

No. 20-1057

IN THE
Supreme Court of the United States

ORACLE AMERICA, INC.,

Petitioner,

v.

UNITED STATES AND AMAZON WEB SERVICES, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

BRIEF IN OPPOSITION

DANIEL R. FORMAN
ROBERT J. SNECKENBERG
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2504

MARK A. PERRY
Counsel of Record
KELLAM M. CONOVER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

*Counsel for Respondent
Amazon Web Services, Inc.*

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that, because petitioner could not meet the government's requirements for participating in a procurement, petitioner could not challenge the structure of that procurement.

2. Whether the court of appeals correctly concluded that the procurement was not prejudiced by any of the personal conflicts of interest alleged by petitioner.

RULE 29.6 STATEMENT

Respondent Amazon Web Services, Inc. states that Amazon.com, Inc. is respondent's parent corporation and indirectly owns 100% of respondent's stock.

ADDITIONAL RELATED PROCEEDINGS

In addition to the proceedings identified in the petition, the following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Amazon Web Servs., Inc. v. United States*, No. 19-cv-1796 (Fed. Cl. filed Nov. 22, 2019)
- *Oracle Am., Inc., B-416657 et al.*, 2018 CPD ¶ 391 (Comp. Gen. Nov. 14, 2018)

TABLE OF CONTENTS

	Page
BRIEF IN OPPOSITION	1
STATEMENT	2
REASONS FOR DENYING THE PETITION.....	6
I. The Alleged Personal Conflicts Are Intensely Fact-Bound.....	7
II. The Alleged Personal Conflicts Are Not Outcome-Determinative.....	8
CONCLUSION	11

TABLE OF AUTHORITIES

Page(s)

Case

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990)8

Other Authority

Inspector General, U.S. Dep't of Defense,
*Report on the Joint Enterprise Defense
Infrastructure (JEDI) Cloud Procurement*,
No. DODIG-2020-079 (Apr. 2020)6, 8

BRIEF IN OPPOSITION

Petitioner Oracle America, Inc. (“Oracle”), respondent Amazon Web Services, Inc. (“AWS”), and two other companies submitted proposals in response to the Department of Defense’s (“DoD’s”) \$10 billion Joint Enterprise Defense Infrastructure (“JEDI”) procurement to provide cloud computing services to the armed forces. Oracle also filed the pre-award bid protest that is the subject of this petition and challenges the structure of the procurement and asserts conflict-of-interest allegations. While these challenges were pending, DoD disqualified Oracle for failure to satisfy DoD’s minimum requirements, described as “gate criteria.”

In this Court, Oracle raises two distinct objections to the procurement: *First*, Oracle contends that the government was required to structure the procurement to allow multiple vendors rather than a single vendor. *Second*, Oracle contends that the procurement was tainted by the involvement of three government officials with alleged conflicts of interest.

On the first question presented, AWS took no position in the court of appeals and takes no position in this Court. On the second question presented, it is important to distinguish between *personal* conflicts of interest involving government employees and *organizational* conflicts of interest involving companies. Oracle’s petition addresses only the former: namely, that former DoD employees allegedly had conflicts of interest while employed at DoD. As explained below, this case is a poor vehicle for addressing those allegations because they are highly fact-bound and are not outcome-determinative in this case. Although Oracle

previously argued that AWS also had an organizational conflict of interest, that argument was rejected below as unfounded and is not included in the petition. Because Oracle has abandoned that claim, AWS does not address it further herein.

Oracle's petition should be denied.*

STATEMENT

Oracle was eliminated from the JEDI competition because it failed to meet DoD's minimum requirements, known as gate criteria. After Oracle initially filed with the Government Accountability Office ("GAO") a pre-award protest challenging, *inter alia*, DoD's minimum requirements, the GAO denied the pre-award protest. Pet. App. 3a. Oracle then filed a complaint in the Court of Federal Claims, which granted judgment on the administrative record to the government. Pet. App. 40a. The court of appeals affirmed. Pet. App. 1a.

