud service providers exponentially increases the challenge of securing data." *Oracle*, 144 Fed. Cl. at 116. The court explained that it had "no reason to doubt" that the security requirements of Gate 1.2 "are the minimum that will be necessary to perform even the least sensitive aspects of the JEDI Cloud project." *Id.* Based on that evidence, the court stated that "the only logical conclusion is that, if multiple awards were made, the security concerns would ratchet up, not down." *Id.* Because the agency's security concerns would not change, the court explained, Oracle "would not stand a better chance of being awarded this contract if the agency determined that the procurement must be changed to multiple award." *Id.* The court therefore concluded that the decision to proceed with the procurement on a single-source basis did not prejudice Oracle.

The Claims Court next addressed Oracle's claim that Gate 1.2 was unenforceable, both because the agency did

not have a demonstrated need to impose the requirements set forth in Gate 1.2 and because Gate 1.2 is an impermissible "qualification requirement" imposed without satisfying the preconditions set forth in 10 U.S.C. § 2319. Section 2319(a) defines a "qualification requirement" as "a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract." Section 2319(b) provides that, except in limited circumstances, the agency must satisfy several prerequisites before establishing a qualification requirement. One such prerequisite is that "the head of the agency shall . . . prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award." 10 U.S.C. § 2319(b)(1).

The Claims Court rejected both of Oracle's arguments that Gate 1.2 was unenforceable. As to the issue of need, the court agreed with the government that Gate 1.2 was tied to the agency's minimum needs. The court referred to the memorandum from Mr. Van Name, one of the principal architects of the solicitation requirement, which justified imposing the FedRAMP Moderate Authorized requirement on the ground that FedRAMP Moderate represents the Department's minimum security requirements for processing or storing the Department's least sensitive information. As noted, Mr. Van Name explained that FedRAMP Moderate was the minimum level of security necessary for the Defense Department to have confidence that the Offeror's proposed data centers would have been able to timely meet the physical security requirements needed to successfully perform the contract. Based on the record evidence, the court found that the requirement to satisfy FedRAMP Moderate is "a useful proxy . . . for the agency's real need. If an offeror were unable to meet the lower threshold, it could not hope to

meet the higher" security requirements that would be required during the performance of the contract. *Oracle*, 144 Fed. Cl. at 117.

As for Oracle's argument that the government improperly used Gate 1.2 as a "qualification requirement" without satisfying the preconditions set forth in section 2319, the Claims Court ruled that Oracle had waived that argument by not raising it before the bids were due. Oracle did not raise the argument about the impermissible use of a qualification requirement until its post-hearing comments submitted to the GAO after the close of the bidding on the procurement.

In any event, the court concluded that there was no merit to the argument, because Gate 1.2 did not constitute "a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract." *Id.* (quoting 10 U.S.C. § 2319(a)). Instead, according to the Claims Court, Gate 1.2 constituted a specification. The statute describes a qualification requirement as generally consisting of "a qualified bidders list, qualified manufacturers list, or qualified products list." 10 U.S.C. § 2319(c)(3). A specification, by contrast, is a requirement "of the particular project for which the bids are sought, such as design requirements, functional requirements, or performance requirements." *W.G. Yates & Sons Constr. Co. v. Caldera*, 192 F.3d 987, 994 (Fed. Cir. 1999) (citing 10 U.S.C. § 2305(a)(1)(C)).

The court concluded that Gate 1.2 is not a qualification requirement, because the agency did not require an offeror to prequalify in order to submit a proposal. In addition, the court explained, FedRAMP Moderate authorization is not an independent requirement that the Department regularly imposes in its procurements. Finally, the court pointed out that the security features that FedRAMP Moderate authorization imposes are the same security features that the Department believed were the

minimum necessary to store the Department's data for the JEDI Cloud project. Accordingly, the court found, the Department was not using the FedRAMP standard as a way to examine the offeror's past performance in storing government data. Rather, "it [was] a uniform way to determine which offerors have certain security capabilities on a number of their cloud offerings." *Oracle*, 144 Fed. Cl. at 118.

The Claims Court next rejected Oracle's argument that Gate 1.2 transformed the procurement into one that uses other than competitive procedures, in violation of 10 U.S.C. § 2304. The court found that the agency structured the procurement as a full and open competition, and that satisfying the gate criteria was merely the first step in ensuring that the Department's time in the evaluation process was not wasted on offerors who could not meet the agency's minimum needs.

Finally, the Claims Court examined Oracle's claims that several Department officials who were involved in some way with the procurement had conflicts of interest, and that Amazon Web Services, Inc., ("AWS"), one of the bidders on the contract, had an organizational conflict, all of which infected the procurement. The court addressed the question whether the contracting officer had properly assessed the impact of the conflicts on the procurement and found that she had. The court then concluded that the contracting officer had properly exercised her discretion in finding that the individual and organizational conflicts complained of by Oracle did not affect the integrity of the procurement.

Based on the court's determination that Gate 1.2 is enforceable and Oracle's concession that it could not meet the requirements of Gate 1.2 at the time of proposal submission, the Claims Court found that Oracle could not "demonstrate prejudice as a result of any other possible errors." *Oracle*, 144 Fed. Cl. at 126. The court therefore

denied Oracle's motion for judgment on the administrative record and granted the cross-motions filed by the government and intervenor AWS. Oracle then took this appeal.

II

Oracle's principal argument on appeal is that the Defense Department committed legal error when it elected to conduct the JEDI Cloud procurement as a single-source procurement. Although the Claims Court agreed with Oracle that the Department committed legal error with respect to the ground it invoked to justify the use of a single-source procurement, the court found the error to be harmless. The court concluded that the error was harmless because even if the Department had opted for a multi-source procurement, Oracle would not have been able to satisfy the requirements of Gate 1.2, which the Department would have imposed regardless of whether the procurement was conducted on a single-source or multi-source basis.

A

In challenging the Department's decision to conduct the JEDI Cloud procurement on a single-source basis, Oracle begins by pointing out that Congress has expressed its preference for awarding, "to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property."10 U.S.C. § 2304a(d)(4). Section 2304a(d) and the regulations issued pursuant to that provision state that the contracting officer and the agency head must make certain specified determinations before the agency can proceed with a single-source award in a large procurement such as this one. On appeal, Oracle does not take issue with the Claims Court's finding that the contracting officer's determination was reasonable. And Oracle agrees with the Claims Court that Under Secretary Lord's rationale for approving the use of a single-source award for the JEDI Cloud procurement

did not satisfy the exception to section 2304a(d)(3) that she invoked. Oracle takes issue, however, with the Claims Court's conclusion that Oracle was not prejudiced by Under Secretary Lord's determination.

In response, the government endorses the Claims Court's "no-prejudice" ruling. In the alternative, the government argues that, apart from the merits of the court's prejudice analysis, we may still affirm because the Claims Court incorrectly rejected Under Secretary Lord's determination that a single-source award was justified under section 2304a(d)(3). Under Secretary Lord based that determination on the exception set forth in section 2304a(d)(3)(B)(ii) for contracts that provide 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." The Claims Court, however, held that the JEDI Cloud solicitation did not provide for "firm, fixed price task orders" for which prices were established in the contract, because the solicitation contained provisions for the awardee to supply unspecified services in the future at as-yet unspecified prices.

The government's argument that the contract provides only for firm, fixed price task orders is unpersuasive for the reasons given by the Claims Court. The JEDI Cloud contract contains a technology refresh provision (section H2) that allows the addition of new cloud services during the period of contract performance, when those services did not exist at the time of award, in order "to keep pace with advancements in the industry." Under that clause, it is anticipated that there will be updates to the cloud services during the pendency of the contract. Thus, the solicitation provides that new services will be added, with new prices, that are not provided for in the initial contract.

The government argues that the exception in section 2304a(d)(3)(B)(ii) applies here because the statute does

not require that "all tasks/prices must be established 'at the time of the award.'" Rather, the government argues, the requirement that tasks and prices be "established in the contract" does not address when the "tasks and prices upon which future orders will be based must be 'established.'" It is enough, according to the government, that new tasks and prices are set pursuant to the terms of the contract, including section H2, and the subsequent task orders are issued on a fixed-price basis.

The Claims Court properly rejected the government's argument. As the court explained, the language of section 2304a(d)(3) makes clear that the services to be performed under the contract and the prices for those services must be established in the contract at the time of award. That follows from the provision in the statute that "no . . . contract . . . may be awarded" unless the agency head determines that the "contract provides only for firm, fixed price task orders or delivery orders for . . . services for which prices are established in the contract."10 U.S.C. § 2304a(d)(3). The plain language of the statute refers to conditions that must exist at the time of the contract award.

B

Having found that the statutory prerequisite for use of a single-source contract had not been satisfied, the Claims Court moved to the question whether that flaw in the process prejudiced Oracle. The court found no prejudice from the error based on the court's finding that the agency's minimum needs, as expressed in Gate 1.2, would not have been different in a multi-award scenario than in a single-award scenario. Therefore, the court concluded, even if the agency had been required to conduct the procurement on a multiple-award basis, the requirements of Gate 1.2 would have applied. And because Oracle would not have been able to satisfy those requirements, it would

have had no chance of a contract award, so the flaw in the procurement process did not harm Oracle.

Oracle takes issue with the Claims Court's harmless error analysis. In particular, Oracle argues that the Claims Court erred by accepting the government's argument that under a multiple-award solicitation the Department would still have insisted on imposing Gate 1.2. That decision, Oracle argues, was one that should have been made by the agency. It was improper, according to Oracle, for the court to decide that the agency would have insisted on Gate 1.2 even if it had known that it was required to use a multiple-award solicitation for the JEDI Cloud procurement. Citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), Oracle contends that the Claims Court should not have "presume[d] how DoD would structure a multiple-award procurement as DoD must make that decision in the first instance." Appellant's Br. 35–36.

The Supreme Court has referred to the *Chenery* doctrine as embodying a "'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). In *Chenery*, the Supreme Court explained the rationale for that rule:

> If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

318 U.S. at 88.

The *Chenery* doctrine, however, does not invariably require a remand to the agency whenever a court holds that the agency's action was based on legally improper grounds. As the Supreme Court, this court, and other circuit courts have recognized, principles of harmless error apply to judicial review of agency action generally. A remand is unnecessary when the error in question "clearly had no bearing on the procedure used or the substance of decision reached," *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964); if there is no reason to believe that the decision would have been different, *In re Watts*, 354 F.3d 1362, 1370 (Fed. Cir. 2004); if it is clear that the agency would have reached the same result, *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998); if the result is "foreordained," *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984); if the court is not "in substantial doubt whether the administrative agency would have made the same ultimate finding with the erroneous finding removed," *Kurzon v. U.S. Postal Serv.*, 539 F.2d 788, 796 (1st Cir. 1976); or where there is no "significant chance that but for the error, the agency might have reached a different result," *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982).

As this court has summed up the rule, a court may affirm the decision of an agency on a ground other than the ground given by the agency, so long as it is clear that the agency would have reached the same decision if it had been aware that the ground it invoked was legally unavailable, or if the decision does not depend on making a finding of fact not previously made by the agency. *See Ford Motor Co. v. United States*, 811 F.3d 1371, 1380 (Fed. Cir. 2016); *Killip v. OPM*, 991 F.2d 1564, 1568–69 (Fed. Cir. 1993); *Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 528 (Fed. Cir. 1992).

In this case, the Claims Court found, based on the evidence in the administrative record, that the Defense

Department would have stuck with Gate 1.2 even if it had been required to conduct the procurement on a multiple-award basis. As the court explained:

> [T]he only logical conclusion is that, if multiple awards were made, the security concerns would ratchet up, not down. They are, indeed, minimally stated. If Oracle cannot meet Gate Criteria 1.2 as currently configured, it is thus not prejudiced by the decision to make a single award. The agency's needs would not change, so Oracle would not stand a better chance of being awarded this contract if the agency determined that the procurement must be changed to [a] multiple award.

Oracle, 144 Fed. Cl. at 116.

This appeal is a review of a Claims Court decision on an administrative record. We review a finding of prejudice or no prejudice by the Claims Court in a trial on an administrative record under the clearly erroneous standard. *See Office Design Grp. v. United States*, 951 F.3d 1366, 1374 (Fed. Cir. 2020); *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1359 (Fed. Cir. 2018); *Diaz v. United States*, 853 F.3d 1355, 1359 (Fed. Cir. 2017); *Bannum, Inc. v. United States*, 404 F.3d 1346, 1354 (Fed. Cir. 2005). "To establish prejudicial error, a party must show that "but for the error, it would have had a substantial chance of securing the contract." *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1378 (Fed. Cir. 2009).[3] In

[3] Oracle asserts that in pre-award protests, "nontrivial competitive injury which can be redressed by judicial relief" establishes prejudice. Appellant's Br. 33 (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1361 (Fed. Cir. 2009)). In some pre-award cases, we have used the "non-trivial competitive injury" test "because there is an inadequate factual foundation for performing a 'substantial chance' test." *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1348 (Fed. Cir. 2013). In this case, however, there was an adequate factual predicate to apply the "substantial chance" test.

light of the Claims Court's careful consideration of the record evidence, the court's conclusion that the Defense Department would have included Gate 1.2 even if it had modified the solicitation to allow for multiple awards, and that Oracle therefore would not have had a substantial chance of securing the contract, is not clearly erroneous. We therefore will not disturb the Claims Court's determination that the case did not need to be remanded to the Defense Department for a further determination whether a single-source award is appropriate.[4]

III

Oracle next argues that Gate 1.2 transformed the procurement into one that did not use competitive procedures.

Oracle further contends that the Defense Department was required to complete a mandatory justification and approval process before using procedures other than competitive procedures, such as Gate 1.2. According to Oracle, the Defense Department failed to do so. The government responds that the Defense Department was not required to engage in the justification and approval process because the JEDI Cloud procurement used competitive procedures. We agree with the government.

Section 2304 of Title 10 prohibits an agency from using "other than competitive procedures" in contracting, except in certain limited circumstances. *See* 10 U.S.C. § 2304(c). Even in such circumstances, section 2304(f) further provides that the head of the agency generally "may

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[4] Oracle argues, *inter alia*, that a remand to the agency is justified because Oracle now meets the FedRAMP Moderate Authorized standard set forth in the solicitation and should be allowed to bid on the contract based on its current qualifications. The issue before the Claims Court and before us, however, is whether the agency committed prejudicial error in the solicitation as of the time that Oracle filed its protest. Subsequent events are irrelevant to that inquiry.

not award a contract using procedures other than competitive procedures unless . . . the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification" and "the justification is approved."

Oracle makes several arguments in support of its contention that the procurement used other than competitive procedures. First, Oracle contends that the Department knew that only two offerors, AWS and Microsoft, could satisfy Gate 1.2 at the time the proposals were due. According to Oracle, the decision to adopt Gate 1.2 was therefore equivalent to prohibiting any parties other than AWS and Microsoft from bidding on the JEDI Cloud contract. Oracle adds that the evidence showed that the Department "devised the gated approach for the express purpose of limiting the number of proposals received." Appellant's Br. 41.

Oracle also relies on the regulations issued pursuant to section 2304. In particular, Oracle relies on the regulation that provides that when there is "a reasonable basis to conclude that the agency's minimum needs can only be satisfied by . . . a limited number of sources," full and open competition does not exist and the agency must follow the justification and approval process. FAR 6.302-1(b)(1)(ii).

We see no error in the Claims Court's rejection of Oracle's arguments. Citing this court's decision in *National Government Services, Inc. v. United States*, 923 F.3d 977 (Fed. Cir. 2019), the Claims Court explained that a solicitation requirement is not necessarily objectionable simply because the requirement has the effect of excluding certain offerors who cannot satisfy that requirement. The Claims Court found that "[t]he few record statements Oracle highlights are insufficient to demonstrate" that the Department was using "other than competitive procedures" in the JEDI Cloud procurement. *Oracle*, 144 Fed. Cl. at 119. Rather, the court explained, the Department

"structured this procurement to use full and open competition and the gate criteria are just the first step in the evaluation of proposals." *Id.* The court added that the use of the gate criteria could have occurred at any point in the evaluation of the proposals; "the agency simply put the gate criteria first to ensure its evaluation was not wasted on offerors who could not meet the agency's minimum needs." *Id.*

As the Claims Court explained, "evaluation criteria which have the effect of limiting competition do not necessarily trigger the procedures required by § 2304(c)." *Id.* "Full 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). Even if the agency expected that only certain firms would be able to satisfy the agency's minimum needs, the solicitation permitted all responsible sources to submit proposals. Under these circumstances, we agree with the Claims Court that the FedRAMP Moderate authorization component of Gate 1.2 did not transform the solicitation into one for less than full and open competition.

Nor did the Department violate FAR 6.302-1. That regulation is one of several "authorities" that "permit contracting without providing for full and open competition." FAR 6.302. In this case, the Department did not prohibit any responsible sources from submitting proposals, so the Department did not need to invoke section 6.302-1 as authority to contract without providing for full and open competition.

IV

Oracle next argues that Gate 1.2 violated 10 U.S.C. § 2319, which requires, *inter alia*, a written justification when the Defense Department imposes a "qualification requirement" in a solicitation. Section 2319(a) defines a "qualification requirement" as a "requirement for testing

or other quality assurance demonstration that must be completed by an offeror before award of a contract." Oracle contends that Gate 1.2 constituted a qualification requirement, as that term has been interpreted, and that because there was no advance written justification for that requirement, Gate 1.2 is unenforceable.

The Claims Court held that Oracle waived the section 2319 argument by not raising it on a timely basis. The court also held that even if the argument had been timely raised, it failed on the merits, because Gate 1.2 is not a "qualification requirement" within the meaning of that term in section 2319.

The Claims Court correctly held that Gate 1.2 does not constitute a "qualification requirement" within the meaning of section 2319.[5] "An essential step in every procurement involves a determination that the potential contractor is qualified to serve as a Government contractor." J. Cibinic, Jr. & R. Nash, Jr., Formation of Government Contracts 403 (3d ed. 1998). That determination requires consideration of whether the firm can be expected to complete the contract work on time and in a satisfactory manner. *Id.* In an individual procurement, the government uses "nonresponsibility" determinations to avoid awarding contracts to unqualified firms. *Id.* Although the government is required to make a determination of responsibility in every case, *see* 10 U.S.C. 2305(b)(4)(C); FAR 9.103, we do not think that Congress intended to impose the obligations enumerated in section 2319 on every government procurement.

Instead, as this court has explained, section 2319 draws a line between extraneous "qualification

[5] Because we agree with the Claims Court that Gate1.2 is not a "qualification requirement," we do not reach the issue of whether the Claims Court correctly held that Oracle waived its section 2319 argument.

requirements," such as a qualified manufacturers list, and requirements that are intrinsic to the particular solicitation, such as requirements that are directed to ensure that the contractor will be able to satisfy the requirements of that solicitation. In *W.G. Yates & Sons Construction Co. v. Caldera*, 192 F.3d 987 (Fed. Cir. 1999), the case on which Oracle principally relies, this court held that a particular prerequisite fell on the "extraneous requirement" side of that line. There, a solicitation for the production of aircraft hangar doors required that the manufacturer either be prequalified or have previously made similar products. We held that those requirements constituted qualification requirements because they were not directly tied to the needs of the procurement.

Unlike the requirements in the *Yates* case, the agency in this case used Gate 1.2 in a way that did not implicate section 2319. Gate 1.2 is analogous to an "intrinsic" requirement in, for example, a contract for emergency military air transport services that the bidding companies have a minimum number of certified pilots available at the time proposals are submitted. Such a requirement would ensure that the company would be ready to proceed on day one of the contract and would not have to hire or train pilots. Gate 1.2 serves a similar purpose in the JEDI Cloud solicitation. In particular, the Department was evaluating whether the actual data centers that would or could be used to provide cloud services would be able to meet the agency's minimum security needs on the proposed schedule. As Mr. Van Name's memorandum explained, the agency believed that if an offeror could not satisfy the security requirements represented by FedRAMP Moderate at the time of proposal, that offeror would not be able to satisfy the more stringent security

requirements the offeror would be required to meet shortly after award.[6]

That is a standard type of responsibility determination that contracting officers regularly make. *See* FAR 9.104-1 ("To be determined responsible, a prospective contractor must . . . [b]e able to comply with the required or proposed delivery or performance schedule . . . [and] [h]ave the necessary production, construction, and technical equipment and facilities, or the ability to obtain them"); *50 State Sec. Serv., Inc.*, Comp. Gen. Dec. B-272114, 96-2 CPD ¶ 123 (Sept. 24, 1996) (upholding contracting officer's determination that the protestor did not have the ability to have a sufficient number of prison guards in place when performance of the contract was set to begin); *Sys. Dev. Corp.*, Comp. Gen. Dec. B-212624, 83-2 CPD ¶ 644 (Dec. 5, 1983) (upholding nonresponsibility determination based on the agency's conclusion that the protestor would not be able to comply with the proposed delivery schedule because the protestor had not yet secured "confirmation of supplier's and subcontractor's commitments to deliver items and equipment with long lead-times"). And in this case, because Gate 1.2 did not relate to an extraneous quality assurance demonstration, such as the successful completion of other related projects, the responsibility determination did not implicate section 2319.

V

Oracle next contends that Gate 1.2 was unreasonable in light of the Defense Department's needs, and that the

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[6] Under the solicitation, the awardee would be required, shortly after the award, to meet a modified version of the FedRAMP High security requirements, sometimes referred to in the record as "FedRAMP High Plus." According to Mr. Van Name's testimony, there are "325 requirements that FedRAMP Moderate covers, and there is a difference of about 145 to get to FedRAMP High. But a few of those, we've granted exemptions to . . . ." J.A. 105496.

solicitation should be invalidated on the ground that it unnecessarily restricted competition. The Claims Court analyzed at some length the Department's needs as the Department assessed them and found that the gating requirements, including Gate 1.2, were reasonable in light of that context. For that reason, the court found that the solicitation requirements did not unduly restrict competition.

Oracle has not provided a sufficient basis for overturning the Claims Court's determination on that issue. As the Claims Court observed, an agency's assessment of its needs in a procurement should not readily be second-guessed by a court. We are even more removed from a detailed assessment of the needs of the procurement than the Claims Court and therefore are even more hesitant to override the agency's judgment as to its needs. Oracle has not shown that the Department's determination as to its need for a level of security represented by Gate 1.2 was unreasonable; that clause of the solicitation therefore cannot be rejected as unnecessarily restrictive of competition.

VI

In the final section of its brief, Oracle contends that conflicts of interest on the part of three former Defense Department employees tainted the procurement in a way that requires that the solicitation be set aside. When the claimed conflicts surfaced, the contracting officer conducted a detailed investigation and made findings as to the conflicts and their effects on the procurement. She determined that although there were conflicts of interest on the part of two of the employees, those conflicts and the asserted conflict on the part of the third employee did not have any effect on the procurement. After reviewing the contracting officer's findings, the Claims Court concluded that the contracting officer's investigation was thorough and her "no effect" determination was reasonable.

A

Oracle raises a number of challenges to the Claims Court's ruling with respect to the conflicts of interest. At the outset, Oracle argues that the Supreme Court's decision in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), sets forth a per se rule that conflicts of interest that violate the federal criminal conflict-of-interest statute, 18 U.S.C. § 208, invalidate any government contracts to which the conflicts relate. Based on that interpretation of the *Mississippi Valley* case, Oracle argues that the conflicts of interest on the part of the former Defense Department employees invalidate the JEDI Cloud solicitation regardless of whether their conflicts had any effect on the solicitation.

Contrary to Oracle's contention, the *Mississippi Valley* case is best read as providing that conflicts of interest invalidate government contracts only if the conflicts materially affect the contracts. That is the way this court read the *Mississippi Valley* case in *Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993). In that case, we noted that the illegality in the *Mississippi Valley* case "permeated the contract." *Id.* at 1475–76 (citing *Mississippi Valley*, 364 U.S. at 553). We then went on to explain:

> A contract without the taint of fraud or wrongdoing, however, does not fall within this rule. Illegal 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. Determining whether illegality taints a contract involves questions of fact.

Id. at 1476; *see also Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1250 (Fed. Cir. 2007) ("In *Godley*, we emphasized that for a government contract to be tainted by fraud or wrong doing and thus void ab initio,

the record must show some causal link between the fraud and the contract.").

We are bound by that ruling interpreting the *Mississippi Valley* case, and we therefore reject Oracle's argument that the conflicts of interest in this case invalidate the solicitation regardless of whether they had any effect on the procurement.

B

The Claims Court separately addressed each of the individual conflicts of interest as well as related allegations of an organizational conflict of interest on the part of AWS. The court noted that under the FAR, a contracting officer who receives information about a conflict of interest on the part of persons involved in a procurement "must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor." *Oracle*, 144 Fed. Cl. at 121 (quoting FAR 3.104-7(a)). If the contracting officer determines that there is no impact on the procurement, the contracting officer must forward the information to a designated individual within the agency, and if that individual agrees with the contracting officer, the procurement may proceed. *Id.*

The contracting officer for the JEDI Cloud project reviewed each of the alleged conflicts of interest and found that while some of the conduct in question was improper, none of the activities by the individuals in question affected the solicitation, and in particular that none of those activities affected the decision to employ a single-award approach or the use of the gating requirements for the procurement. A designated Department official concurred in the contracting officer's findings in each instance.

The standard for Claims Court review of a contracting officer's decision with regard to a conflict of interest is highly deferential. A contracting officer's conflict of

interest determination will be upheld unless it is "arbitrary, capricious, or otherwise contrary to law." *PAI Corp. v. United States*, 614 F.3d 1347, 1352 (Fed. Cir. 2010). If the contracting officer's findings are rational, they will be upheld on judicial review. *See Turner Constr. Co. v. United States*, 645 F.3d 1377, 1383–87 (Fed. Cir. 2011).

The Claims Court upheld the contracting officer's conclusion that the alleged conflicts on the part of the three Defense Department employees had no impact on the procurement. Specifically, the court ruled that the contracting officer was correct in concluding that the three individuals "were bit players in the JEDI Cloud project," in that none of them held responsible positions with regard to the procurement. *Oracle*, 144 Fed. Cl. at 121. Based on its analysis, the court concluded that "[w]hile they should not have had the opportunity to work on the JEDI Cloud procurement at all, or at least for certain periods of time, nevertheless, their involvement does not taint the work of many other persons who had the real control of the direction of the JEDI Cloud project." *Id.*

The three former Defense Department employees whose conduct is at issue are Deap Ubhi, Anthony DeMartino, and Victor Gavin. Oracle challenges the Claims Court's conclusions as to the conflict of interest claims with respect to all three employees. Specifically, Oracle contends that the conflicted employees influenced the procurement by affecting the decision to use a single award and the selection of the gate criteria. While we share the views of the contracting officer and the Claims Court that some of the conduct at issue is troubling, at the end of the day we agree with the Claims Court that the conflict of interest problems of those three individuals had no effect on the JEDI Cloud solicitation.

The Claims Court, like the contracting officer, concluded that at least two of the Department officials, Mr.

Ubhi and Mr. Gavin, disregarded their ethical obligations by negotiating with AWS for employment while working on the procurement. The court added that the Department, because of "lax oversight, or in the case of Ubhi, deception . . . was apparently unaware of this fact." *Id.* at 120. As the Claims Court explained, however, the question before it was "whether any of the actions called out make a difference to the outcome," and in particular, whether the contracting officer's conclusion of no impact was reasonable. *Id.* As to that issue, the court found that the contracting officer conducted a detailed examination of the record, that her work was "thorough and even-handed," that she "understood the legal and factual questions and considered the relevant evidence," and that she "determined that, although there were some violations or possible violations of law relating to conflicts of interest, those conflicted individuals did not impact the decision to use a single award approach or the substance of the evaluation factors." *Id.* at 120–21.

1

Mr. Ubhi was employed by AWS until January 2016. After a period of time working for the Defense Department between August 2016 and November 2017, he returned to AWS. The contracting officer found that during Mr. Ubhi's tenure in the Department, he was involved in marketing research activities for the JEDI Cloud procurement and that he participated in drafting and editing some of the first documents shaping the procurement.

In October 2017, Mr. Ubhi advised the Department that a company he had founded might be engaging in discussions with Amazon, the owners of AWS, and that he was recusing himself from further involvement in the JEDI Cloud procurement. The contracting officer subsequently concluded that Mr. Ubhi's involvement in the procurement did not materially impact the procurement, for several reasons: the restrictions on his involvement based

on his prior employment had expired by the time he began working on the procurement; his participation in the procurement was limited; and he promptly recused himself when the potential conflict arose.

It was later determined that the reason Mr. Ubhi gave for his recusal was false, and that instead he was negotiating for employment with AWS during the period before his recusal. When that fact came to light, the contracting officer reassessed the impact of Mr. Ubhi's actions in light of the new information. While the contracting officer found that Mr. Ubhi's behavior was troubling, she again determined that Mr. Ubhi's conflict of interest had not tainted the JEDI Cloud procurement.

The Claims Court agreed with the contracting officer that Mr. Ubhi's behavior was troubling. The court agreed with the contracting officer that despite being aware of his ethical obligations, Mr. Ubhi ignored them and remained involved in the procurement when he should not have been.

The situation with respect to Mr. Ubhi is more complex than is the case for the other alleged conflicts of interest. As the contracting officer recognized, his behavior was "disconcerting," as he was aware of his ethical obligations, but "ignored them." *Oracle*, 144 Fed. Cl. at 122. The contracting officer concluded that Mr. Ubhi had violated FAR 3.101-1 and possibly other statutory and regulatory provisions governing conflicts of interest, including 18 U.S.C. § 208. Nonetheless, the contracting officer and the Claims Court noted that when Mr. Ubhi returned to AWS, he did not work on the JEDI Cloud proposal team or in AWS's Federal Business Sector or its DoD Programs section.

Moreover, the contracting officer found no evidence that Mr. Ubhi had shared any information with the team at AWS that was working on the JEDI Cloud procurement. The court found that the contracting officer's

investigation in that regard was thorough and that there was no reason to disturb it.

The contracting officer also found that even if Mr. Ubhi had disclosed nonpublic information to AWS, none of it would have been competitively useful. And she found that his seven-week period of work on the preliminary planning stage of the JEDI Cloud procurement did not introduce bias in favor of AWS. The Claims Court found the contracting officer's conclusions on those issues to be supported by the record. The Claims Court, moreover, found that Mr. Ubhi's primary role was industry liaison; the record did not "warrant attributing to him any serious involvement in the technical or security aspects of the gate criteria." *Oracle*, 144 Fed. Cl. at 123.

Based on its review of the record, the Claims Court found that the contracting officer correctly concluded that although Mr. Ubhi should not have worked on the JEDI Cloud procurement, his involvement did not affect the procurement in any material way. With regard to the decision whether to use a single award or multiple awards, the Claims Court noted that the Defense Department's Cloud Executive Steering Group (of which Mr. Ubhi was not a member) expressed a preference for a single-award approach early on in the process, before Mr. Ubhi's involvement. Yet even after Mr. Ubhi left the Department, "the Deputy Secretary remained unconvinced regarding which approach to use," and the contracting officer recalled that as of April 2018, long after Mr. Ubhi was gone, "the single award decision was still being vigorously debated." *Oracle*, 144 Fed. Cl. at 123–24. Thus, the contracting officer concluded that Mr. Ubhi had no effect on the decision to use a single-award approach or the fashioning of the gate criteria. The Claims Court sustained that judgment.

Oracle first argues that the contracting officer "failed to consider an important aspect of the problem" because

she did not wait for the results of the Department of Defense inspector general's investigation of the conflict of interest allegations with respect to Mr. Ubhi as well as Mr. Gavin. That contention is meritless. The contracting officer found that Mr. Ubhi and Mr. Gavin had conflicts of interest that violated federal regulations and possibly section 208. Neither the contracting officer nor the Claims Court needed the results of the inspector general's investigation to confirm whether Mr. Ubhi and Mr. Gavin had acted improperly.[7] The critical question for the

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[7] In April 2020, the Department of Defense Office of Inspector General ("OIG") issued a report detailing its extensive review of the JEDI Cloud procurement, including its conclusions regarding Mr. Ubhi's and Mr. Gavin's alleged ethical violations and the impact of those violations on the procurement. With respect to Mr. Ubhi, the OIG reached the following conclusion:

> In sum, we concluded that Mr. Ubhi engaged in unethical conduct when he made three false statements and failed to properly report financial interests in Amazon. These actions, combined with his involvement in early Cloud Initiative activities in September and October 2017, also created the appearance of violation of laws and ethical standards. However, his early involvement in the Cloud Initiative was not substantial and did not provide any advantage to his prospective employer, Amazon, in the JEDI Cloud contract competition, which was decided 2 years after Mr. Ubhi's resignation from the DoD. Although Mr. Ubhi's Cloud actions from September through October 2017 violated the JER and the FAR, his minimal and limited contributions were largely discarded and did not affect the conduct or outcome of the JEDI Cloud procurement.

Dep't of Def. Off. of Inspector Gen., Rep. on the Joint Enterprise Def. Infrastructure (JEDI) Cloud Procurement 157 (Apr. 13, 2020). The OIG also noted that it presented its findings regarding Mr. Ubhi to the United States Attorney for the Eastern District of Virginia for consideration as a criminal matter, but prosecution was declined. *Id.* at 154. With respect to Mr. Gavin, the OIG reached the following conclusion:

> In sum, we concluded that Mr. Gavin should have used better judgment by not attending the April 5, 2018, JEDI Cloud Acquisition strategy meeting after he had accepted a job with AWS, or by

contracting officer and the Claims Court was whether their improper conduct had impacted the procurement in a way that required the solicitation to be set aside. On that issue, the contracting officer's investigation, which the Claims Court held to be thorough and even-handed, was sufficient.

Second, Oracle argues that the Claims Court improperly upheld the contracting officer's determination with respect to the impact of Mr. Ubhi's conflict of interest on a ground different from that adopted by the contracting officer. According to Oracle, the Claims Court held, in effect, that Mr. Ubhi's involvement in the JEDI Cloud procurement occurred too late to influence the single-award decision, while the contracting officer concluded that Mr. Ubhi's involvement in the procurement occurred too early, i.e., before the final decisions were made as to whether to award one or multiple contracts.

That is too facile a characterization of the ground for the Claims Court's decision. The court recognized that, as the contracting officer found, the decision whether to use a single award or multiple awards was not made until long after Mr. Ubhi left the Defense Department. In fact, the Claims Court cited the contracting officer's remark that she had attended a meeting in April 2018, well after Mr. Ubhi's departure, in which the issue was "still being vigorously debated." *Oracle*, 144 Fed. Cl. at 124. Yet, as the court noted, the record also showed that at a September 2017 meeting of the Cloud Executive Steering Group, of which Mr. Ubhi was not a member, the group expressed a preference for a single award. The Claims Court's point

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sending someone else in his place, to avoid the appearance of a conflict. However, he did not violate ethical standards by following the ethics advice he received, and his participation in the meeting did not affect the JEDI Cloud procurement.

Id. at 166.

was that there was an expressed preference among the decisionmakers for a single award approach from prior to the time Mr. Ubhi was involved in the procurement, but the debate on that issue continued until after he was gone. And a final decision was not made until months after his departure. Under those circumstances, the contracting officer and the Claims Court agreed, there was no indication that Mr. Ubhi's brief seven-week involvement in the procurement materially affected the decision to use a single-award approach.

Oracle next contends that the Ubhi no-impact determination "runs counter to the evidence before the agency." There is no force to this argument. Oracle's contention that Mr. Ubhi "deliberately, systematically, and successfully influenced individuals to adopt the single-award approach" far outruns the limited evidence Oracle cites to support it. First, Oracle cites two separate instant messages in which a Department attorney told Mr. Ubhi, "Single is assumed now," and added, "Really glad you were here this week." That is not evidence that Mr. Ubhi's support for a single-award approach was important to the decision. Moreover, as the contracting officer found, the evidence shows that the issue of single-versus-multiple contract awards was debated long after Mr. Ubhi's departure from the agency, contrary to the implication in the instant message. Second, Oracle cites an instant message from Mr. Van Name in which he stated: "The single [vs.] multiple conversation is done. Everyone that matters is now convinced; Thursday's meeting was decidedly clear that we are all in favor of a single award." That message, however, does not remotely suggest that Mr. Ubhi's preference for a single-award approach was important to, or otherwise materially affected, the decisionmakers' selection.

Oracle next argues that the contracting officer was wrong to state that there was no evidence that Mr. Ubhi's

participation "had any substantive impact on the procurement decisions or documents," because there was evidence that Mr. Ubhi "edited material in October 2017" that the Department ultimately included in the solicitation. But the contracting officer reviewed Mr. Ubhi's "edits" in detail, and concluded that Mr. Ubhi's "influence and direct edits to the documents were minimal." The contracting officer estimated that Mr. Ubhi contributed an estimated 100 changes to the Problem Statement, "ranging in significance from formatting and grammar to revision of sentences and paragraphs," which were made as part of a group effort. In addition, the contracting officer noted, Mr. Ubhi's participation "contributed a total of eight (8) edits to the [request for information], all of which were contained within two sentences." Contrary to Oracle's contention, the evidence amply supports the contracting officer's conclusion that Mr. Ubhi did not materially impact the solicitation, particularly with respect to the single-award approach and the gating requirements.

On a separate issue, Oracle briefly contends that the contracting officer was wrong to find that there was "no evidence that . . . [Mr.] Ubhi obtained or disclosed any competitively useful nonpublic information." In fact, Oracle argues, Mr. Ubhi had access to sensitive information, including the JEDI Cloud team's Google drive, which he had on his computer. The contracting officer, however, found that Mr. Ubhi did not share any competitively useful nonpublic information with AWS and was not in a position to do so. The contracting officer noted that when Mr. Ubhi was rehired by AWS, he did not join AWS's JEDI Cloud proposal team, but joined the commercial team that was not involved in government contracts. Moreover, Mr. Ubhi was subject to firewalls within AWS, and the contracting officer reviewed numerous affidavits from AWS employees stating that he had not disclosed nonpublic information and that he was excluded from any

involvement with AWS's JEDI Cloud proposal. In light of the deferential standard of review for contracting officers' findings regarding conflicts of interest, the finding that Mr. Ubhi did not share sensitive information with AWS must be sustained.

2

Mr. DeMartino was a consultant for AWS before joining the Defense Department and therefore was prohibited by applicable ethics rules from participating in matters involving AWS throughout his tenure at the Department. At the Department he occupied two positions at different times: Deputy Chief of Staff for the Secretary of Defense and Chief of Staff for the Deputy Secretary. In the course of his duties, Mr. DeMartino had limited involvement in the JEDI Cloud procurement. The contracting officer characterized Mr. DeMartino's involvement in the procurement as "ministerial and perfunctory" and noted that he "provided no input into the JEDI Cloud acquisition documents." The contracting officer noted that the Department's Standards of Conduct Office had determined that "Mr. DeMartino's involvement in ministerial/administrative actions (such as scheduling meetings, editing/drafting public relations,[] etc.) did not constitute participating in the JEDI Cloud acquisition itself," and that Mr. DeMartino therefore was not in violation of the applicable ethical standards. However, in light of the high visibility of the procurement and in an abundance of caution Mr. DeMartino was advised that he should consider recusing himself from even ministerial and administrative matters related to the JEDI Cloud procurement, and he did so. In light of Mr. DeMartino's limited role, the contracting officer concluded that his activities "did not negatively impact the integrity" of the procurement.

The Claims Court upheld that determination, finding that none of the facts in the case contradicted the contracting officer's determination that Mr. DeMartino's

involvement with the JEDI Cloud project had no substantive impact on the procurement. According to the court, the contracting officer rationally determined that Mr. DeMartino "was merely a go-between for the Deputy Secretary and did not have substantive input into the structure or content of the solicitation." *Oracle*, 144 Fed. Cl. at 121. The court found that Mr. DeMartino "did not have a voice in whether DoD should use a single or multiple award approach and did not craft the substance of the evaluation factors." *Id.*

Oracle contends that the contracting officer failed to consider an important aspect of the problem and that her conclusions were contrary to the evidence. Oracle points to various communications among Department officials, including Mr. DeMartino, and a draft public statement relating to the JEDI Cloud procurement that Mr. DeMartino participated in editing. The evidence cited by Oracle does not establish that Mr. DeMartino was significantly involved in crafting the substance of the procurement.[8] We conclude that the record supports the contracting officer's finding, upheld by the Claims Court, that Mr. DeMartino's role in the procurement was limited, largely nonsubstantive, and did not significantly impact the procurement.