1. The JEDI Cloud procurement is "directed to the long-term provision of enterprise-wide cloud computing services to [DoD]." Pet. App. 2a. The JEDI solicitation sought a single contractor to fulfill DoD's cloud requirements. *Ibid.* Prospective bidders were required to satisfy seven threshold gate criteria: If an offeror passed all seven gates, it would be eligible for further evaluation; if an offeror failed even one gate,

* AWS is currently protesting the final award decision at the Court of Federal Claims, on the grounds that DoD's technical evaluation of proposals was flawed and that the Trump Administration improperly interfered in the award. This petition, which arises from Oracle's pre-award protest, is unrelated to AWS's post-award protest.

however, it would be ineligible for further evaluation or award. Pet. App. 60a–61a.

2. Oracle filed a pre-award challenge with the GAO, arguing that DoD’s justifications for awarding the JEDI procurement to a single contractor were insufficient under applicable statute and regulation, Pet. App. 3a, challenging certain of the solicitation’s threshold gate criteria, *ibid.*, and claiming that the procurement was tainted by alleged conflicts of interest, Pet. App. 27a.

The GAO rejected Oracle’s protest. The GAO upheld the single-award structure and each of the challenged gate criteria, and held that the alleged personal conflicts could not have tainted the procurement given that the solicitation reflected DoD’s actual needs. *See* C.A.J.A. 105,900–105,918.

3. Oracle then filed a complaint in the Court of Federal Claims. Pet. App. 3a. While that case was pending, DoD excluded Oracle from the procurement for its failure to satisfy multiple gate criteria: Specifically, DoD found that Oracle’s proposal failed to satisfy Gate 1.1, and Oracle conceded that it failed to satisfy Gate 1.2 “at the time of proposal.” Pet. App. 2a; *see* Pet. App. 3a, 42a. DoD also completed an exhaustive investigation of potential conflicts of interest, finding none that could have tainted the procurement. Pet. App. 24a.

a. Oracle’s principal challenge was to the single-award structure and Gates 1.1 and 1.2. Pet. App. 41a, 98a. Oracle’s conflicts challenges concerned three DoD employees. The contracting officer (“CO”) had found that none of these employees “tainted the JEDI Cloud procurement.” Pet. App. 29a; *see also* Pet. App. 37a.

The first DoD employee, Deap Ubhi, “was involved in marketing research activities for the JEDI Cloud procurement” and “participated in drafting and editing some of the first documents shaping the procurement.” Pet. App. 28a. Oracle alleged that, in October 2017, Mr. Ubhi did not recuse himself from participating in the procurement until after beginning to negotiate his return to work at one of the offerors in the procurement. Pet. App. 28a–29a. The CO found, however, that Mr. Ubhi “had not tainted the JEDI Cloud procurement” because his “participation in the procurement was limited,” Pet. App. 29a, he “lacked the technical expertise to substantively influence the JEDI Cloud procurement,” and, “most importantly, all the key decisions for the JEDI Cloud procurement, [including] whether to award one or multiple contracts, were made well after [he] recused himself,” Pet. App. 78a.

The second DoD employee, Anthony DeMartino, had limited involvement with the JEDI procurement, participating only in “ministerial/administrative actions (such as scheduling meetings, editing/drafting public relations,[] etc.)” Pet. App. 35a (alteration in original). Oracle alleged that Mr. DeMartino had a conflict of interest because he had been a consultant for one of the offerors in the JEDI procurement. *Ibid.* But the CO found that he “‘did not negatively impact the integrity’ of the procurement” because he performed only “‘ministerial and perfunctory’” functions and had a “‘limited role,” in which he “‘provided no input into the JEDI Cloud acquisition documents.’” *Ibid.*