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[8] Many of the record excerpts cited by Oracle are so cryptic as to be of no value in supporting Oracle's contention that Mr. DeMartino was significantly involved in the substantive work of crafting the solicitation. Moreover, the list of 72 persons who the Department said were "personally and substantially" involved in the JEDI Cloud procurement between September 2017 and August 2018 did not include Mr. DeMartino's name. Oracle's suggestion that the inclusion of the name of the Deputy Secretary of Defense must have implicitly included Mr. DeMartino is entirely speculative, particularly because Mr. DeMartino was recused from involvement in the JEDI Cloud procurement after April 2018.

During the procurement, Mr. Gavin was a Deputy Assistant Secretary of the Navy. Between August 2017 and January 2018, he discussed retirement plans with an AWS recruiter. In October 2017, he attended a meeting of the Cloud Executive Steering Group, which was planning the JEDI Cloud procurement, to share the Navy's experience with cloud services. In January 2018, he submitted a Request for Disqualification from Duties, asking that he be excluded from matters affecting the financial interests of AWS. Later that month, he interviewed with AWS, and on March 29, 2018, he was offered a position with AWS, which he later accepted. On April 5, 2018, Mr. Gavin attended a meeting at which the attendees discussed the Draft Acquisition Strategy for the JEDI Cloud procurement. The contracting officer attended the same meeting and recalled that Mr. Gavin did not advocate for any particular vendor but instead advocated for a multiple-award approach.

After beginning his employment with AWS, Mr. Gavin was instructed by AWS that he was subject to an information firewall that prohibited him from disclosing any nonpublic information about the JEDI Cloud procurement to anyone at AWS. He agreed to comply with the firewall requirement.

Following her investigation of the conflicts of interest involving the JEDI Cloud procurement, the contracting officer concluded that Mr. Gavin had violated FAR 3.101 and possibly 18 U.S.C. § 208. But the contracting officer found that Mr. Gavin's involvement in the JEDI Cloud project did not taint the procurement. In particular, the contracting officer found that Mr. Gavin had limited access to the Draft Acquisition Strategy, did not furnish any input to that document, did not introduce bias into any of the meetings that he attended, and did not disclose any competitively useful information to AWS. Although Mr.

Gavin spoke with one member of the AWS JEDI Cloud proposal team before the firewall was instituted, that member and Mr. Gavin represented that Mr. Gavin had not disclosed any nonpublic information about the JEDI Cloud procurement.

The Claims Court found that the contracting officer's conclusions regarding Mr. Gavin were "well-supported." *Oracle*, 144 Fed. Cl. at 121. In particular, the court concluded that the record supported the contracting officer's findings that Mr. Gavin was involved in the procurement "only to offer his knowledge of the Navy's cloud services experience," and was not a member of any team that was working on the JEDI Cloud procurement. *Id.* at 121–22. The court noted that Mr. Gavin did not "assist in crafting the single award determinations or the technical substance of the evaluation factors." *Id.* at 122. At most, the court concluded, Mr. Gavin "attended a few JEDI Cloud meetings." *Id.* Moreover, the court added, Mr. Gavin did not appear to have obtained any contractor bid or proposal information, nor did he appear to have introduced any bias toward AWS in the meetings he attended. *Id.*

The court agreed with the contracting officer that Mr. Gavin had acted improperly in having a conversation with an AWS employee about the JEDI Cloud procurement after Mr. Gavin began working for AWS. The court found, however, that the contracting officer had "reasonably determined that Mr. Gavin simply did not have access to competitively useful information to convey to AWS." *Id.* at 122.

Oracle argues that the Claims Court's statement that Mr. Gavin did not have access to competitively useful information to convey to AWS is contrary to the contracting officer's findings that Mr. Gavin had access to the draft Acquisition Strategy in April 2018. That draft Acquisition Strategy, according to the contracting officer, contained nonpublic information that could be competitively useful.

The Claims Court observed, however, that by the time Mr. Gavin began working at AWS, the draft request for proposals had been released. The draft request for proposals, the court explained, provided AWS "access to the relevant information that also appeared in the draft Acquisition Strategy." *Id.* The court's observation that the information in the draft Acquisition Strategy had become public by the time Mr. Gavin began working for AWS thus provided support for the contracting officer's finding that Mr. Gavin did not disclose any competitively useful nonpublic information to AWS; it did not reflect a conflict between the findings of the contracting officer and the decision of the Claims Court.

In sum, notwithstanding the extensive array of claims raised by Oracle, we find no reversible error in the Claims Court's decision.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

Filed July 19, 2019 Re-Filed July 26, 2019[1]

No. 18-1880C

ORACLE AMERICA, INC.,
PLAINTIFF

v.

UNITED STATES,
DEFENDANT

AND

AMAZON WEB SERVICES, INC.,
INTERVENOR

Appeal from the United States Court of Federal Claims
(No. 1:18-cv-01880)

Craig A. Holman, Washington, DC, for plaintiff. *Kara L. Daniels*, *Dana E. Koffman*, *Amanda J. Sherwood*, and *Nathaniel E. Castellano*, of counsel.

William P. Rayel, Senior Trial Counsel, United States Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, with whom were *Joseph H. Hunt*, Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director, *Patricia M. McCarthy*,

[1] This opinion was originally issued under seal to permit the parties an opportunity to propose redactions by July 25, 2019. The government and intervenor proposed two redactions; plaintiff opposed one. Because both proposed redactions address protected information, the court adopts both. The parties also identified several possible clerical mistakes or omissions; to the extent we agree that they were clerical mistakes or omissions, and not substantive changes, we corrected them. RCFC 60(a).

Assistant Director, for defendant. *Christina M. Austin* and *Andrew Bramnick*, Washington Headquarters Service & Pentagon Force Protection Agency, United States Department of Defense, Office of General Counsel, of counsel.

Daniel R. Forman, Washington, DC, for intervenor. *Robert J. Sneckenberg*, *Olivia L. Lynch*, *James G. Peyster*, *Christian N. Curran*, and *Gabrielle Trujillo*, of counsel.

BRUGGINK, *Judge*.

This protest involves the Department of Defense's ("DoD") Joint Enterprise Defense Infrastructure ("JEDI") Cloud procurement. In the JEDI Cloud procurement, DoD is seeking an enterprise cloud services solution that will accelerate DoD's adoption of cloud computing technology. Oracle America, Inc. ("Oracle") initially filed this as a pre-award bid protest on December 6, 2018. After it was excluded from the competition during the protest and DoD completed several conflicts of interest determinations, Oracle amended its complaint. It currently has three primary challenges. First, it argues that the decision to use a single award as opposed to multiple awards was a violation of law. This argument has two components because the decision to use a single award had to be made both by an Under Secretary of Defense and independently by the contracting officer ("CO"). Second, it argues that the use of certain gate criteria, the application of which led to Oracle's exclusion, were improper for various reasons. Third, it contends that conflicts of interest on the part of DoD employees and Amazon Web Services, Inc. ("AWS"), one of the other bidders, prejudicially affected the procurement. AWS has intervened.

The parties filed cross-motions for judgment on the administrative record. The matter is fully briefed, and we held oral argument on July 10, 2019. As stated in the court's July 12, 2019 order, because we find that Gate

Criteria 1.2 is enforceable, and Oracle concedes that it could not meet that criteria at the time of proposal submission, we conclude that it cannot demonstrate prejudice even if the procurement was otherwise flawed. Plaintiff's motion for judgment on the administrative record is therefore denied. Defendant's and intervenor's respective cross-motions for judgment on the administrative record are granted.

One feature of the protest makes resolution somewhat awkward. Although we ultimately conclude that Gate Criteria 1.2 is enforceable and thus a comprehensive answer to all of plaintiff's arguments, it is necessary to provide a virtually complete recitation of the facts and arguments because Oracle contends that two of the asserted errors—the decisions adopting a single award approach and the conflict of interest determinations— influenced the formulation of Gate Criteria 1.2. The critical question as to those two arguments, therefore, is whether, if Oracle is correct on the merits, they impacted the formulation of the criteria on which Oracle concedes it fails. We ultimately conclude that they did not taint the formulation of that criteria or other aspects of the solicitation.

BACKGROUND

DoD is ready to adopt an enterprise cloud services solution.[2] It plans to award the vast majority of DoD's cloud

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[2] The agency defines "cloud" as "[t]he practice of pooling physical servers and using them to provide services that can be rapidly provisioned with minimal effort and time, often over the Internet." Administrative Record ("AR") Tab 25 at 478. The agency explains, "The term is applied to a variety of different technologies (often without clarifying modifiers), but, for the purpose of this document, cloud refers to physical computing and storage resources pooled to provide virtual computing, storage, or higher-level services." DoD explains that "commercial cloud means that a commercial cloud service provider is maintaining, operating, and managing the computing, networking, and storage resources that are being made available to

services business to a single vendor. Although DoD has been developing the JEDI Cloud procurement for several years, we enter the development timeline in August 2017, when the Secretary of Defense traveled to Seattle, Washington, and Palo Alto, California, to visit cloud services companies. Administrative Record ("AR") Tab 91 at 5955.

Following this trip, Deputy Secretary of Defense Patrick Shanahan sent a memorandum on September 13, 2017, to the secretaries of the military departments. He emphasized that certain technologies "are [1] changing the character of war; (2) commercial companies are pioneering technologies in these areas; [and] (3) the pace of innovation is extremely rapid." *Id.* The Deputy Secretary concluded that "accelerating [DoD's] adoption of cloud computing technologies is critical to maintain our military's technological advantage." *Id.* He explained that the adoption of cloud computing technology was "a Department priority" in which "[s]peed and security are of the essence." AR 5956. His memo went on to broadly outline the steps to set the JEDI Cloud procurement in motion.

To devise a strategy to accelerate the adoption of cloud services, the Deputy Secretary established the Cloud Executive Steering Group. The group would brief the Deputy Secretary on a bi-weekly basis on progress toward adoption of cloud computing technology. The Cloud Executive Steering Group consisted of Chair Ellen Lord, Under Secretary of Defense for Acquisition, Technology, and Logistics; Director Chris Lynch, Defense Digital Service; Director Will Roper, Strategic Capabilities Office; Managing Partner Raj Shah, Defense Innovation Unit Experimental; Executive Director Joshua Marcuse,

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customers. Depending on the contract, the commercial cloud service provider may be performing in commercial facilities or on premises." *Id.*

Defense Innovation Board; and advisor John Bergin, DoD Chief Information Officer Business Technology Office.

Adoption of an enterprise cloud would proceed in two phases. First, DoD would use "a tailored acquisition process to acquire a modern enterprise cloud services solution that can support unclassified, secret, and top secret information." *Id.* The Deputy Secretary tasked the Defense Digital Service, under Mr. Lynch, with leading phase one. The Defense Digital Service is a team within DoD's United States Digital Service. Members of Defense Digital Service dedicated to the JEDI Cloud procurement at that time included Mr. Lynch, legal counsel Sharon Woods, industry specialist Deap Ubhi, Deputy Director Timothy Van Name, and engineer Jordan Kasper. In the second phase, the Cloud Executive Steering Group would "rapidly transition select DoD Components or agencies to the acquired cloud solution," using cloud services as extensively as possible. *Id.*

Early Commitment to a Single Award and Tailored Acquisition Plan

The Cloud Executive Steering Group held a meeting the day after the Deputy Secretary issued his memo.[3] AR Tab 86. In attendance were Mr. Lynch; Ms. Woods; a Defense Digital Service engineer; Mr. Ubhi; two representatives from the Strategic Capabilities Office; Mr. Shah; Mr. Marcuse; and a "C3 cyber and business systems AT&L" representative. AR 5927. The meeting notes record that Mr. Lynch stated "[o]ver time there ha[ve] been considerable changes to the tech world outside of the DoD that are so fundamental that they are now serious constraints on delivering the mission of defense." *Id.* Mr. Lynch further noted, "If we feel uncomfortable moving

[3] The government's AR index states this meeting occurred on September 14, 2017. The meeting notes do not state the date of the meeting.

forward, then we are probably headed in the right direction." *Id.* The group noted that "Sec Deft DSD is afraid of vendor lock in." AR 5928.

The notes include the following comment: "Avoid specifying that there is a single vendor. This will create perception issues with vendors already in use." *Id.* This suggests that, from the beginning, the expectation was that there would be a single award.

The Cloud Executive Steering Group met again on September 28, 2017, and discussed when the problem statement draft, RFI, Business Case Analysis, and RFP would be developed. AR Tab 87. The meeting notes read: "Questions and inquiries form [sic] industry should be directed to Deap [Ubhi]." AR 5932. Procurement documents, such as the ones discussed at this meeting, were developed and stored in a Google Drive accessible by certain DoD personnel, including the Cloud Executive Steering Group and Defense Digital Service team.

In between meetings, members of the Defense Digital Service discussed the progress of the JEDI Cloud project on the agency's internal communication medium, Slack.[4] During this period, Defense Digital Service members discussed what to include in the problem statement. For instance, on October 2, 2017, they discussed whether "metrics" should be included in the problem statement or if they were too difficult to articulate at that point. Ms. Woods wrote, "Let me put the metrics in this context. The agreed upon measures drive what acquisition strategy will be approved. So, if multiple cloud providers can meet

[4] "Slack is a communication tool utilized by [the Defense Digital Service], and other authorized collaborators, to facilitate timely communication and coordination of work activities . . . . Slack channels are comprised of distinct groups of Slack users and are organized by purpose." AR Tab 221 at 58699. The government provided an index of user names and the message timestamps can be converted using an epoch time converter.

the metrics, then we don't get to one. The metrics drive how we solve the problem." AR 3123.

The "Draft Problem Statement" was complete October 3, 2017. The draft explained that DoD's "current computing and storage infrastructure environment and approach . . . is too federated, too slow, and too uncoordinated to enable the military to rapidly utilize DoD's vast information to make critical, data driven decisions." AR 60089. DoD envisioned acquiring services that "seamlessly extend[] from the homefront to the tactical edge."[5] *Id.* The authors concluded that DoD "cannot achieve this vision without a coordinated enterprise approach that does not simply repeat past initiatives." *Id.* The document repeated the ills of fragmented infrastructure in nearly every paragraph.

On October 5, 2017, the Cloud Executive Steering Group convened again.[6] According to the meeting notes, Under Secretary Lord explained that more than "600 cloud initiatives across" DoD currently exist and that the "cloud initiative is about implementing an enterprise approach rather than an uncoordinated eclectic approach that has resulted in pockets of cloud adoption." AR 5933. Mr. Lynch contributed: "[a] [s]ingle cloud solution [is] necessary for this enterprise initiative to be successful

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[5] DoD defines tactical edge as "[e]nvironments covering the full range of military operations, including, but not limited to forces deployed in support of a Geographic Combatant Commander or applicable training exercises, on various platforms . . . and with the ability to operate in austere and connectivity-deprived environments." AR Tab 25 at 479.

[6] DoD defines tactical edge as "[e]nvironments covering the full range of military operations, including, but not limited to forces deployed in support of a Geographic Combatant Commander or applicable training exercises, on various platforms . . . and with the ability to operate in austere and connectivity-deprived environments." AR Tab 25 at 479.

and allow DoD to achieve its mission objectives with cloud adoption." AR 5934.

Slack messages among the Defense Digital Service team members refer to a late October 2017 Cloud Executive Steering Group meeting at which Mr. Ubhi, along with others, argued for a single award approach. AR 60100, 60229. The messages suggest that attendees either already favored a single award or were persuaded at the meeting.

On October 27, 2017, Defense Digital Service's Mr. Kasper sent the Deputy Secretary a two-page update on the DoD Cloud efforts and the draft Request for Information ("RFI"). AR Tab 51. Under "Acquisition Strategy Approach," the update anticipated an Indefinite Delivery, Indefinite Quantity ("IDIQ") contract and "[f]irm-fixed pricing with commercial catalog." AR 4324. On "Single versus Multiple Providers," the update stated: "General consensus is that we should press forward with a single provider approach for now . . . The [Cloud Executive Steering Group] acquisition strategy is focusing on a single-award." AR 4325. The primary reasoning for a single rather than multiple award was "reduced complexity, ensuring security of information to the greatest degree possible, ease of use and limited barriers to entry, virtual private cloud-to-virtual private cloud peering, and seamless, secure sharing of data across the enterprise through cloud peering." *Id.*

Development of the Tailored Solicitation Approach and Needs

DoD issued an RFI to the commercial world on October 30, 2017, inquiring into available cloud computing services. DoD emphasized its need to rely on "the cloud provider(s)" for all levels of data classification from the homefront to the tactical edge. AR 5936. Among other items, DoD asked for information about responders' third-party marketplace, failover and data replication architecture,

ability to operate "at the edge of connectivity," and for an example of "a large commercial customer with worldwide presence that has migrated to your infrastructure and platform services." AR 5937-38.

Before DoD received responses, it completed a summary of the JEDI Cloud procurement effort to date on November 6, 2017. This included an "Acquisition Strategy" description: "Single-award [IDIQ] contract using full and open competitive procedures. A single Cloud Service Provider (CSP) to deliver services for cloud computing infrastructure and platform services. Up to ten-year ordering period." AR 5957.

The agency received RFI responses on November 17, 2017. Many responders questioned whether a single award would offer the best cost model, whether one vendor could possibly be the leader in all areas, and whether a single vendor would devalue investment made by existing vendors. Oracle argued that a single award would stifle adoption of market-driven innovation. Microsoft concurred: "DoD's mission is better served through a multi-vendor cloud approach," because "competition drives innovation," and offers "greater flexibility." AR 1545. Microsoft urged DoD to preserve its flexibility and agility to adopt the latest cloud technology and to avoid "a single point of failure." *Id.* IBM likewise responded: "Limiting the DoD to a single cloud provider will negatively impact DoD's source access to innovative cloud offerings and increase risk of deployment failure." AR 1983. Google argued that DoD must not become "beholden to monolithic solutions or single cloud providers." AR 1924.

AWS, on the other hand, argued that, although multiple awards might decrease the likelihood of protests, a single award would increase consistency, interoperability, and ease of maintenance. AWS posited that commercial parity requirements would guarantee innovation. AWS

was not alone in noting that single awards had been used in the past and that they might offer advantages.

On December 22, 2017, the Joint Requirements Oversight Council issued a memo to twenty-two DoD stakeholders to address "Joint Characteristics and Considerations for Accelerating to Cloud Architectures and Services." AR Tab 17. The council "accept[ed] the Defense Digital Service cloud brief" and acknowledged that "accelerating to the cloud [is] critical in creating a global, resilient, and secure information environment that enables warfighting and mission command." AR 321. The memo repeated DoD's expectations: data exchange across all classification levels and DoD components; an environment that is scalable and elastic; security from persistent adversary threats; use to the tactical edge; and industry-standard high availability.

The memo identified "cloud characteristics and elements of particular importance to warfighting missions." AR 323. Those characteristics were: cloud resiliency without a single point of failure, support of DoD's cyber defenses, enabling cyber defenders, and role-based training. The attached presentation referred to a single "cloud provider." AR 330.

On January 8, 2018, Deputy Secretary Shanahan circulated a memorandum to the secretaries of the military departments providing an "Accelerating Enterprise Cloud Adoption Update." AR Tab 94. This memo stated that the Cloud Executive Steering Group had provided recommendations as requested and that "the Deputy Chief Management Officer (DCMO), in partnership with Cost Assessment and Program Evaluation, Chief Information Officer, and Defense Digital Service, [would now] take the lead in implementing the initial acquisition strategy." AR 5978. The memo also directed the Deputy Chief Management Officer to establish a Cloud Computing Program Manager. The Deputy Secretary directed the

Deputy Chief Management Officer and the Chief Information Officer to work with "the Services; the Under Secretary of Defense for Intelligence; and the Under Secretary of Defense for Acquisition, Technology, and Logistics to build cloud strategies for requirements related to military operations and intelligence support." *Id.*

Three months later, DoD released the first draft RFP and held an industry day on March 7, 2018. DoD provided the draft RFP for "early and frequent exposure to industry of the Department's evolving requirement." AR 5995. DoD anticipated awarding a single award IDIQ that would issue firm fixed-price task orders. DoD would seek Infrastructure as a Service ("IaaS") and Platform as a Service ("PaaS").

IaaS is "[t]he capability provided to the consumer to provision processing, storage, networks, and other fundamental computing resources where the consumer is able to deploy and run arbitrary software, which can include operating systems and applications." AR Tab 25 at 478. DoD explained, "The consumer does not manage or control the underlying cloud infrastructure but has control over operating systems, storage, deployed applications, and possibly limited control of select networking components (e.g., host firewalls)." *Id.*

PaaS is "[t]he capability provided through software, on top of an IaaS solution, that allows the consumer to replicate, scale, host, and secure consumer created or acquired applications on the cloud infrastructure." AR 479. As with IaaS, DoD explained, "The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, or storage, but has control over the deployed applications and possibly application hosting environment configurations." *Id.*

The draft included a specially crafted "New Services" clause, providing that "DoD may acquire new products and/or services from the contractor for capabilities not

currently provided in the Cloud Services Catalog Price List under this contract." AR 6013. The draft also introduced the concept of Factor 1 Gate Criteria, a number of metrics which offerors would have to meet to advance to consideration of other factors. Three of the criteria are at issue in this protest. Gate Criteria 1.1 required the offeror to "provid[e] a summary report for the months of January and February 2018 that depicts each of the four metric areas detailed below." AR 6083. Gate Criteria 1.2 required the offeror to have no fewer than three physical, unclassified data center locations at least 150 miles apart and to document network availability. An additional criteria (later numbered 1.6) required the offeror to provide a marketplace for both native and third-party programs.

On March 27, 2018, the Cloud Computing Program Office completed its Market Research Report, which DoD used to "inform the overall acquisition strategy." AR 366. Market research included vendor meetings held from October 12, 2017 to January 26, 2018, focus sessions within DoD and with industry leaders, intelligence community meetings, and the RFI.

The Cloud Computing Program Office found that "market research indicate[s] that multiple sources are capable of satisfying DoD's requirements for JEDI Cloud." *Id.* The office found, however, that "[o]nly a few companies have the existing infrastructure—in both scale and modernity of processes—to support DoD mission requirements, worldwide." AR 369. The office concluded that "[i]f the JEDI Cloud contract is sufficiently flexible and requires maintaining technical parity with commercial solutions," DoD would be able to apply cloud solutions to the tactical edge. AR 366. The office also found that providers' information security and ability to operate in disconnected environments were still growing and that a "robust, self-service marketplace" is "essential." AR 369. The office found that the responses did not clearly

demonstrate how multiple clouds benefitted the agency's security needs.

The Cloud Computing Program Office completed the Business Case Analysis on April 11, 2018. The summary provides that the Business Case Analysis, Acquisition Strategy, Statement of Objectives, and Cybersecurity Plan form the foundation of the procurement. The problem statement indicated that DoD's operations are hampered by fragmented, outdated computing and storage infrastructure; tedious, manual management processes; and lack of interoperability, seamless systems, standardization, and automation. "In short, DoD's current computing and storage infrastructure critically fails DoD's mission and business needs." AR 403. This gloomy assessment led to eight objectives: available and resilient services; global accessibility; centralized management and distributed control; ease of use; commercial parity; modern and elastic computing; storage; and network infrastructure, fortified security, and advanced data analytics.

The office turned to available alternatives. The analysis of alternatives was "based on outcomes when the overarching goal is for JEDI Cloud to host 80% of all DoD applications that currently reside in DoD on-prem[ise] centers, existing cloud offerings, and legacy systems." AR 405. The office assumed that the solution required "significant transformation," because "DoD needs to extricate itself from the business of installing, managing, and operating data centers." AR 406. The office also assumed that a high degree of integration is necessary and using multiple vendors would increase complexity and cost.

Four alternatives were considered: DoD retaining 80% of the workload; DoD splitting its workload with JEDI Cloud; a single JEDI Cloud provider managing 80% of the workload; and multiple JEDI Cloud providers splitting 80% of the workload. The office concluded that a single JEDI Cloud provider would fulfill seven of the

eight objectives and partially fulfill the global accessibility objective. Multiple JEDI Cloud providers, on the other hand, would meet only four objectives and partially meet four objectives. The DoD-focused options all failed at least one objective.

The office did not see any disadvantage to adopting a single JEDI Cloud provider approach. It found that global accessibility is problematic in any scenario because the technology is evolving. This section concluded: "There are significant overlaps in the commercial cloud services offered by the various providers, such that any provider selected will meet the majority of Department needs." AR 410.

The office acknowledged that DoD would "benefit from the commercial parity, investment, innovation, and technical evolution of commercial cloud offerings driven by industry, and additional commercial service offerings [that] will be made available" if it chose a multiple award approach. AR 411. Ultimately, it concluded that this approach would be "technically more complex." *Id.* Using multiple vendors would "significantly complicate[] management," "raise[] the risk profile," compromise ease of use, create new security vulnerabilities, and impede interoperability. *Id.* The office recommended that the agency "proceed with the acquisition of services from a single" cloud services provider. AR 412.

The analysis set out nine "high-level programmatic success criteria" mapped to the eight objectives. AR 415. Among the criteria were "a commercial [cloud services provider] where total usage by DoD does not exceed 50% of the provider's total network, computing, and storage capacity;" "ongoing parity with commercial offerings for unclassified applications for pricing;" a "scalable, resilient, and accredited" cloud services solution that can manage needs from DoD's users; and ability to operate in disconnected and austere environments. AR 415-16.

The analysis addressed seven program risks. Oracle highlights the sixth risk assessed, which it believes indicates a connection between the desire for a single awardee and the metrics selected for the gate criteria:

> The JEDI Cloud program schedule could be negatively impacted if source selection extends beyond the planned timeline due to an unexpected number of proposals or lengthy protest delays. To mitigate this risk, the solicitation will use a gated evaluation approach that includes "go/ no-go" gate criteria. Offerors must meet the established minimum criteria in order to be considered a viable competitor. Also, [the Cloud Computing Program Office] will communicate those criteria through a draft solicitation process.

AR 422.

On April 16, 2018, DoD issued the second draft RFP, including a chart with DoD's responses to questions received from industry. Although many potential offerors questioned the gate criteria, DoD made only a few changes. For Factor 1.1, the relevant measuring period remained January through February 2018. For Factor 1.2, the location of the three data centers was broadened from the continental United States to "the Customs Territory of the United States." AR 6241. DoD added that the proposed data centers must contain hardware used to provide IaaS and PaaS services "that are FedRAMP Moderate compliant." *Id.* Factor 1.6, a marketplace containing native services and third-party services, remained unchanged, as did the "New Services" provision, which allowed the introduction of new services during the ten-year contract period.

CO's Justification of Single Award Approach

The agency was required to explain its decision to use a single award for the JEDI Cloud procurement. The agency must satisfy both a regulatory requirement for the

CO to consider whether a multiple award was appropriate and a statutory requirement for the head of the agency to determine if a single award was permissible in an acquisition of this size. We discuss those requirements below.

On July 17, 2018, the CO issued her memo stating that the rationale for using a single award IDIQ contract overcame the multiple award preference stated in FAR 16.504(c) (2018). That regulation provides that, when planning an IDIQ acquisition, the CO must determine whether multiple awards are appropriate, giving preference to multiple awards to the "maximum extent practicable." FAR 16.504(c). The regulations set out six exceptions to the single award preference; if the CO determines any of those conditions exist, the agency "must not" use a multiple award approach. *Id.*

The CO relied on three exceptions to the multiple award preference. First, "[b]ased on the CO's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made." AR 455. Second, "[t]he expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards." *Id.* Third, "[m]ultiple awards would not be in the best interests of the Government." *Id.*

The CO explained that a vendor is more likely to offer favorable price terms and make the initial investment to serve DoD's needs if it can be assured it will recoup its investment through packaging prices for classified and unclassified services. The CO next observed that administering multiple contracts is costlier and less efficient. Finally, she reasoned that "[p]roviding the DoD access to foundational commercial cloud infrastructure and platform technologies on a global scale is critical to national defense and preparing the DoD to fight and win wars." AR 461-62. "Based on the current state of technology, multiple awards . . . i) increase security risks; ii) create

impediments to operationalizing data through data analytics, machine learning (ML), and artificial intelligence (AI); and iii) introduce technical complexity in a way that both jeopardizes successful implementation and increases costs." AR 462.

She explained that "multiple awards increase security risks," because a single cloud can offer data encryption but with the added benefit of seamless data transfer. *Id.* Multiple clouds, on the other hand, would "frustrate the DoD's attempts to consolidate and pool data so data analytics capabilities can be maximized for mission benefit." AR 463. The CO iterated that "[o]ne of the primary goals of" the procurement "is to decrease barriers to adoption of modern cloud technology to gain military advantage." *Id.* She found that multiple clouds inherently raise barriers, because they require additional training, interoperability, more space, and more investment. In the conclusion, the CO stated that a single award solution "achieves better security, better positions the DoD to operationalize its data, and decreases barriers to rapid adoption." AR 464.

The Under Secretary's Justification of Single Award Approach

Just two days after the CO signed her single award determination, on July 19, 2018, Under Secretary Lord signed a separate Determination and Findings ("D&F") stating that DoD was authorized to award the JEDI Cloud contract to a single cloud services provider. This separate determination was required, because in 2008 Congress prohibited DoD, among other agencies, from awarding task order contracts in excess of $112 million[7] to

[7] 41 U.S.C. § 1908 (2012) (statutory inflation adjustment requirement); Inflation Adjustment of Acquisition-Related Thresholds, 80 Fed. Reg. 38293-01, 38997 (July 2, 2015) (adjusting the $100 million single award prohibition).

a single source. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843(a)(1), 122 Stat. 3, 236 (2008) ("Limitation on Single Award Contracts"). This added another level of scrutiny unique to large single award procurements in addition to the multiple award preference.

Exceptions are permitted, however, when the head of the agency determines that one of four exceptions to the single award prohibition exists. 10 U.S.C. § 2304a(d)(3)(A)-(D) (2012).

The Under Secretary based the D&F on one exception to the statutory prohibition: "the contract provides only for firm, fixed price (FFP) task orders or delivery orders for services for which prices are established in the contract for the specific tasks to be performed." AR Tab 16 at 318. Although the statute offers three other exceptions to the single award prohibition, the D&F only applied this single exception to the JEDI Cloud procurement.

The D&F then set out seven findings. The fourth through seventh findings provided more detail justifying a single award. The findings set out that the successful offeror's discount methodologies will be incorporated into the contract, thus presumably minimizing concern over pricing. The contract line item numbers for cloud offerings "will be priced by catalogs resulting from the full and open competition, thus enabling competitive forces to drive all aspects of [firm fixed] pricing." AR 319. The catalogs will cover the "full potential 10 years." *Id.* The successful offeror's catalog will be incorporated in the contract.

The Under Secretary's discussion acknowledged two pricing-related clauses in Section H of the contract that warranted mentioning: sections H2 and H3. Section H2 New Services, provides:

1. Subsequent to award, when new (including improved) IaaS, PaaS, or Cloud Support Package services are made publicly available to the commercial marketplace in the continental United States (CONUS) and those services are not already listed in the JEDI Cloud catalogs . . . the Contractor must immediately (no later than 5 calendar days) notify the JEDI Cloud Contracting Officer for incorporation of the new services into the contract . . . . At its discretion, the Contractor may also seek to incorporate new services into the contract in advance of availability to the commercial marketplace. The JEDI Cloud Contracting Officer must approve incorporation of any new services into the contract.

2. Any discounts, premiums, or fees . . . shall equally apply to new services, unless specifically negotiated otherwise.

3. The price incorporated into the JEDI Cloud catalog for new unclassified services shall not be higher than the price that is publicly-available in the commercial marketplace in CONUS, plus any applicable discounts, premiums or fees . . . .

> a. New services that are proposed to be incorporated into the contract in advance of availability to the commercial marketplace may potentially be considered a noncommercial item. The JEDI Cloud Contracting Officer will make a fact specific commerciality determination. If the new service is not a commercial item and no other exception or waiver applies, the JEDI Cloud Contracting Officer may require certified cost and pricing data or other than certified cost and pricing data under FAR Subpart 15.4 to make a fair and reasonable price determination.
>
> > i. If there are any new fees associated with a new service that is proposed to be

> incorporated into the contract in advance of availability to the commercial marketplace, the new proposed fee must be provided to the JEDI Cloud Contracting Officer for review and, if appropriate, approval and incorporation into the contract.
>
> 4. The price incorporated into the JEDI Cloud catalog for new classified services may include a price premium as compared to unclassified services because of the additional security requirements. . . .

AR Tab 35 at 740-41 (Final Amended RFP). The net effect of this provision is to permit the addition of wholly new services to the contract over time.

Section H3 provides:

> 1. Within 45 calendar days of the Contractor lowering prices in its publicly-available commercial catalog in CONUS, the Contractor shall submit a revised catalog for incorporation into Attachment J-1, Price Catalogs as follows:
>
> > a. For unclassified services, the revised catalog price shall match the commercially lower price.
> >
> > b. For classified services, the revised catalog price shall be lowered by to be completed by Offeror percentage of the net value difference for the newly lowered rate for the unclassified service. . . .
>
> 2. Any discounts, premiums, or fees in Attachment J-3: Contractor Discounts, Premiums, and Fees shall equally apply to any services with price changes, unless specifically negotiated otherwise.
>
> 3. The Contractor may offer new or additional discounts at any time to be incorporated into Attachment J-3: Contractor Discounts, Premiums, and Fees only upon JEDI Cloud Contracting Officer approval.

> 4. When the JEDI Cloud Contracting Officer incorporates the revised price into the Attachment J-1, Price Catalogs and/or Attachment J-3: Contractor Discounts, Premiums, and Fees, as appropriate, the Contractor shall update the listing of services and corresponding prices in the online pricing calculator and APIs for JEDI Cloud within 24 hours.

AR 741. This section would apparently offer some assurance that the prices of new services would be moderated.

The attraction of these clauses was that DoD could take advantage of changes in new cloud services that likely will emerge in the marketplace over the ten year lifetime of the contract. They would also ensure that the awardee could not price the new service "higher than the price that is publicly-available in the commercial marketplace in the continental United States." AR 740. The CO could then choose to approve the addition of these services to the contract. The Under Secretary reasoned that, because the CO had to approve the new service, once the service was added, its unit price would be fixed, and that the contract thus remained one in which all task orders had "established" firm fixed prices within the terms required by the chosen exception.

JEDI Cloud RFP

On July 26, 2018, DoD issued the RFP for the JEDI Cloud. DoD anticipated awarding a single IDIQ contract, incorporating the awardee's fixed unit price information and catalog offerings to serve as the basis for firm-fixed price task orders. The performance period could extend over ten years: a two-year base period, two three-year option periods, and a final two-year option period.

Section M provides that the agency will evaluate proposals according to the RFP requirements and for best value to the government. The evaluation includes two phases. First, the agency will evaluate the offeror's

submission against the seven gate criteria. An offeror which receives an "Unacceptable" rating for any gate criteria "will not be further evaluated." AR 805.

The second phase begins with the agency evaluating the remaining proposals against Factors 2 through 6 (non-price) and Factor 9 (price). After applying those factors, the agency will establish a competitive range. Offerors in the competitive range will be invited to submit materials for evaluation on non-price Factors 7 and 8 and to engage in discussions. The agency will eliminate any offerors that are rated "Marginal" or "Unacceptable" for Technical Capability or are rated "High" risk under Factor 8 Demonstration. Once any discussions conclude, remaining offerors will be permitted to submit a final proposal revision. The agency will evaluate final proposals, eliminate any proposals with a "High" risk rating or that are rated below "Acceptable" on non-price factors, and determine the proposal that offers the best value.

We return now to phase one, application of the seven gate criteria from Factor 1: 1.1 Elastic Usage; 1.2 High Availability and Failover; 1.3 Commerciality; 1.4 Offering Independence; 1.5 Automation; 1.6 Commercial Cloud Offering Marketplace; and 1.7 Data. The protest puts Gate Criteria 1.1, 1.2, and 1.6 at issue.

Under Gate Criteria 1.1, the agency evaluates offers for whether "the addition of DoD unclassified usage will not represent a majority of all unclassified usage." AR 806. To comply with this gate criteria, the offeror must submit a summary report reflecting its capacity in terms of "Network," "Compute," and "Storage" parameters for the period of January to February 2018. AR 791. "JEDI unclassified usage [must be] less than 50% of the [Commercial Cloud Offering] usage as demonstrated by" the three metrics: Network, Compute, and Storage. *Id.* Under Network, for the selected two months, offerors had to assume JEDI Cloud unclassified ingress was 10.6

Petabytes and 6.5 Petabytes for unclassified egress. Under Compute, offerors had to assume the JEDI Cloud unclassified average physical compute cores in use by application servers was 46,000 cores. Under Storage, offerors had to assume JEDI unclassified data storage usage averaged 50 Petabytes online, 75 Petabytes nearline, and 200 Petabytes offline across the 2 months.

Three days prior to the release of the JEDI Cloud RFP, Timothy Van Name, Deputy Director of the Defense Digital Service, submitted a memorandum to the CO justifying the use of the gate criteria. It states that Gate Criteria 1.1 exists "to ensure that JEDI Cloud: 1) is capable of providing the full scope of services even under surge capacity during a major conflict or natural disaster event; and 2) experiences ongoing innovation and development and capability advancements for the full potential period of performance (10 years)." AR 944.

Mr. Van Name continued, "Not including this criteria will risk future military operations that depend on the overall ability of the Offeror to support surge usage at vital times." *Id.* He explained that, "Limiting JEDI Cloud to 50%, excluding the Offeror's own usage, is essential to ensuring the Offeror's ability to support commercial innovation by requiring a critical mass of non-JEDI customers and usage that will drive further development of the service offerings." AR 945. Mr. Van Name justified the requirement for offerors to present summary reports based on data from January 2018 and February 2018 as necessary in order "to facilitate fair competition, as this prevents potential Offerors from taking measures to change their numbers once they became aware of this [Gate Criteria] requirement at the release of the draft RFP in March 2018." *Id.*

The next challenged Gate Criteria is 1.2. There are four elements within Gate Criteria 1.2, but only the first is relevant to this protest:

> No fewer than three physical existing unclassified [Commercial Cloud Offering] data centers within the Customs Territory of the United States . . . that are all supporting at least one IaaS offering and at least one PaaS offering that are FedRAMP Moderate "Authorized" by the Joint Authorization Board (JAB) or a Federal agency as demonstrated by official FedRAMP documentation.

AR 792.

Concerning Gate Criteria 1.2, Mr. Van Name wrote, "The rationale for including these minimum requirements in the RFP is to validate that JEDI Cloud can provide continuity of services for DoD's users around the world." AR 947. He notes that "[h]igh availability and failover requirements are long standing within the DoD, particularly around the critical infrastructure that supports warfighters." *Id.* Plaintiff specifically challenges the inclusion of the FedRAMP Moderate "Authorized" requirement, which it was admittedly unable to meet at the time of proposal submission. Mr. Van Name explained at the time that, even though the successful offeror would not have to be FedRAMP Moderate "Authorized" during performance, such authorization "is the Federal cloud computing standard and represents the Department's minimum security requirements for processing or storing DoD's least sensitive information." *Id.* (emphasis added). The authorization process "validates [that] the physical data center security requirements are appropriately met." *Id.* Upon award, the offeror has thirty days to "meet the more stringent security requirements outlined in the JEDI Cyber Security Plan for unclassified requirements, but being able to meet the more stringent requirements are contingent on the underlying physical data center security requirements that are approved during the FedRAMP Moderate review process." *Id.*

The third gate criteria at issue is 1.6. The marketplace will be used "to deploy [Commercial Cloud Offering] and third-party platform and software service offerings onto the [Commercial Cloud Offering] infrastructure." AR 793. It exists "to enable DoD to take advantage of the critical functionality provided by modern cloud computing providers to easily 'spin up' new systems using a combination of IaaS and PaaS offerings as well as offerings provided through the vendor's online marketplace." AR 950-51. The marketplace provides ease of use and rapid adoption. Mr. Van Name concluded that "all [s]ub-factors under Factor 1 Gate Criteria are necessary and reflect the minimum requirements for JEDI Cloud." AR 952.

Post-Solicitation Events

Oracle filed a pre-bid, pre-award protest at the GAO on August 6, 2018, challenging the single award approach. The agency then amended the RFP, and Oracle filed a supplemental protest on August 23, 2018, challenging the three gate criteria discussed above. The agency amended the RFP again on August 31, in relevant part permitting an offeror to demonstrate that it met Gate Criteria 1.2, FedRAMP Moderate "Authorized," through authorization by the Joint Authorization Board or by an agency. Oracle then filed a consolidated protest on September 6, 2018, raising its conflicts of interest argument (the facts of which are discussed in the next section).