The third DoD employee, Victor Gavin, attended one high-level meeting of the group “which was planning the JEDI Cloud procurement, to share the Navy’s

experience with cloud services,” and one other meeting in April 2018 “at which the attendees discussed the Draft Acquisition Strategy for the JEDI Cloud procurement.” Pet. App. 37a. Oracle alleged that Mr. Gavin attended the second meeting after receiving a job offer from an offeror in the JEDI procurement. *Ibid.* The CO found, however, that Mr. Gavin “did not taint the [JEDI Cloud] procurement” because he “had limited access to the Draft Acquisition Strategy, did not furnish any input to that document, [and] did not introduce bias into any of the meetings that he attended.” *Ibid.*

b. The Court of Federal Claims denied Oracle’s protest and granted judgment in favor of the government on the administrative record. Pet. App. 42a. After upholding Gate 1.2, the court found that because Oracle failed to demonstrate that Gate 1.2 would have been different under a multiple-award contract, any error in DoD’s single-award determination was harmless. Pet. App. 97a.

The Court of Federal Claims also rejected each of Oracle’s conflicts challenges. Pet. App. 107a–120a. As to the three former DoD employees, the court found that their involvement did not “taint” the overall procurement, detailing its fact findings with respect to each employee. *See* Pet. App. 110a–116a.

4. Oracle appealed, and the Federal Circuit affirmed the Court of Federal Claims’ rejection of Oracle’s allegations. Pet. App. 1a–39a. The court of appeals held that the Court of Federal Claims was not “clearly erroneous” in finding the single-award determination harmless error. Pet. App. 16a–18a. The court of appeals further reviewed the record and “agree[d] with the Claims Court that” each alleged personal conflict of interest “had no effect on the JEDI

Cloud solicitation.” Pet. App. 27a; *see also* Pet. App. 28a–39a.

5. Oracle subsequently filed a petition for a writ of certiorari in this Court seeking review of the court of appeals’ rulings that (1) Oracle’s conceded failure of Gate 1.2 precluded it from challenging the single-award structure of the JEDI procurement and (2) no alleged personal conflict of interest prejudiced Oracle or otherwise tainted the procurement. Oracle did *not* raise any allegations of organizational conflicts of interest—which had been found meritless by the contracting officer (*see* C.A.J.A. 158,709–158,716, 158,747–158,748), the Court of Federal Claims (*see* Pet. App. 117a), and the Federal Circuit (*see* Pet. App. 35a, 39a), and had been separately rejected following an investigation by the Office of the Inspector General, *see* Inspector General, U.S. Dep’t of Defense, *Report on the Joint Enterprise Defense Infrastructure (JEDI) Cloud Procurement*, No. DODIG-2020-079 (“OIG Report”), at 128–168, 201–208 (Apr. 2020).

REASONS FOR DENYING THE PETITION

As noted at the outset, AWS takes no position on the first question presented—*i.e.*, whether the procurement should have been structured differently. With regard to the second question presented—*i.e.*, whether the court of appeals correctly concluded the procurement was not prejudiced by the personal conflicts of interest of three DoD employees—this case is a poor vehicle for deciding that issue. The alleged personal conflicts of interest (which concern the actions of DoD employees, not the actions of AWS) are highly fact-bound and had no effect on Oracle’s exclusion from the competitive range. Indeed, the DoD, the GAO, the Court of Federal Claims, and the Federal

Circuit each correctly concluded the alleged personal conflicts *could not* have affected the procurement. Accordingly, the petition for a writ of certiorari should be denied.

I. THE ALLEGED PERSONAL CONFLICTS ARE INTENSELY FACT-BOUND.

Reviewing the alleged personal conflicts in this case would not provide helpful guidance in other cases. Even Oracle acknowledges that, under the proper inquiry into the impact of an alleged personal conflict of interest, a court may need to engage in a “materiality inquiry” “to decide whether a contract has been tainted by” the conflict. Pet. 29. To call such an inquiry fact-intensive—and hence of little value in other cases—is an understatement.