Four offerors, including Oracle, submitted proposals on October 12, 2018. GAO subsequently denied Oracle's protest. Oracle filed its protest in this court on December 6, 2018. Oracle did not move for a preliminary injunction. The agency informed the court that it did not intend to make an award until midsummer 2019.

Meanwhile, the agency continued to perform its evaluation, starting with Factor 1 Gate Criteria. On December 12, 2018, the Technical Evaluation Board ("TEB") found

Oracle's proposal "Unacceptable" under Factor 1 Gate Criteria 1.1 and it ended evaluation of Oracle's proposal.

Oracle was found "Unacceptable" under the Network component of Gate Criteria 1.1 because its "proposal does not specify a comparison of the aggregate network usage as required, it only specifies a comparison against installed network capacity in the Summary Report." AR 57848. The board also found Oracle's proposal unacceptable for the Compute component, because Oracle placed its table for JEDI Cloud and Cloud Commercial Offering average physical compute cores in use in its Tab A narrative instead of in its Summary Report. For the Storage component, the board concluded, "The JEDI Cloud RFP requires that 'JEDI unclassified usage must be less than 50% of the [Commercial Cloud Offering] [average storage] in use'. This proposal is found 'Unacceptable' for Subfactor 1.1(2) because the calculated JEDI Cloud daily average storage usage is 50.79%." AR 57849. The proposal also failed to provide detailed storage information in bytes for each of the required categories, instead providing an aggregate for all types of storage. *Id.* Because Oracle did not meet Gate Criteria 1.1, the agency did not consider whether it met the other five criteria.

The TEB also completed the gate criteria evaluations for the other three offerors. The board found AWS and Microsoft "Acceptable" under all gate criteria. It found IBM "Unacceptable" under Gate Criteria 1.2 and ended its evaluation.

On February 19, 2019, the TEB completed its evaluation of the only two remaining offerors, AWS and Microsoft, for non-price Factors 2-6. [redacted]

In late February 2019, the Source Selection Evaluation Board completed its Executive Summary Reports, confirming that it had reviewed the technical evaluations. The Source Selection Advisory Council then affirmed the TEB's consideration of the gate criteria submissions and

completed the Executive Summary Report. The Source Selection Advisory Council Chair concluded: "[I]t is not recommended that the SSA make award based on the initial proposal, as both [AWS] and [Microsoft] proposals have deficiencies that make them unawardable." AR 58641. After discussion with the Source Selection Authority Council, however, the Chair recommended "that the [Procuring Contracting Officer] make a competitive range determination of two, to include both AWS and Microsoft." *Id.* The CO determined that AWS and Microsoft would be the competitive range. The evaluation process is ongoing.

Conflicts of Interest Relating to the JEDI Cloud Procurement

Oracle alleges that, throughout this procurement, three individuals with conflicts of interest (Deap Ubhi, Tony DeMartino, and Victor Gavin) affected the integrity of the JEDI Cloud acquisition and that AWS has an organizational conflict of interest. On July 23, 2018, the CO completed a memo for the record stating her assessment that the possible conflicts of interest of five individuals, including Mssrs. Ubhi and DeMartino, had "no impact" on the procurement. She applied FAR 3.104-7. Her initial analysis is considered below.

Tony DeMartino

Mr. DeMartino was an AWS consultant prior to joining DoD. In January 2017, he became the Deputy Chief of Staff for the Secretary of Defense. In March, he transitioned to Chief of Staff for the Deputy Secretary.

On April 24, 2017, a Senior Attorney in the Office of General Counsel, Standards of Conduct Office, emailed Mr. DeMartino a "Cautionary Notice." AR 4345. The attorney wrote: "[Y]ou may have a regulatory prohibition under 5 C.F.R. § 2635.502 on participating in matters where one of the entities for whom you served as a

consultant during the last year is or represents a party to the matter." *Id.* The attorney reminded Mr. DeMartino that DoD does business with "Amazon" and that he must "be vigilant and consult with our office before participating in any matters involving these entities until the one-year period has expired." *Id.* The email concluded, "If you have potentially conflicting duties, please discuss with your supervisor and coordinate with our office to ensure that any conflicts are properly resolved." *Id.*

As a part of his duties as Chief of Staff, Mr. DeMartino performed work related to the JEDI Cloud procurement. He did not, however, have access to the Google Drive or the Slack channels. He coordinated staffing of the September 13, 2017 Accelerating Enterprise Cloud Adoption Memorandum. In October 2017, he participated in editing an opinion piece for the Deputy Secretary regarding the procurement just before the release of the RFI. He coordinated meetings for the Deputy Secretary relating to the procurement through early 2018.

Mr. DeMartino's position required him to communicate the Deputy Secretary's questions to members of the Cloud Executive Steering Group and the Defense Digital Service, among others. He also attended meetings where the development of procurement documents was discussed.

Mr. DeMartino worked for the Deputy Secretary through March 2018. He then returned to his position as Deputy Chief of Staff for the Secretary of Defense. Inquiries arose in 2018 regarding his former position as an AWS consultant. Only then did Mr. DeMartino seek advice from the Standards of Conduct Office. The office determined that Mr. DeMartino had not participated in the JEDI Cloud procurement in a manner covered by regulations. The office verbally advised Mr. DeMartino, however, that given the high visibility of the procurement, he should consider recusing himself from anything to do with

the acquisition. The office also notified those working on the JEDI Cloud procurement of that warning.

On April 2, 2018, Mr. DeMartino communicated with Defense Digital Service Director Lynch regarding a JEDI Cloud Update document, providing comments and questions on that document. Between April 4 and June 5, he emailed with members of the Defense Digital Service about an unrelated matter, received a final briefing paper for the Secretary of Defense, and was copied on an email from Ms. Woods regarding the second draft RFP. Mr. DeMartino resigned from federal employment in July 2018. The record does not reflect Mr. DeMartino negotiating for or returning to any form of AWS employment after his resignation.

The CO considered whether Mr. DeMartino was impartial in performing his official duties. She found that he did not have "input or involvement in the reviewing or drafting of the draft solicitation package, the Acquisition Strategy, Business Case Analysis, or other pre-decisional sensitive documents relative to the JEDI Cloud acquisition." AR 685. She also found that he "worked with [Standards of Conduct Office] throughout his DoD employment to ensure compliance with all applicable ethical rules." *Id.* The CO concluded that his "involvement was ministerial and perfunctory in nature" and he "did not participate personally and substantially in the procurement. Therefore, Mr. DeMartino's involvement did not negatively impact the integrity of the JEDI Cloud acquisition." *Id.* In her testimony during the GAO hearing in Oracle's bid protest, the CO repeated this conclusion. The CO did not revisit her conclusion on Mr. DeMartino's actions in her 2019 assessment.

Deap Ubhi

The CO also evaluated Mr. Ubhi's impact on the JEDI Cloud procurement. She listed five findings. First, "Mr. Ubhi was previously employed with AWS, which

ended in January 2016." AR 686. Second, "Mr. Ubhi was employed with Defense Digital Service from August 22, 2016 to November 27, 2017." *Id.* Third, "Mr. Ubhi was involved with JEDI Cloud market research activities between September 13, 2017 and October 31, 2017." *Id.* Fourth, "[b]ecause greater than one year had lapsed between when his AWS employment ended and when his participation in JEDI Cloud started, no restrictions attached to prohibit Mr. Ubhi from participating in the procurement." *Id.* Her fifth finding was:

> In late October 2017, AWS expressed an interest in purchasing a start-up owned by Mr. Ubhi. On October 31[,] 2017, Mr. Ubhi recused himself from any participation in JEDI Cloud. His access to any JEDI Cloud materials was immediately revoked, and he was no longer included in any JEDI Cloud related meetings or discussions.

Id.

The CO detailed what the agency knew at the time. Mr. Ubhi had access to the Google Drive and Slack channels. He attended meetings within DoD and with industry, acting as a point of contact for industry representatives. He participated in drafting and editing some of the first documents shaping the procurement. He argued that DoD should adopt a single award approach. In short, Mr. Ubhi was involved in developing the JEDI Cloud procurement until he left DoD on November 24, 2017.

On October 31, 2017, Mr. Ubhi emailed Mr. Lynch and Mr. Van Name, copying counsel for the Standards of Conduct Office and Ms. Woods. Mr. Ubhi wrote:

> As per guidance from [Standards of Conduct Office] (Eric Rishel) and our in-house general counsel Sharon Woods, I am hereby recusing myself from the [Defense Digital Service's] further involvement in facilitating SecDef and [Defense Digital Service's]

> initiative to accelerate adoption of the cloud for the DoD enterprise, due to potential conflicts that may arise in connection to my personal involvement and investments. Particularly, Tablehero, a company I founded, may soon engage in further partnership discussions with Amazon, Inc., which also owns and operates one of the world's largest cloud service providers, Amazon Web Services, fulfilling that responsibility to my fullest. This project is critical to the national security of our country, and I regret that I can no longer participate and contribute.

AR Tab 45 at 2777. Although the agency was not aware at the time, Mr. Ubhi's reason for leaving DoD was fabricated. On November 13, 2017, Mr. Ubhi resigned.

Although the agency listed Mr. Ubhi on its list of individuals submitted to GAO who were personally and substantially involved in the JEDI Cloud procurement, the CO nevertheless concluded that Mr. Ubhi's participation did not negatively affect the integrity of the procurement, because (1) his impartiality restriction had expired prior to working on the JEDI Cloud procurement; (2) his participation was limited; and (3) Mr. Ubhi "promptly recused himself." AR 687.

Oracle challenged the CO's conclusions before GAO and before this court. Oracle also raised a question as to whether AWS had an organizational conflict of interest and whether the actions of another individual, Anthony DeMartino, tainted the integrity of the JEDI Cloud procurement. During the early stages of this protest, the agency represented that it was evaluating whether AWS had an organizational conflict of interest.

Shortly after Oracle filed its original motion for judgment on the administrative record, the agency filed a motion to stay this case, prompted by an unsolicited letter it had received from AWS pointing out that some of the information provided by Mr. Ubhi to the agency was false.

The agency therefore decided to reevaluate the impact of Mr. Ubhi's actions in light of the new information. The agency also planned to complete its organizational conflict of interest evaluation of AWS. The court granted the motion to stay. On April 15, 2019, the government filed a status report updating the court that the agency had completed those evaluations.

When she reassessed the facts, the CO determined that, even with the new information, Mr. Ubhi's conflict of interest had not tainted the JEDI Cloud procurement. The reassessment began with Mr. Ubhi's involvement. Mr. Ubhi was selected by Mr. Lynch to serve as "a product manager with a business focus" on the Defense Digital Service JEDI Cloud team. AR 58699. Mr. Ubhi was involved in acquisition planning. He had administrative privileges on the Google Drive and participated in vendor meetings, although it was DoD's practice to have two representatives present at those meetings.

The information supplied by AWS related to Mr. Ubhi's relationship with AWS during his Defense Digital Service employment. AWS maintained throughout its communication with the CO that it hired Mr. Ubhi without knowing that he had lied to DoD about his reason for resigning and lied to AWS about complying with DoD ethics rules. Mr. Ubhi in fact hid relevant information and misdirected both DoD and AWS. The CO recited: "'AWS did not offer to purchase Tablehero . . . at any time, while he was engaged in market research activity or otherwise. . . . Those discussions concluded (with no deal and no future business relationship) in December 2016, long before the JEDI Cloud procurement began.'" AR 58701-02. Mr. Ubhi's discussions with AWS regarding Tablehero thus ended after he started at Defense Digital Service but before he began working on the procurement.

AWS further informed DoD that Mr. Ubhi had communicated with AWS as early as April 26, 2017, to discuss

future AWS employment.[8] Prior to beginning work on the procurement, Mr. Ubhi had applied for, been offered, and declined a job at AWS. Mr. Ubhi indicated in August 21 and 23, 2017 emails that he would be interested in future employment at AWS.

At nearly the same time he began work on the JEDI Cloud procurement, Mr. Ubhi had discussions "with his former Supervisor at AWS regarding the possibility of rejoining AWS in a commercial startup role unrelated to AWS's government business." AR 58702. On October 4, 2017, Mr. Ubhi made a "[v]erbal commitment to rejoin AWS." AR 58703.

Throughout October, Mr. Ubhi "[m]et with companies as part of market research" related to the JEDI Cloud project. AR 58703. In that same period, on October 17, 2017, he applied for "an open position in AWS's commercial organization." AR 58702. On October 19, 2017, Mr. Ubhi completed an AWS Government Entity Questions form on which he "specifically represented to AWS that he 'confirmed by consulting with [his] employer's ethics officer' that he was permitted to have employment discussions with AWS." AR 58702 (alteration original). On that form he also represented that he did not have "any employment restrictions [preventing him] 'from handling any specific types of matters if employed by Amazon or its subsidiaries.'" AR 58705. Both representations were false.

AWS made Mr. Ubhi an offer on October 25, 2017, which Mr. Ubhi accepted two days later. Mr. Ubhi sent the email recusing himself to Mr. Lynch on October 31, 2017, which falsely represented his reason for leaving DoD. He resigned on November 13, 2017. He worked at Defense Digital Service until November 24, 2017. He

[8] After AWS's February 12, 2019 letter, the CO and AWS communicated through March 2019.

rejoined AWS as "Senior Manager, Startup Programs Management in AWS Business Development" on November 27, 2017. [9] *Id.*

When considering Mr. Ubhi's impact on the procurement, the CO placed his actions in the context of the RFP-drafting process, which included multiple stages and involved various DoD offices. She noted, "[M]ore than 70 individuals participated personally and substantially in the JEDI Cloud acquisition prior to the receipt of proposals." AR 58700. Under Secretary Lord considered many documents that "had extensive reviews," including technical and legal review. AR 58699. The draft RFP went through a Defense Procurement and Acquisition Policy peer review in April 2018. The DoD Chief Information Officer also performed "a full top-down, bottom-up independent review of JEDI Cloud pre-solicitation acquisition documents, including the RFP." *Id.* He consulted security, technical, and acquisition experts. Additionally, industry offered comment on the RFI and draft RFPs.

The CO held eight interviews and reviewed numerous documents in an effort to determine whether anyone knew that the information in the 2018 determination was inaccurate, whether anyone would adjust their opinion about Mr. Ubhi's influence based on the new information, and whether there was any other undisclosed information. The CO spoke with Mr. Lynch, Mr. Van Name, Ms.

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[9] Beyond the 2019 investigation materials, the CO also refers to AWS's Organizational Conflict of Interest Mitigation Plan, submitted with its proposal, which included an affidavit from Mr. Ubhi. In it he stated that he was only involved in the planning stages of the JEDI Cloud procurement and that he did not provide input regarding any draft of the RFP. She relied on her personal knowledge of the procurement development to corroborate Mr. Ubhi's statements. Mr. Ubhi stated that he had complied with AWS's information firewall and had not and would not share nonpublic information or documentation with AWS.

Woods, Mr. Kasper, Mr. Daniel Griffith, two other Defense Digital Service representatives, and an attorney with the Standards of Conduct Office. The CO also spoke with Ms. Christina Austin, who is Associate General Counsel at the Washington Headquarters Service & Pentagon Force Protection Agency within DoD.

The CO reviewed documents that she believed "were apropos to the timeframe when Mr. Ubhi was actively involved with JEDI Cloud related details." AR 58707. She reviewed the draft problem statement, the notes and questions from vendor meetings that Mr. Ubhi attended, the RFI, and Slack conversations. She also considered AWS's employment offer to Ubhi to determine if it reflected payment in exchange for information.

The CO reached six conclusions. First, Mr. Ubhi violated the FAR 3.101-1 requirement that officials "avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships" and the matter therefore had to be referred to the DoD Inspector General. AR 58707-09. The CO reported that interviewees were surprised by Mr. Ubhi's lie that AWS had or would be acquiring Tablehero. He apparently did not mention any other communications with AWS. The CO found that Mr. Ubhi had been aware of his ethical obligations and had ignored them. She found that he should have ceased work on the procurement after he began employment discussions with AWS. She was "disconcert[ed]" that Mr. Ubhi's actions called into question the integrity of the procurement. In this section, the CO also found that the facts "warrant further investigation concerning whether Mr. Ubhi violated 18 U.S.C. § 208, 5 CFR § 2635.604, and 5 CFR § 2635.402." AR 58709. She referred the issue for assessment to the Inspector General and concluded, "Whether Mr. Ubhi's conduct violated these particular laws does not affect my determinations below that his unethical behavior has no impact on the []

pending award or selection of a contractor in the JEDI procurement." *Id.*

Second, she found that there was no violation of FAR 3.104-3(a) by Mr. Ubhi and no violation of FAR 3.104-3(b) by AWS. FAR 3.104-3(a) prohibits officials with access to contractor, proposal, or source selection information from "knowingly disclos[ing] contractor bid or proposal information or source selection information before the award of a Federal agency procurement to which the information relates." FAR 3.104-3(b) prohibits "knowingly obtain[ing] contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates."

The CO broadly investigated "whether there was any evidence of quid pro quo between AWS and Mr. Ubhi." AR 58709. The CO examined the emails between Mr. Ubhi and his former supervisor and that supervisor's affidavit. She found that it was apparent that "Mr. Ubhi wanted to return to AWS dating back to at least February 2017," and AWS wanted him to return as of April 2017. AR 58710. She concluded that "the AWS hiring efforts, which started long before the JEDI Cloud, were not related to JEDI Cloud even though the hiring occurred after the JEDI Cloud initiative started." AR 58711.

The CO compared his employment offer to "a review of Glassdoor and discussion with others about typical AWS employment offers." *Id.* She found that his [redacted] employment package was "relatively standard," even if the bonus was slightly higher due to his "personal relationship with" his former supervisor. *Id.* Because the offer did not appear connected to the JEDI Cloud procurement or the sharing of nonpublic information, the CO found that neither Mr. Ubhi nor AWS entered into the discussions or job offer for the exchange of non-public information.

Regarding FAR 3.104-3(a)-(b), the CO noted that Mr. Ubhi stated that he had not shared any non-public JEDI Cloud information and that, in any event, he did not have access to RFI responses, RFP drafts, or other acquisition sensitive documents. The CO also evaluated AWS's statements. Based on the company's Organizational Conflict of Interest Response and its emails with the CO, she concluded that it had not received non-public JEDI Cloud information. The Senior Manager of United States Federal Business Development and JEDI Proposal Manager provided an affidavit stating that Mr. Ubhi had not provided any information to him, or anyone else, on the AWS JEDI team that would have affected AWS's proposal. AWS's DoD Programs Director represented that no one from the AWS Commercial Startup team had anything to do with AWS's JEDI proposal. AWS's DoD Programs Director also represented that Mr. Ubhi was "organizationally and geographically" prevented from providing nonpublic information to her team. *Id.* She had "confidence that Mr. Ubhi had absolutely no involvement whatsoever in the AWS JEDI capture effort and that he has been truly firewalled." *Id.* The Director of Startups at Amazon Web Services World Wide Commercial Sector Business Development stated that Mr. Ubhi "has never revealed or attempted to reveal nonpublic information to me about the JEDI Cloud procurement or any of the offerors involved." *Id.* The CO noted that Mr. Ubhi has not been assigned to any tasks or teams interacting with the AWS JEDI proposal team. *Id.* Based on this review, she found that neither Mr. Ubhi nor AWS violated FAR 3.104-3(a)-(b).

Third, she concluded that even if there had been a violation of FAR 3.104-3(a) and (b), Mr. Ubhi could not have provided competitively useful information. Regarding the vendor meetings, she found that the information would not have been useful to AWS and, in any event, her research indicated that the information regarding a

competitor such as Microsoft was publicly available. Nor was the CO convinced that any DoD meetings in which Mr. Ubhi participated were competitively useful, because they occurred prior to the decisional documents and addressed individual needs rather than the actual procurement strategy. Furthermore, she concluded that much of his information relating to costs or needs would be outdated.

Fourth, there was no violation of FAR 3.104-3(c). FAR 3.104-3(c) requires officials such as Mr. Ubhi to promptly report contacting or being contacted "by a person who is an offeror in that Federal agency procurement regarding possible non-Federal employment for that official" and then to disqualify himself from further personal and substantial participation in the procurement. The CO found that although Mr. Ubhi failed to promptly report the contact with AWS in writing to his supervisor and the agency ethics official and failed to timely recuse himself from JEDI Cloud activities, because the offers were not submitted until October 12, 2018, AWS technically was not an "offeror" until then and therefore Mr. Ubhi did not violate the regulation. *Id.* She nevertheless found "Mr. Ubhi's actions to be unethical and improper." *Id.*

Fifth, Mr. Ubhi's participation in the preliminary stages of the JEDI Cloud procurement did not introduce bias in favor of AWS. Mr. Ubhi was involved in JEDI Cloud for seven weeks during the preliminary stages of planning and no "critical decisions" were made during this period. AR 58716. The CO apparently asked "[a]ll individuals directly involved in the JEDI Cloud effort" whether the revelations in the AWS letter changed their opinion on Mr. Ubhi's effect on the procurement. They uniformly said no.

She reviewed Slack messages to determine whether Mr. Ubhi expressed bias toward any potential offeror. She determined that he did not, because, although Mr. Ubhi

had strong, sometimes coarsely-expressed opinions, he did not show bias in favor of AWS in particular.[10] Instead, he believed that there were very few companies who could offer the services that DoD would need to adopt an enterprise cloud solution; those companies apparently included both Microsoft and AWS. The CO also reviewed Mr. Ubhi's emails and found similar sentiments. The CO pointed out that, if anything, the Slack channels demonstrate that no one person could have swayed the planning decisions because so many people contributed.

Sixth, even if Mr. Ubhi had attempted to introduce bias in favor of AWS, he did not impact the procurement, for three reasons. First, Mr. Ubhi lacked the technical expertise to substantively influence the JEDI Cloud procurement. Second, his actual attempts to influence the procurement were limited. "Third, and most importantly, all the key decisions for the JEDI Cloud procurement, such as the actual RFP terms and whether to award one or multiple contracts, were made well after Mr. Ubhi recused himself, after being vetted by numerous DoD personnel to ensure that the JEDI Cloud RFP truly reflects DoD's requirement." AR 56719-23. The CO reiterated that Mr. Ubhi was a product manager focused on market research, not an engineer. In her interview with Mr. Lynch, Mr. Lynch explained that Mr. Ubhi was one member of a large group of people including "engineers, business owners, and entrepreneurs" who favored a single provider strategy absent Mr. Ubhi's influence. AR 58720. The other interviewees expressed the view that Mr. Ubhi was effective at his job, but he did not have the

[10] The court reviewed hundreds of pages of Slack messages—generally an unedifying exercise, except as a cautionary tale about ill-considered use of instant messaging. One would have thought that in this litigious culture, people would be less promiscuous about sharing every stray mental hiccup. Mr. Ubhi, in particular, contributed any number of banal, puerile, profane and culinary messages.

ability to bias vendor meetings, RFI questions, or the single award decision.

The CO then turned to Mr. Ubhi's contributions to procurement documents. Regarding the problem statement, the CO found that Mr. Ubhi contributed 100 changes to the document, along with other collaborators. She concluded that his contributions were outdated, because the Defense Digital Service Product Manager who was tasked with drafting the Business Case Analysis after Mr. Ubhi left found the Problem Statement tone helpful, but the content too limited to form the basis of the Business Case Analysis. The CO determined that Mr. Ubhi's RFI edits were minor, relating to how responders discussed Tactical Edge abilities. Technical interviewees expressed the view that Mr. Ubhi lacked the technical expertise to contribute substantively to those documents.

Procurement documents created or received after Mr. Ubhi's departure included the RFI responses, Market Research Report, Joint Requirements Oversight Council Memorandum, Single Award D&F, the CO's justification for a single award, Business Case Analysis, Acquisition Strategy, RFP and draft RFPs, and justification for the gate criteria. She iterated that multiple DoD teams developed the documents. She concluded that, even if Mr. Ubhi had exhibited bias in favor of AWS, he had not impacted the procurement. In summary, "[e]ven though I find that Mr. Ubhi violated FAR 3.101-1 and may have violated 18 U.S.C. § 208 and its implementing regulations, I determine that there is no impact on the pending award or selection of a contractor in accordance with FAR 3.104-7." AR 58720.

Victor Gavin

The CO also investigated the potential impact of Victor Gavin on the integrity of this procurement and completed that investigation during the stay in the protest. During the procurement, Mr. Gavin was a Deputy

Assistant Secretary of the Navy for C41 and Space Programs. In the summer of 2017, Mr. Gavin discussed with Navy ethics counsel future employment with defense contractors. He then discussed retirement plans with an AWS recruiter and with AWS Director of DoD programs from August 2017 to January 2018.

Mr. Gavin attended the October 5, 2017 meeting of the Cloud Executive Steering Group to share the Navy's experience with cloud services. He submitted a Request for Disqualification from Duties on January 11, 2018, requesting he be excluded from matters affecting the financial interests of AWS. He interviewed with AWS on January 15, 2018. On March 29, 2018, AWS offered Mr. Gavin a position and he accepted.

Mr. Gavin then attended a JEDI Cloud meeting on April 5, 2018, where, among other things, the attendees discussed the draft Acquisition Strategy. The CO attended the meeting as well. She recalled that Mr. Gavin did not show bias toward a particular vendor and advocated for a multiple-award approach. He did not edit the Acquisition Strategy.

Mr. Gavin retired from the Navy on June 1, 2018. He began work at AWS on June 18 as Principal, Federal Technology and Business Development. After he began work at AWS, but before AWS implemented an information firewall, he "had a few informal conversations with AWS's Director, DoD, Jennifer Chronis, in which JEDI came up." AR 24550. He "provided only general input on DoD acquisition practices and Navy cloud usage based on [his] years of experience as an information technology acquisition professional at the Navy." AR 24550-51. He represented to DoD that he did not provide any JEDI Cloud procurement information to AWS's Director of DoD Programs.

AWS first informed Mr. Gavin of an information firewall on July 26, 2018. In separate emails on July 31, AWS

informed Mr. Gavin that he is "strictly prohibited from disclosing any non-public information about DoD's JEDI procurement (were he to have any) to any AWS employee" and informed the AWS JEDI team of the firewall. AR 24544-45. Mr. Gavin said that he would comply with the firewall.

The CO determined that, although Mr. Gavin's attendance at the October 5, 2017 meeting did not constitute personal and substantial participation in the JEDI Cloud procurement, his attendance at the April 5, 2018 meeting may have constituted such participation. The CO did not consider his participation of any significance, however, but referred the issue to ethics counsel for further review.

The CO decided that Mr. Gavin violated FAR 3.101-1, and possibly 18 U.S.C. § 208 (2012), but that his involvement did not taint the procurement. The CO specifically found that he had limited access to the draft Acquisition Strategy and did not furnish any input on the document; he did not disclose any competitively useful nonpublic information; he did not obtain or disclose other bid information to AWS; and he did not introduce bias into the meetings he attended. Regarding AWS, she concluded that it had not received any competitively useful information or an unfair advantage through Mr. Gavin.

Organizational Conflict of Interest

Finally, the CO determined that AWS did not receive an unfair competitive advantage in the JEDI Cloud procurement and that no organizational conflict of interest exists. She relied on FAR 9.505 as she considered whether a significant potential conflict exists, particularly whether AWS has received an unfair competitive advantage. She considered whether AWS possesses "[p]roprietary information that was obtained from a Government official without proper authorization; or [s]ource 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." FAR 9.505(b).

When submitting a proposal, the offeror was required to disclose any actual or perceived conflicts of interest and identify measures to avoid or mitigate those conflicts. The CO reviewed the AWS Organizational Conflicts of Interest Response and supplemental materials. She considered whether Mr. Ubhi, Mr. Gavin, and two other individuals, Brandon Bouier and Cynthia Sutherland, could provide information to AWS that would give it an unfair competitive advantage.

The CO began with AWS's plan as it relates to Mr. Ubhi. Due to Mr. Ubhi's misrepresentations, she understandably "did not give much weight or credibility to the statements Mr. Ubhi provided in his declarations." AR 58750. Instead, she relied on AWS's Organizational Conflicts of Interest Response, which offered three assurances: (1) Mr. Ubhi has not supported the AWS sector handling its JEDI Cloud proposal and has not been involved in any JEDI Cloud proposal activities. (2) He has not had "any substantive communications" with any AWS employee regarding the JEDI Cloud procurement and has not disclosed nonpublic information. *Id.* (3) AWS implemented an information firewall on May 11, 2018, sending the notice to both Mr. Ubhi and the AWS JEDI Cloud team. It prohibited any contact, disclosure, or discussion of information between Mr. Ubhi and AWS's JEDI Cloud team.

AWS's letter provided more information regarding the information firewall. The letter represents that, upon arrival, Mr. Ubhi "'informally firewalled himself by duly notifying his manager that he should not be involved in JEDI Cloud activities because of potential conflict issues.'" AR 58751. The formal information firewall has functional, organizational, and geographic components. The AWS Senior Lead Recruiter, the Director of Startups

of AWS Commercial Sector Business Development, the AWS JEDI Proposal Team Lead, and the Director of DoD Programs at AWS each provided an affidavit regarding whether Mr. Ubhi shared nonpublic information. The materials consistently described Mr. Ubhi's exclusion from working with AWS's JEDI Cloud proposal team.

The AWS Senior Lead Recruiter stated that Mr. Ubhi represented during the hiring process, falsely as it turned out, that he had spoken with DoD ethics officials and was engaging in employment discussions with AWS. The recruiter also stated that Mr. Ubhi did not provide detail regarding his work at Defense Digital Service; this was consistent with Mr. Ubhi's application materials. The Director of Startups of AWS Commercial Sector Business Development—Mr. Ubhi's manager—stated that no one on his team, including Mr. Ubhi, worked with the AWS JEDI Cloud proposal team. Although the CO could not determine exactly when Mr. Ubhi's manager became aware of Mr. Ubhi's conflict, she explained that the exact date did not matter since the manager was aware of the conflict and his sector did not overlap with the AWS JEDI Cloud proposal team. Both the AWS JEDI Proposal Team Lead and the Director of DoD Programs at AWS stated that Mr. Ubhi had not communicated information to them and that they would not seek any in the future.

Based on the mitigation plan and AWS's representations, the CO determined that "Mr. Ubhi's employment with AWS Commercial Sector Business Development does not create an [organizational conflict of interest]." AR 58752. The CO also found that "AWS did not receive any nonpublic information or documentation JEDI Cloud-related, including potential competitors, from Mr. Ubhi." AR 58753. She iterated that, even if Mr. Ubhi had shared the early planning information, that information would not have been competitively useful.

The CO next turned to AWS's Organizational Conflicts of Interest Plan as it related to Mr. Gavin. The plan stated that Mr. Gavin was not involved in the AWS JEDI Cloud proposal preparation; had not seen AWS proposal materials; had not provided input on the AWS proposal; and had not disclosed nonpublic information to anyone at AWS. AWS emailed notices to Mr. Gavin and the AWS JEDI Cloud proposal team on July 31, 2018, establishing an information firewall. Mr. Gavin provided an affidavit stating that he participated in only one JEDI Cloud procurement meeting while he was with the Navy (which was an inaccurate statement because he attended a second meeting); he had no access to competitively useful information; and he has not shared JEDI Cloud procurement information. The CO concluded that Mr. Gavin's employment at AWS did not create a potential organizational conflict of interest and that Mr. Gavin had not provided competitively useful information to AWS because he did not have any to provide.

Reaching beyond the AWS Organizational Conflicts of Interest Plan, the CO requested information relating to Brandon Bouier, who was employed at Defense Digital Service in 2017. He resigned from Defense Digital Service on August 18, 2017 and concluded his employment there on September 1, 2017. He began work at AWS on September 25, 2017. AWS submitted an affidavit from him. The CO noted that Mr. Bouier departed Defense Digital Service prior to the Deputy Secretary's September 14, 2017, Accelerating Enterprise Cloud Adoption Memorandum. The CO, and others at Defense Digital Service, did not recall him working on the JEDI Cloud procurement. She thus found that he did not have nonpublic information related to the procurement and that his employment at AWS did not create an organizational conflict of interest.

The CO considered one last person: Cynthia Sutherland. Dr. Sutherland worked for the Cybersecurity and

Defenses Branch, Cyberspace Division, Joint Chiefs of Staff. Dr. Sutherland reached out to the CO on February 26, 2019. She was the cloud expert for the Joint Staff Chief Information Officer. Dr. Sutherland was personally and substantially involved in the JEDI Cloud procurement, "principally" in November and December 2017. AR 58755. She contributed work to the Joint Requirements Oversight Council Memorandum. She addressed cloud concerns from council members and adjusted the memo based on the council's feedback. Dr. Sutherland attended the Cloud Cybersecurity Working Group's initial conversations, recommended how to shape cybersecurity requirements, and provided a data dictionary to that group. She "led the development of the cloud characteristics/requirements for the JEDI Cloud based on the needs of the Combatant Commands, warfighter." *Id.* After the Joint Requirements Oversight Council Memorandum was signed, she provided bi-weekly updates to the Vice Chief of the Joint Chiefs of Staff regarding the JEDI Cloud procurement and other cloud efforts through April 2018. At that point she only relayed information without providing input on decisions.

Dr. Sutherland applied to be an AWS Public Sector Specialist on January 9, 2019, approximately a year after her work on the JEDI Cloud procurement. Between her application date and February 26, 2019, she completed four interviews with AWS. During those interviews, she discussed "'her level of understanding and creation of cloud requirements for her current customers, the warfighter.'" *Id.* She had a final interview on February 27, 2019. Dr. Sutherland represented that she did not discuss the JEDI Cloud procurement in any of her conversations with AWS, instead sticking to her understanding of cloud computing generally and her work developing cybersecurity requirements for "global customers." AR 58756.

AWS offered Dr. Sutherland the position of Industry Specialist on AWS's Security Assurance team on March 11, 2019. She accepted on the same day. When she was communicating with the CO, she had not started working at AWS. The AWS JEDI Proposal Team Lead and the Director of DoD Programs at AWS stated that they were unaware that AWS had interviewed Dr. Sutherland. AWS represented that Dr. Sutherland had not contributed to the AWS JEDI Cloud proposal submitted in October 2018.

The CO found that, other than the drafts of the Joint Requirements Oversight Council Memorandum and the initial conversations of the Cloud Cybersecurity Working Group, Dr. Sutherland did not have access to nonpublic information related to the JEDI Cloud procurement. The CO concluded that Dr. Sutherland had not provided nonpublic information to AWS, that Dr. Sutherland's prospective employment did not create an organizational conflict of interest, and that AWS's plan to institute an informational firewall when Dr. Sutherland began work was reasonable.

In conclusion, the CO decided that AWS had proposed a reasonable risk mitigation plan, did not have an organizational conflict of interest, and had not received nonpublic information. In its amended complaint and supplemental motion for judgment on the administrative record, Oracle challenges the 2019 conflicts of interest determinations.

After we lifted the stay in this protest, the parties briefed cross motions for judgment on the administrative record. We held oral argument on July 10, 2019. On July 12, 2019, we issued an order denying plaintiff's motion and granting defendant's and intervenor's motions because Oracle has not shown prejudice as a result of the errors discussed below.

DISCUSSION

This court has jurisdiction over actions "objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract . . . or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (2012). We review such actions for whether the agency decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012); 28 U.S.C. § 1491(b)(4). In other words, the court's "task is to determine whether the procurement official's decision lacked a rational basis or the procurement procedure involved a violation of a regulation or procedure." *Tinton Falls Lodging Realty, LLC v. United States*, 800 F.3d 1353, 1358 (Fed. Cir. 2015) (citation omitted).

If we conclude that DoD's conduct fails under this standard of review, we then "proceed[] to determine, as a factual matter, if the bid protester was prejudiced by that conduct." *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351 (Fed. Cir. 2005). To show that it was prejudiced by an error, the protestor must demonstrate "that there was a 'substantial chance' it would have received the contract award but for the [agency's] errors." *Id.* at 1353. The "substantial chance" standard has been applied in pre-award bid protests in which offerors have submitted their proposals, the protestor has been evaluated and excluded from competition, and the agency has established the competitive range. *E.g.*, *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1348-49 (Fed. Cir. 2013); *Ultra Elecs. Ocean Sys., Inc. v. United States*, 139 Fed. Cl. 517, 526 (2018).

Plaintiff argues that, in a pre-award bid protest, the court applies the "non-trivial competitive injury" standard articulated in *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed. Cir. 2009). But the court in *Weeks Marine* applied the "non-trivial competitive injury

test" where the potential offeror had not submitted a bid, "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. Here, on the other hand, we cannot ignore the fact that it is now possible to determine whether Oracle had a substantial chance of winning this award. We have the necessary factual predicate, because Oracle's proposal was evaluated and excluded from competition based on its failure to meet Gate Criteria 1.1 and Oracle concedes that it also could not meet Gate Criteria 1.2. Thus, while Oracle meets the most basic element of standing—it submitted a serious proposal—we have to consider whether it was prejudiced, even if some of its substantive arguments are valid.

For this reason, defendant contends that it is pointless to consider most of plaintiff's arguments. Plaintiff responds, however, that its inability to meet the gate criteria is not dispositive if the gate criteria are unenforceable, either because they violate the law or because they would have been drafted differently if the agency had not employed a single award strategy. That question, in turn, depends in part, on whether the single award determination was tainted by the participation of, among others, Mr. Ubhi. In short, the merits of Oracle's arguments are wrapped around the axle with the prejudice question. We believe the tidiest approach, therefore, is to deal with the merits of Oracle's arguments, and if any survive, determine if they are nevertheless off limits because Oracle cannot demonstrate that it was prejudiced. We begin with Oracle's initial contention that the single award determinations of the Under Secretary and the CO were flawed. We conclude that one was, and one wasn't.

I. The Contracting Officer Reasonably Justified Her Determination Under 10 U.S.C. § 2304a(d)(4) And FAR 16.504(c) To Use A Single Award Approach.

As discussed in the background, two single award determinations were made, by different officials under different standards. This is because, as currently codified, 10 U.S.C. § 2304a (2012) is a mixture of different legislative efforts at promoting competition in IDIQ contracts. Separate legislative and regulatory efforts have been layered on top of one another over time, resulting in the two distinct single award determinations in the JEDI Cloud acquisition.

First, Congress directed that regulations be developed to implement a multiple award preference that would "establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property." 10 U.S.C. § 2304a(d)(4). The implementing regulation is FAR 16.504(c)(1)(i) (2018), which states the multiple award preference and sets out the circumstances in which a single award is appropriate for an IDIQ contract of any value. The CO made her singe award determination under this regulation.

Section 2304a(d)(3), discussed in the next section, followed after the codification of the multiple award preference. In that section, Congress prohibited single awards in task or delivery order contracts valued at more than $112 million in the absence of a written finding from the head of the agency that one of four conditions exist. For aught that appears, these requirements operate independently—different officials make the determination considering different factors—although they involve very similar subject matter. The underlying goal is certainly the same: to protect competition.

With respect to the CO's decision under FAR 16.504(c)(1)(i), when the agency is considering using an

indefinite-quantity contract, "the CO must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar . . . services to two or more sources." But FAR 16.504(c)(1)(ii)(B) adds that "[t]he contracting officer must not use the multiple award approach if—

> (1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;
>
> (2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;
>
> (3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;
>
> (4) The projected orders are so integrally related that only a single contractor can reasonably perform the work;
>
> (5) The total estimated value of the contract is less than the simplified acquisition threshold; or
>
> (6) Multiple awards would not be in the best interests of the Government.

Here, the CO found that multiple awards must not be used for three reasons: "(2) Based on the CO's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;" "(3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;" and "(6) Multiple awards would not be in the best interests of the Government." AR 455.

The regulation is unambiguous: even in light of the multiple award preference, "[t]he contracting officer must not use a multiple award approach if" one of six listed

conditions exist. FAR 16.504(c)(1)(ii)(B) (emphasis added). The question is whether the CO rationally determined that any of the three chosen conditions exist. We believe she did.

Oracle argues that the CO's memorandum did not properly balance the multiple award preference against a single award approach. It contends that the CO "did not meaningfully consider the benefits of competition, arbitrarily inflated the cost of competition, and violated Congressional policy." Pl.'s Suppl. Mot. at 26. Oracle challenges the CO's assessment of whether more favorable terms and conditions are available if a single award is made, but "the CO's knowledge of the market" is the standard set out in the regulation. She explained her understanding of cost and vendor investment in a multiple award and single award context and drew the reasonable conclusion that a single award was more likely to result in favorable terms, including price. The CO also considered the fact that even if price might not be more favorable in a single award, two other conditions also exist that mandate a single award.

She asserted that multiple awards are costlier to administer and that multiple awards simply cannot meet DoD's expectations from cloud services, whether security concerns, interoperability, or global, seamless reach. In particular, the CO considered which approach would best serve the agency's security needs and concluded that a single cloud services provider would be best positioned to provide the necessary security for the agency's data. She was careful to document several conditions that led the agency to conclude it must not use multiple awards and we will not second guess her conclusion. Plaintiff offers us no real no basis for questioning any of these conclusions. They were completely reasonable, and we have no grounds to disturb her conclusion that multiple awards cannot be used.

II. The D&F Relies On An Exception To The 10 U.S.C. § 2304a(d)(3) Single Award Prohibition That Does Not Accurately Reflect The Structure Of The JEDI Cloud Solicitation.

Separate from the CO's single award determination, DoD was also required to decide whether it was permitted to use a single award approach in a procurement of this size. DoD anticipates awarding a task order contract for cloud services to a single vendor that, including the full ten-year period, is valued at $10 billion. This triggers the application of 10 U.S.C. § 2304a(d)(3), which prohibits awarding such large task order contracts to a single vendor, unless the agency finds that one of four exceptions to the prohibition exist. Section 2304a(d)(3) states,

No task or delivery order contract in an amount estimated to exceed [$112 million] (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.

DoD, through Under Secretary Lord's D&F, decided that the second exception applies to this procurement:

"the contract provides only for firm, fixed price (FFP) task orders . . . for services for which prices are established in the contract for the specific tasks to be performed." AR 318.

At first blush, DoD's D&F tracks precisely with the chosen exception: the JEDI Cloud RFP provides only for firm, fixed price task orders. It solicits IaaS, PaaS, and support services for which offerors will propose a catalog of prices; that catalog will be incorporated into the contract, i.e., established, at the time of award. If the prices of all possible tasks were "established" in this fashion, then we would agree that exception (B)(ii) could be relied upon. That is not the case, however.

The D&F acknowledged that, during the possible ten-year life of the contract, services not contemplated at the time of initial award would likely be needed and added to the contract through the technology refresh provision, Section H2 New Services. Section H2 was crafted because DoD knows that the cloud computing sector is constantly evolving. *E.g.*, AR Tab 130 at 8721 ("IaaS/PaaS offerings are not static and will be updated overtime both in terms of available services and applicable pricing. The clauses are necessary to maintain commercial parity with how cloud services evolve and are priced."); AR Tab 137 at 9603 ("The landscape of cloud offerings is evolving. . . . With growing demand comes an evolving landscape of supply. It seems new cloud providers are emerging monthly, and the service offerings of the vendors are rapidly shifting.").

If at some point over the ten years of the contract the cloud services provider creates a new service, Section H2 requires it to offer that new service to DoD at a price not "higher than the price that is publicly-available in the commercial marketplace in the continental United States." AR 318. The CO will then decide whether to add the new service. The clause also permits DoD to acquire

services before they are available on the commercial market or that will not be offered on the commercial market. After the award, and perforce, after any competition, these new services could only be obtained from the single awardee. Of necessity, then, these services could not be identified as "specific tasks," much less priced, at the time of the award.

Recognizing the apparent inconsistency between Section H2 and the requirements of § 2304a(d)(3)(B)(ii), the D&F attempted to reconcile the use of Section H2 with the exception DoD chose to justify a single award: "As with any other cloud offering, once the new service is added to the catalog, the unit price is fixed and cannot be changed without CO approval." *Id.* In other words, even though the tasks are different than those described and priced in the original contract, the contract eventually will still use only firm, fixed price task orders. The agency found that its custom-made technology refresh provision therefore is consistent with "[firm, fixed price] task orders for services for which prices are established in the contract for the specific tasks to be performed." *Id.* It is difficult to treat this as anything more sophisticated than the assertion that "these are established fixed prices for specific services because we say they are."

As Oracle points out, there is a logical disconnect between claiming that prices are "established in the contract" for "specific tasks" while simultaneously acknowledging that those tasks, and their accompanying prices, do not yet exist. While the government and intervenor respond that Oracle is improperly reading a term into the text of § 2304a(d)(3)(B)(ii) that is not present, namely "at the time of entering the contract," plaintiff does not have to "read" this interpretation into the statute. It is already present in the use of the term, "established," and in the language of the prohibition itself that "no contract may be awarded." Reading this as a present tense description of

the status of the contract terms is much less tortured than inserting a phrase with a future spin: "or which may be established in the contract prior to placing future task orders." We see no ambiguity in the language. In an ordinary reading, prices for specific services must be "established" at the time of contracting. Prices for new, additional services to be identified and priced in the future, even if they may be capped in some cases, are not, by definition, fixed or established at the time of contracting. It should go without saying that the exception must be true at the time of award—no task order contract exceeding $112 million "may be awarded"— and exception (B)(ii) speaks of prices and specific tasks as "established in the contract," not that "will be" established in the future. Given the tenor of the language employed in describing the need for cloud computing, Section H2 is not a trivial addition.

The government argues that requiring prices for specific tasks to be established at the time of contracting would prevent DoD from modifying the contract during performance in any way. This is not entirely accurate. It is true that the statutory prohibition prevents a particular type of change—the contractor and agency cannot add new tasks at new prices after entering the contract. Other types of modifications that fall outside of the bespoke Section H2 are not affected, however. The use of a technology refresh provision thus appears to be at odds with § 2304a(d)(3)(B)(ii), and the Under Secretary apparently chose an exception under § 2304a(d)(3) which does not fit the contract.

This conclusion is obviously somewhat in tension with our previous decision upholding the CO's decision that multiple awards are not allowed. This peculiar state of affairs is an artifact of a code section which is a mixture, rather than an alloy, of various pieces of legislation. Not surprisingly, the parties have different views about the

implications of this possible result and whether Oracle is prejudiced by the flawed D&F.

III. Oracle Cannot Demonstrate Prejudice As A Result Of The Flawed D&F.

Oracle argues that the requirements are independent and that it is prejudiced by the agency's failure to comply with 10 U.S.C. § 2304a(d)(3) because Oracle could have competed in a properly structured multiple award procurement. Oracle's argument assumes there would be some purpose to remanding to the agency to obtain a new D&F, despite the CO's conclusion. And not operating on that assumption treats § 2304a(d)(3) as superfluous, which the court is reluctant to do. Moreover, Oracle argues that it is prejudiced because the agency's needs, as expressed in the gate criteria, could well be different in a multiple award procurement. It argues that the single award determination and the gate criteria are necessarily connected: the agency improperly decided to award the majority of its cloud computing business to one provider and, thus, the agency must have a monolithic provider to meet its minimum needs.

The government and AWS first respond that if the CO's decision is upheld, the Under Secretary could not have sanctioned the use of multiple awards, so a remand would be pointless. This assertion strikes us as a tad sophistical, but, in any event, and fortunately for the defendant, we think their next argument concerning prejudice has merit.

The government and intervenor argue that Oracle cannot demonstrate prejudice as a result of the flawed D&F because the agency's minimum needs would not have changed in a multiple-award scenario. In other words, Gate Criteria 1.1 and 1.2 are enforceable, Oracle cannot meet them, and there is no connection between the single award determination, the gate criteria, and possible

ethics violations. Under any scenario, Oracle would be out of the competition.

In substance we agree, at least with respect to Gate Criteria 1.2. While Oracle may well be correct that some aspects of the gate criteria are driven by the agency's insistence on using a single provider to manage an immense amount of data, one critical aspect of the gate criteria is not connected to the choice of a single provider: data security.

The security concern is explicit in Gate Criteria 1.2. The security component of Gate Criteria 1.2 is based on DoD's "minimum security requirements for processing or storing DoD's least sensitive information." AR 947. Mr. Van Name explained that the challenged portion of Gate Criteria 1.2 reflects the "minimum criteria necessary for DoD to have confidence that the Offeror's proposed data centers have met the underlying physical security requirements necessary to successfully perform the contract." *Id.* Many of the acquisition documents bolster the agency's conviction that use of multiple cloud service providers exponentially increases the challenge of securing data. We have no reason to doubt the agency's many representations that the Gate Criteria 1.2 security requirements are the minimum that will be necessary to perform even the least sensitive aspects of the JEDI Cloud project.

In other words, although this criteria presumes a single award, the only logical conclusion is that, if multiple awards were made, the security concerns would ratchet up, not down. They are, indeed, minimally stated. If Oracle cannot meet Gate Criteria 1.2 as currently configured, it is thus not prejudiced by the decision to make a single award. The agency's needs would not change, so Oracle would not stand a better chance of being awarded this contract if the agency determined that the procurement must be changed to multiple award.

Thus, in order to prevail, Oracle must show that both Gate Criteria 1.1 and Gate Criteria 1.2 are otherwise unenforceable. It would not be sufficient for Oracle to demonstrate that Gate Criteria 1.1 alone is unenforceable, because it also cannot not meet Gate Criteria 1.2. We need not consider Gate Criteria 1.1, or 1.6 for that matter, because we are satisfied for reasons set out below, that Gate Criteria 1.2 is enforceable.

IV. Gate Criteria 1.2 Is Enforceable.

Oracle argues that Gate Criteria 1.2 is unenforceable because it exceeds the agency's minimum needs, that it is in fact an unauthorized qualification requirement, and it amounts to the use of "other than competitive procedures" without proper justification.

Oracle first argues that DoD did not identify an underlying need before imposing Gate Criteria 1.2. When preparing to procure services, the agency must "specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement." 10 U.S.C. § 2305(a)(1)(A)(i) (2012). The solicitation must "include specifications which[,] consistent with the provisions of this chapter, permit full and open competition; and include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law." § 2305(a)(1)(B). The specifications "shall depend on the nature of the needs of the agency and the market available to satisfy such needs." § 2305(a)(1)(C). The agency may state specifications for "(i) function, so that a variety of products or services may qualify; (ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or (iii) design requirements." *Id.*

Oracle alleges that the requirement in Gate Criteria 1.2 that certain offerings must be FedRAMP Moderate "Authorized" by the proposal deadline exceeds DoD's

minimum needs. Oracle does not challenge any other aspect of Gate Criteria 1.2 in terms of the agency's need. Oracle also does not argue that the agency could not require some security assurance at the time of proposal, just that the agency improperly chose FedRAMP authorization. The government responds that the agency has properly justified the criteria based on its needs.

We agree with the government that Gate Criteria 1.2 is tied to the agency's minimum needs. Mr. Van Name's memorandum explained that "FedRAMP Moderate is the Federal cloud computing standard and represents the Department's minimum security requirements for processing or storing DoD's least sensitive information." AR 947. The cloud services provider will be required to work with the agency to meet the "more stringent security requirements outlined in the JEDI Cyber Security Plan" shortly after award, and if the cloud services provider cannot meet even the FedRAMP Moderate standard at the time of proposal the agency will not be able to move forward with implementing the JEDI Cloud in a timely manner. *Id.* Furthermore, even though the JEDI Cyber Security Plan is a separate requirement, Mr. Van Name explained that "FedRAMP Moderate is the minimum criteria necessary for DoD to have confidence that the Offeror's proposed data centers have met the underlying physical security requirements necessary to successfully perform the contract." AR 947-48. It is a useful proxy, in other words, for the agency's real need. If an offeror were unable to meet the lower threshold, it could not hope to meet the higher.

Oracle argues by pointing to Slack messages and risk statements that DoD's security requirements are not the real reason for this Gate Criteria 1.2 component; rather the agency wanted to decrease the possibility of too many proposals or protests. *E.g.*, AR 422, 3123. The Slack messages and risk sections in acquisition planning documents

that Oracle points to do not, however, undermine Mr. Van Name's justification. The agency's concern about being inundated with too many unqualified offers or protests does not reveal a nefarious purpose for the gate criteria; that concern can coexist with legitimate security risks. The agency's justification provides a rational basis for why it chose FedRAMP Moderate "Authorized" to satisfy itself that a bidder's offerings would be eligible to house DoD data.

Alternatively, Oracle argues that Gate Criteria 1.2 is a qualification requirement subject to the provisions of 10 U.S.C. § 2319 (2012). The government responds that Oracle waived this argument, because it had the opportunity to object to the terms of Gate Criteria 1.2 as improperly imposed qualification requirements prior to the close of the bidding process and failed to do so. *See Blue & Gold Fleet, LP v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). The government is correct—Oracle's more generalized challenges to the criteria did not raise this precise argument until post-hearing comments submitted to GAO on October 18, 2018, after the close of bidding. In any event, even if the qualification requirement argument was timely raised, Gate Criteria 1.2 is not a qualification requirement.

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). If using one, the agency must prepare a written justification stating the requirement and explaining why it must be completed pre-award, specifying a cost estimate, providing for a prompt opportunity for an offeror to demonstrate its ability, and ensuring that the offeror is provided specific information if it fails the qualification requirement. A qualification requirement is generally "a qualified bidders list, qualified manufacturers list, or qualified products list." § 2319(c)(3).

This distinguishes a specification from a qualification requirement. Specifications, the subject of 10 U.S.C. § 2305(a)(1)(A)(i)-(B)(ii), "are the requirements of the particular project for which the bids are sought, such as design requirements, functional requirements, or performance requirements." *W.G. Yates & Sons Const. Co., Inc. v. Caldera*, 192 F.3d 987, 994 (Fed. Cir. 1999). "Qualification requirements, on the other hand, are activities which establish the experience and abilities of the bidder to assure the government that the bidder has the ability to carry out and complete the contract." *Id.*

In *W.G. Yates*, the Federal Circuit found that the Army had improperly established a qualification requirement. The Army required a potential bidder "to have designed, manufactured, and installed ten similar door systems in satisfactory operation for a minimum of five years" prior to award. *Id.* at 993. The Federal Circuit concluded that the requirement was not a specification, because it pertained to "to successful completion of other, similar hangar door projects," unrelated to the Army's solicitation. *Id.* at 994. A specification would relate to the project at hand, such as "the size of the doors, structural steel requirements, ability to withstand wind loads, and the like." *Id.*

By comparison, in *California Industries Facilities Resources, Inc. v. United States*, this court considered whether the Air Force improperly imposed qualification requirements when it required liner system, wind gust, and snow load testing for certain military shelters prior to award. 80 Fed. Cl. 633, 641-43 (2008). The court compared the Air Force's requirement to the Army's requirement in *W.G. Yates* and also explored GAO's explanations of qualification requirements. GAO considers a qualification requirement "a systematized quality assurance demonstration requirement on a continuing basis as an eligibility for award," *Aydin Corp.*—Reconsideration, B–224185, 87–1

CPD ¶ 141 (Feb. 10, 1987), or "a system [that] is intended to be used prior to, and independent of, the specific procurement action." *Scot, Inc.*, B– 292580, 2003 CPD ¶ 173 (Oct. 3, 2003). The court concluded that the Air Force's testing requirements were specifications, because they did not relate to other contracts, products, or a system independent of the procurement but were focused on the particular features of the shelters that the offerors would propose.

Oracle argues that the FedRAMP Moderate "Authorized" requirement in Gate Criteria 1.2 is a qualification requirement, specifically because that authorization would have been acquired in the past through either the Joint Authorization Board or from another agency. The substance of this requirement is that an offeror must show that a sampling of its offerings, at datacenters 150 miles apart, have certain security features. Oracle contends that this is a backwards-looking, independent quality assurance mechanism because the awardee will not be subject to the FedRAMP approval process and DoD described using FedRAMP as a "mechanism to validate that the core architecture is extensible and likely to be able to meet the JEDI Cloud requirements across all service offerings." AR Tab 43 at 955.

The FedRAMP authorization requirement does resemble an independent quality assurance system in some respects, but a few facts distinguish this component of Gate Criteria 1.2 from the "ten similar door systems in satisfactory operation for a minimum of five years" requirement in *W.G. Yates*. First, the agency did not require an offeror to prequalify in order to submit a proposal or to be on qualified bidders list prior to submitting its proposal. In that way the JEDI Cloud gate criteria are distinctly unlike classic qualification requirements. Second, as Oracle acknowledges, FedRAMP authorization is not an independent, systematic requirement that DoD

imposes in its procurements. Third, the security features that FedRAMP authorization includes are the security features that DoD believes are in fact the minimum necessary to store DoD data for the JEDI Cloud project itself. The agency is not using the FedRAMP process as a way to examine the offeror's past performance storing government data. Rather it is a uniform way to determine which offerors have certain security capabilities on a number of their cloud offerings. The offeror cannot store even the least secure data without such security features. DoD can specify that an offeror must show that some of its offerings can meet certain security baselines, using a uniform tool to measure that security baseline, without triggering a qualification requirement.

Finally, Oracle argues that Gate Criteria 1.2 transforms this procurement into one that uses other than competitive procedures. The agency "(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." 10 U.S.C. § 2304(a)(1). The agency "may use other than competitive procedures," when one of seven conditions is present. § 2304(c).

Relevant here, the agency may forgo competitive procedures when the services "are available . . . only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency," § 2304(c)(1), or the agency's need "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 . . . ." § 2304(c)(2).

Even if the agency has grounds to forgo competitive procedures, it must not award a contract under such circumstances "unless the contracting officer . . . justifies the

use of such procedures in writing and certifies the accuracy and completeness of the justification;" the justification is properly approved; and any required notice is given. § 2304(f)(1).

Oracle alleges that the agency chose the gate criteria specifically to limit the number of bidders, effectively resulting in "other than competitive procedures." The statements that Oracle points to, however, are not in the gate criteria justification memorandum. They appear either in Slack messages between members of Defense Digital Service, or in the risk section of acquisition planning documents.

The Federal Circuit recognized in *National Government Services, Inc. v. United States*, "the unremarkable 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). The few record statements Oracle highlights are insufficient to demonstrate that the agency is using "other than competitive procedures" in the JEDI Cloud procurement. The agency structured this procurement to use full and open competition and the gate criteria are just the first step in the evaluation of proposals. The government aptly pointed out that the substance of the gate criteria evaluation could have occurred at any point in evaluation of proposals; the agency simply put the gate criteria first to ensure its evaluation was not wasted on offerors who could not meet the agency's minimum needs. As Mr. Van Name's memorandum reflects, the gate criteria are based on more than the agency's awareness that its timeline would be delayed if it received too many proposals. While the gate criteria certainly had the effect of excluding some offerors, that does not transform the procurement into less than full and open competition.

Specific to the Gate Criteria 1.2 component that certain offerings must be FedRAMP Moderate "Authorized," Oracle argues that the agency knew at the time of issuing the RFP that only two companies could meet that gate criteria. As such, the agency knew that the necessary cloud services are available from only a limited number of responsible sources. Because the agency knew that only a limited number of responsible sources could offer the services, the agency necessarily chose less than open competition without following the proper procedure. Oracle bases this argument on the fact that "the FedRAMP approval process is government-run (with DoD involvement). DoD necessarily knew that only two offerors could meet this requirement—Microsoft and AWS." Pl.'s Suppl. Mot. 41. In its response and reply brief, Oracle adds that "[b]ased on its market research, DoD necessarily knew that only two cloud service providers had the existing infrastructure with FedRAMP authorized offerings to meet the gate." Pl.'s Resp. & Reply 23.

The government is correct, however, that evaluation criteria which have the effect of limiting competition do not necessarily trigger the procedures required by § 2304(c). Full 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 (2012); 10 U.S.C. § 2302(3)(D) (2012). Here, they were. The solicitation permitted all responsible sources to submit proposals. Four offerors submitted proposals. Even if the agency knew that as of early 2018 only certain firms would survive the gate criteria, it nevertheless chose to accept proposals from all responsible sources. Indeed, the CO in her memorandum documenting the rationale for a single award contract stated, "The results of market research indicate that multiple sources are capable of satisfying DoD's requirements for JEDI Cloud and that commercial cloud services customarily provided in the

commercial marketplace are available to meet a majority of DoD's requirements." AR 457. The FedRAMP authorization component does not transform the solicitation into one for less than full and open competition.

Having considered both the single award determinations and Gate Criteria 1.2, we can return to the question of prejudice. Assuming the agency relied on a flawed D&F, would Oracle have had a better chance of competing for this contract? We can confidently answer, no, because Oracle could not meet the agency's properly imposed security requirements.

This conclusion might normally be the natural stopping point in our decision, but Oracle raises a few other arguments that it contends present an independent prejudicial error requiring this procurement to be set aside. We thus address the competitive range briefly before turning to the conflicts of interest determinations.

V. The CO Rationally Set The Competitive Range.

Oracle's next argument is that, regardless of the propriety of the gate criteria, the agency unequally considered offerors when she permitted Microsoft and AWS to advance to a competitive range, despite the fact that they were both considered unawardable on several factors. Since all four offerors failed some factors, Oracle contends that the agency should have established a range of all four offerors.

Oracle is incorrect. DoD reasonably evaluated the offerors according to the terms in Section M of the solicitation. Section M unambiguously provided that any offeror who failed Factor 1, the gate criteria, would be immediately eliminated from consideration. Oracle and IBM failed Factor 1 and were thus properly eliminated. According to the terms of Section M, only AWS and Microsoft were eligible for further evaluation. The agency took the next step of evaluating both under the non-price

factors and, finding both unawardable and in need of significant revisions, chose to set the competitive range of those two offerors and continue on to discussions and revisions. The evaluation thus equally treated all offerors in accordance with the process set out in Section M.

VI. The CO's Determinations Regarding Conflicts Of Interest Are Rational And Consistent With FAR Subparts 3 And 9.

Oracle challenges the CO's determination that the involvement in the procurement by Mssrs. Ubhi, DeMartino, and Gavin did not taint the process. It also argues that the CO irrationally determined that AWS does not have an organizational conflict of interest. Oracle contends that its conflicts of interest arguments are independent bases on which to set aside this procurement, because the individual conflicts tainted the structure of the procurement, particularly the single award determinations and the substance of the gate criteria.

The facts on which Oracle rests its conflicts of interest allegations are certainly sufficient to raise eyebrows. The CO concluded that at least two DoD officials disregarded their ethical obligations by negotiating for AWS employment while working on this procurement. Through lax oversight, or in the case of Ubhi, deception, DoD was apparently unaware of this fact. AWS, for its part, was too prepared to take at face value assurances by Mr. Ubhi that he had complied with his ethical obligations. While there is nothing per se illegal about capitalizing on relevant experience in moving to the private sector, the larger impression left is of a constant gravitational pull on agency employees by technology behemoths. The dynamic apparently is real enough that one would hope the agency would be more alert to the possibilities of an erosion of public confidence, particularly given the risk to the agency in having to redo procurements of this size.

The limited question, however, is whether any of the actions called out make a difference to the outcome. And in particular, the even narrower question before the court is whether the CO's conclusion of no impact is reasonable. The court is fully prepared to enforce the agency's obligation to redo part or all of this procurement if the CO's conclusion that there was no impact was unreasonable in any respect, but our ultimate conclusion, after a detailed examination of the record, is that the CO's work was thorough and even-handed. She understood the legal and factual questions and considered the relevant evidence. It is unfortunate that the employees in question gave her so much evidence to consider, making it is easy for Oracle to cherry pick from the vast amount of communications and isolate a few suggestive sound bites. But that volume should not compel an unreasoned leap to the conclusion that there was fire as well as smoke.

1. Individual Conflicts of Interest

We review the CO's determinations for a rational basis and consistency with the applicable law. Regarding the personal conflicts of interest, "[a] contracting officer who receives or obtains information of a violation or possible violation of 41 U.S.C. 2102, 2103, or 2104 (see 3.1043) must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor." FAR 3.01-7(a) (2018). If the CO determines that there is no impact on the procurement, she must forward the information to a designated individual within the agency. *Id.* If that individual concurs with the CO, the procurement may proceed.[11] *Id.*

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[11] Oracle argues that the court must go beyond the CO's determinations in this matter and consider whether these personal conflicts of interest constitute a violation of certain statutes, particularly 18 U.S.C. § 208 as it relates to Mr. Ubhi. We disagree. Our standard of review is explicitly set out in 28 U.S.C. § 1491(b)(4) and does not include this court holding a mini criminal trial in the course of deciding

Here, the CO determined that, although there were some violations or possible violations of law relating to conflicts of interest, those conflicted individuals did not impact the decision to use a single award approach or the substance of the evaluation factors. It is easy to critique uncritically her analysis and characterize it as, "there were lots of people involved in the decisions here, so it's unlikely the persons in question impacted the result." We are satisfied that would be a simplistic and inaccurate critique. In fact, there were a lot of people involved in this procurement, and the ones called out by the ethics investigations indeed were a very small part of the substance of the procurement, both as a result of their limited roles and as a result of the timing of important decisions.

We think that the conclusion the CO in effect asks us to draw, that these individuals were bit players in the JEDI Cloud project, is correct. They were not members of the Cloud Executive Steering Group, the Cloud Computing Program Office, the Joint Requirements Oversight Council, or the Cost Assessment and Program Evaluation, and that is only a partial list of the many DoD offices and officials who had a role in the structure of this procurement. *See, e.g.*, AR Tab 64, 91, 94. Nor were they acting as the CO, Under Secretary, the Chief Information Officer, the Deputy Chief Management Officer, or other official who developed or signed off on challenged components of this procurement. While they should not have had the opportunity to work on the JEDI Cloud procurement at all, or at least for certain periods of time, nevertheless, their involvement does not taint the work of many other persons who had the real control of the direction of the JEDI Cloud project.

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a bid protest. In any event, the CO here considered possible violations of 18 U.S.C. § 208 and performed an "even if" analysis as a part of her FAR Subpart 3 determination.

A. Mr. DeMartino

The CO considered all of the relevant facts regarding Mr. DeMartino's involvement. None of the facts contradict her ultimate conclusion that his involvement with JEDI did not impact the procurement. While we might view the CO's characterizations as a bit generous (for instance, Mr. DeMartino clearly did not work with government ethics personnel "throughout" his DoD employment), nevertheless, she rationally determined that he was merely a go-between for the Deputy Secretary and did not have substantive input into the structure or content of the solicitation. Specifically, Mr. DeMartino did not have a voice in whether DoD should use a single or multiple award approach and did not craft the substance of the evaluation factors. His employer, the Deputy Secretary, was expressly "open" to either single or multiple award at least into late 2017. AR 4352. Moreover, DeMartino did not leave DoD to work for AWS during, or apparently after this procurement. We view him as not relevant to the AWS organizational conflict of interest analysis.

B. Mr. Gavin

The CO likewise considered all of the relevant facts regarding Mr. Gavin's involvement. First, her conclusion that "Mr. Gavin violated FAR 3.101-1, and possibly violated 18 U.S.C. § 208 and its implementing regulations," is well-supported. The CO properly went on to ask whether, in light of the conflict, Mr. Gavin impacted the procurement. The record supports her conclusion that Mr. Gavin was involved only to offer his knowledge of the Navy's cloud services experience. He was not a member of the Cloud Executive Steering Group, Defense Digital Service, the Chief Information Office, or any other team tasked with spearheading aspects of this procurement. As far as we can tell from the record, he did not assist in crafting the single award determinations or the technical substance of the evaluation factors. At most, he attended a

few JEDI Cloud meetings. He does not appear to have obtained any contractor bid or proposal information nor does he appear to have introduced any bias toward AWS into the meetings he attended. It would have been proper for the CO to discount Mr. Gavin's affidavit as she did Mr. Ubhi's, because she felt he had violated FAR 3.101-1. Even when his involvement is considered without his own assurances that he did not act improperly, the CO's review of the record was reasonable that Mr. Gavin was involved solely to offer his past experience with cloud computing contracts.

Oracle is correct that we do not know exactly what Mr. Gavin communicated to AWS's JEDI proposal team lead prior to the information firewall. Mr. Gavin acted improperly in that regard, as did the AWS employee who spoke with him. But the CO reasonably determined that Mr. Gavin simply did not have access to competitively useful information to convey to AWS. By the time Mr. Gavin began working at AWS, the draft RFP had been released, providing AWS access to the relevant information that also appeared in the draft Acquisition Strategy. We thus find that the CO's conclusion regarding Mr. Gavin was rational.

C. Mr. Ubhi

The last individual who worked on the procurement despite a personal conflict of interest was Mr. Ubhi. We agree with the CO that his behavior was disconcerting. Despite being aware of his ethical obligations, he ignored them. The CO drew six conclusions regarding Mr. Ubhi; we will consider each in turn.

First, the CO reached the obvious conclusion that Mr. Ubhi violated the FAR 3.101-1 requirement that officials "avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government contractor relationships" and thus the matter had to be referred to the DoD Inspector General. AR 58707-09. She also considered

related prohibitions and reasonably concluded that Mr. Ubhi's behavior must be referred to the Inspector General for investigation of "whether Mr. Ubhi violated 18 U.S.C. § 208, 5 CFR § 2635.604, and 5 CFR § 2635.402." AR 58709. The CO continued her analysis, as FAR 3.104-7 directed her to do, assuming that Mr. Ubhi's participation was unethical and might have impacted events he participated in. We find nothing irrational in this first conclusion.

Next, the CO concluded both that Mr. Ubhi's employment package did not reflect a quid pro quo for nonpublic information relating to the JEDI Cloud procurement and that there is no evidence that Mr. Ubhi shared nonpublic information with AWS. To reach this conclusion, she considered all of the employment negotiations between Mr. Ubhi and AWS (beginning before the JEDI Cloud procurement) and his employment offer. Based on discussions and research, she concluded that AWS was interested in hiring Mr. Ubhi regardless of his JEDI Cloud involvement and that his substantial employment package did not appear to be tied to receiving nonpublic information. Her conclusion here is reasonable and highlights an important aspect of Mr. Ubhi's post-DoD work: he did not return to AWS to work on its JEDI Cloud proposal team, for its Federal Business Sector, or for the DoD Programs section.

She went on to consider the communications DoD had with AWS and the affidavits submitted from AWS employees stating that they had not received, or hoped to receive, any information from Mr. Ubhi. She considered affidavits from individuals both within AWS's commercial sector (where Mr. Ubhi is now employed) and AWS's federal business sector (where the AWS JEDI Team works). None of those affidavits suggest that Mr. Ubhi shared any information with the JEDI Cloud team or that the team would welcome his input. The CO did not find any

evidence to suggest that he had shared nonpublic information with AWS or that AWS had solicited such information. The CO took the whole record into account, discounted Mr. Ubhi's assurances, and considered AWS's apparent motivations and the statements made by its employees under penalty of perjury. We did not find any critical facts that she overlooked in reaching this conclusion and thus find no reason to disturb it.

The CO's third conclusion was that even if Mr. Ubhi had disclosed nonpublic information, none of it would have been competitively useful. The CO detailed both potential offeror information and DoD information that Mr. Ubhi had access to as a member of the Defense Digital Service team. She detailed her analysis that the vendor meeting information would not have been competitively useful to AWS and that much of the DoD information was premature, based on incorrect assumptions, and, in any event, was revealed to the public during meetings and industry research. Again, the CO considered this question closely and we have found nothing in the record to suggest that her explanation was unsatisfactory.

Oracle takes issue with the fact that the CO, in her fourth conclusion, applied FAR 3.104-3(c) too literally. The section requires officials such as Mr. Ubhi to promptly report contacting or being contacted "by a person who is an offeror in that Federal agency procurement regarding possible non-Federal employment for that official" and then to disqualify himself from further personal and substantial participation in the procurement. FAR 3.104-3(c) (emphasis added). The CO repeated that Mr. Ubhi was personally and substantially involved. She found that Mr. Ubhi failed to "promptly report the contact with AWS in writing to his supervisor and the agency ethics official" and failed to timely recuse himself from JEDI Cloud activities. But Mr. Ubhi did not violate this particular section of FAR Subpart 3 because AWS was not an

offeror at the time. The CO repeated that Mr. Ubhi behaved unethically and improperly and she read and applied FAR 3.104-3(c) as written. We find nothing objectionable in her analysis under FAR 3.104-3(c).

Fifth, the CO concluded that Mr. Ubhi's seven-week contribution to the planning stage of the JEDI Cloud procurement did not introduce bias in favor of AWS. The CO reviewed Mr. Ubhi's work and found that, despite often expressing vehement opinions about various people and companies, he did not lobby in favor of a particular cloud services provider. Her conclusion is supported in the record.

Sixth, the CO concluded that even if Mr. Ubhi tried to introduce bias into the procurement process, he failed. Oracle argues that the reasoning behind this determination was flawed. First, the CO found that Mr. Ubhi did not have the technical expertise to substantially influence the procurement. Second, she concluded that his actual attempts to influence the procurement were limited. Third, the key decisions were made after Mr. Ubhi recused himself.

As to Mr. Ubhi's technical expertise, or lack thereof, the record reflects that Mr. Ubhi' specialty was lead product manager. The CO placed Mr. Ubhi's participation in the broader context of the Defense Digital Service team, which was only one team among at least half a dozen DoD organizations that contributed to and reviewed the content of the JEDI Cloud solicitation. Mr. Van Name explained in his GAO testimony that Mr. Ubhi was indeed conversant in cloud computing, as one must be to work as an industry specialist in cloud computing. But his involvement early in the planning stage of this procurement does not reflect any meaningful role in crafting the technical aspects of this solicitation, particularly the gate criteria. We are not aware of any step in the procurement that required his approval. By the time DoD finished its

decisions and amendments to Gate Criteria 1.2, Mr. Ubhi had long since left DoD. In reality, the gate criteria, particularly the security requirements, were crafted by a number of DoD teams which focused on technical and security requirements. Mr. Ubhi's primary role was industry liaison; the record does not warrant attributing to him any serious involvement in the technical or security aspects of the gate criteria.

While Oracle points to Mr. Ubhi's loud advocacy for a single award approach, real DoD decisionmakers had been independently in favor of a single award approach both before and after Mr. Ubhi's involvement. As early as September 14, 2017, the Cloud Executive Steering Group (of which Mr. Ubhi was not a member) expressed a preference for a single award approach. On the other hand, after Mr. Ubhi left DoD, the Deputy Secretary remained unconvinced regarding which approach to use; he was "[o]pen to the first cloud contract being single source OR multiple source" and asked for a "layout [of] all options and recommendations from Team Cloud" in November 2017. AR 4352. The CO recalled being in a meeting in April 2018 in which "the single award decision was still being vigorously debated." AR 58721. Nor is it credible to suggest that Mr. Ubhi was steering DoD toward AWS. Our narrative began with the visit to AWS (among other cloud service providers) by DoD top brass, before Mr. Ubhi's involvement surfaces.

Ultimately, we find that the CO correctly concluded that although Mr. Ubhi should have never worked on the JEDI Cloud procurement, his involvement did not impact it. We are left with the firm conviction that the agency was headed in the direction of a single award from the beginning, indeed probably before Mr. Ubhi was enlisted to participate in the JEDI Cloud project. The CO is fundamentally correct: if there was a high speed train headed toward a single award decision, Mr. Ubhi was merely a

passenger on that train, and certainly not the conductor. Moreover, he exited DoD prior to the substance of the evaluation factors being crafted. Although the CO correctly found the assurances in his affidavit to be untrustworthy, we ultimately agree with the substance of her conclusion that his self-promoting, fabulist and often profanity-laced descriptions of his own role were merely that.

2. Alleged Organizational Conflict of Interest

Finally, Oracle turns to the CO's assessment of AWS. Oracle argues that the CO's determination that AWS did not violate procurement integrity law and does not have an unfair advantage lacks a rational basis. While Oracle's argument focuses on Mr. Gavin's and Mr. Ubhi's relationship with AWS, even though the CO properly considered both Mr. Bouier's and Dr. Sutherland's relationship with the company as well.

FAR Subpart 9 prescribes rules and responsibilities regarding organizational conflicts of interest. "An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition." FAR 9.502(c) (2018). It is the CO's responsibility to "[i]dentify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible" and to "[a]void, neutralize, or mitigate significant potential conflicts before contract award." FAR 9.504(a). The CO "should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The [CO's] judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists." FAR 9.504(d).

The CO should examine "[e]ach individual contracting situation . . . on the basis of its particular facts and the nature of the proposed contract." FAR 9.505. "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." *Id.* Relevant here, the CO should seek to prevent "unfair competitive advantage." *Id.* Such unfair 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 . . . that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract." *Id.*

Oracle argues that there can be no question that AWS had a significant, actual conflict and that only extreme measures would eliminate the conflict at this stage. It contends that the CO irrationally determined that AWS could not derive an unfair competitive advantage from the information Mr. Ubhi or Mr. Gavin brought with them to AWS. The government responds that the CO properly determined that a significant potential conflict did not exist, because there is no evidence—in the CO's determination or that she missed—that indicates AWS possesses proprietary information or source selection information not available to all competitors.

The CO's conclusion that a conflict of interest did not exist was sufficiently supported based on the facts presented to her. She specifically considered whether the DoD employees who accepted jobs at AWS could have, and did, communicate information to AWS that would give AWS an unfair competitive advantage. She concluded that the information the three individuals had could not offer an unfair competitive advantage and that, in any event, there is no evidence that protected information was communicated to AWS.

Her assessment began with whether AWS obtained source selection information that is relevant, not available to all competitors, and would assist AWS in winning the JEDI Cloud contract. The pertinent facts she considered are that Mr. Ubhi participated in many JEDI Cloud meetings and assisted in drafting several pre-RFP documents; he had access to the contents of the Google Drive; Mr. Gavin participated in two meetings and viewed a limited set of documents; and Dr. Sutherland apparently had access to some documents through her work with the Joint Requirements Oversight Council. The substance of the documents to which they had access, however, along with the meeting notes, concerns DoD's need to adopt cloud computing, the disadvantages of not being able to access an enterprise cloud, the list the cloud services DoD would need, and the processes for how to get to closure in the procurement.

AWS could have contemporaneously gathered such information through the November 2017 JEDI Cloud summary, the RFI, meetings with the JEDI Cloud procurement team, and later through the draft RFP and the final solicitation package, not to mention DoD's 2017 meeting with AWS prior to the kickoff of the JEDI Cloud procurement process. DoD was not particularly secretive about its cloud services needs or its plan for the solicitation. In fact, DoD involved industry from the beginning of this procurement. At the time Mr. Ubhi and Mr. Gavin sought AWS employment, no bids or other source selection information existed. We find nothing irrational in the CO's conclusion that Mr. Gavin and Mr. Ubhi did not offer AWS an unfair competitive advantage based on their knowledge of nonpublic information relating to the procurement.

Oracle also argues that Mr. Ubhi had nonpublic information regarding AWS's potential competitors, implying that he had imparted to AWS "[p]roprietary information

that was obtained from a Government official without proper authorization." FAR 9.505(b)(1). There is no real support for this supposition. The CO considered this issue and concluded that the information Mr. Ubhi had access to could be accessed publicly. She also concluded that Mr. Ubhi's knowledge of Microsoft's proprietary information, submitted to DoD during its one-on-one meeting with the JEDI Cloud team, could be accessed publicly. Moreover, none of the information Oracle points out appears to be sensitive to Microsoft's future offer or approach to tackling the JEDI Cloud project. It is a reasonable conclusion that AWS had access to the information with or without Mr. Ubhi.

In this case, there was a significant amount of communication and negotiation between AWS and DoD employees. As in the case of the individual conflicts of interest, the individuals, the company, and the agency were slow to identify the potential this created for an organizational conflict, particularly as it might relate to a procurement of this magnitude, and less than aggressive in heading off potential harm. Nevertheless, our review is not de novo. The question is whether the procurement was tainted, so as to warrant a redo or possible exclusion of AWS, a question that lies, in the first instance, in the hands of the CO. The issue for the court is whether she properly exercised her discretion in concluding that AWS does not have an organizational conflict of interest based on the facts as presented. We believe she correctly focused on the significance of the potential conflict and whether it gave AWS any competitive advantage. Her conclusion that the errors and omissions were not significant and did not give AWS a competitive advantage was reasonable and well supported.

CONCLUSION

Because the court finds that Gate Criteria 1.2 is enforceable, and because Oracle concedes that it could not

meet that criteria at the time of proposal submission, we conclude that it cannot demonstrate prejudice as a result of any other possible errors. Plaintiff's motion for judgment on the administrative record is therefore denied. Defendant's and intervenor's respective cross-motions for judgment on the administrative record are granted. The Clerk is directed to enter judgment for defendant. No costs.

APPENDIX C

10 U.S.C. § 2304a(d):

(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)(A) Except as provided under subparagraph (B), 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—

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

(ii) 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;

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

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

(B) A task or delivery order contract in an amount estimated to exceed $100,000,000 (including all options) may be awarded to a single source without the written determination otherwise required under subparagraph (A) if the head of the agency has made a written determination pursuant to section 2304(c) of this title that procedures other than competitive procedures may be used for the awarding of such contract.

(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.

18 U.S.C. § 208:

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the

rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply—

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights—

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall—

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.