Consider the CO’s inquiry in the first instance. The CO interviewed eight government officials and reviewed *thousands* of pages of emails, Slack messages, proposal materials, and affidavits. C.A.J.A. 158,704–158,707. On the basis of this extensive inquiry, the CO found that while Mr. Ubhi worked for DoD, his “participation in the procurement was limited,” Pet. App. 29a, that he “lacked the technical expertise to substantively influence the JEDI Cloud procurement,” and that “most importantly, all the key decisions for the JEDI Cloud procurement, [including] whether to award one or multiple contracts, were made well *after* [he] recused himself,” Pet. App. 78a (emphasis added). The CO similarly found that Mr. DeMartino performed only a “ministerial and perfunctory” and “limited role,” in which he “provided no input into the JEDI Cloud acquisition documents” and “did not negatively impact the integrity’ of the procurement,” Pet. App. 35a, and that Mr. Gavin “had limited access to the Draft Acquisition Strategy, did

not furnish any input to that document, [and] did not introduce bias into any of the meetings that he attended,” Pet. App. 37a.

Or consider the 48 pages the Office of the Inspector General (“OIG”) spent discussing the alleged conflicts by these three former DoD employees. See OIG Report at 128–168, 201–208. OIG’s Report—which was based on an examination of “approximately 31.2 gigabytes of e-mails and 1.05 gigabytes of relevant documents” and “more than 80 interviews,” *id.* at 4—concluded that “Mr. Ubhi’s brief early involvement in the JEDI Cloud Initiative was not substantial,” *id.* at 8, that Mr. Gavin’s “comments about acquisition strategy” at a single JEDI meeting “did not affect the JEDI Cloud procurement or contract award,” *id.*, and that Mr. DeMartino had only “a limited role related to JEDI that involved drafting cloud-related correspondence for the Deputy Secretary of Defense,” *id.* at 208.

This sort of highly fact-bound inquiry “is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law” for other cases, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), and, therefore, is not well-suited for this Court’s review, *see* Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings”).

II. THE ALLEGED PERSONAL CONFLICTS ARE NOT OUTCOME-DETERMINATIVE.

This case is also a poor vehicle because the outcome of the procurement would have been the same—*i.e.*, Oracle would have been excluded from the competitive range for its conceded failure to satisfy Gate 1.2—regardless of whether its allegations related to

the personal conflicts of the DoD employees are accurate (they are not).

Oracle makes no argument that either Mr. Gavin or Mr. DeMartino had any involvement in the development of Gate 1.2. And Oracle’s unsubstantiated assertion that Mr. Ubhi was involved in the development of Gate 1.2, *see* Reply Br. 10, is plainly wrong. As the United States correctly sets forth, Gate 1.2 was not added to the procurement until *after* March 2018, whereas Mr. Ubhi had left DoD in November 2017—several months *before* March 2018. Opp. 26 (citing Pet. App. 69a, 114a–115a; C.A.J.A. 106,083–106,084). Thus, none of the alleged personal conflicts could have possibly affected the development of Gate 1.2—meaning Oracle would have been excluded for failure to satisfy Gate 1.2 regardless of those conflicts.

Oracle focuses primarily on whether Mr. “Ubhi’s conduct was []material to the single-award structure of JEDI.” Pet. 33. But even if his conduct had been material to the single-award structure (it was not), it still would not have been material to the development of Gate 1.2. In any event, the CO, the GAO, the Court of Federal Claims, and the Federal Circuit all correctly concluded that Mr. Ubhi’s involvement was, in fact, immaterial to the single-award structure. While Oracle suggests that the courts below applied only deferential review, that ignores that each court reviewed the extensive record and expressly agreed with the CO’s conclusions.

The Court of Federal Claims, for example, reviewed “hundreds” of Slack messages and emails, Pet. App. 78a & n.10, and agreed that “the conclusion . . . that these individuals were bit players in the JEDI Cloud project, *is correct*,” Pet. App. 109a (emphasis added). That court explained that, because none of

the DoD employees at issue was among “the many DoD offices [sic] and officials who had a role in the structure of this procurement,” and because they did not “develop[] or sign[] off on [any] challenged components of this procurement,” their involvement “d[id] not taint the work of many other persons who had the real control of the direction of the JEDI Cloud project.” Pet. App. 109a.

After conducting its own review of the record, the court of appeals likewise “agree[d] with the Claims Court that the conflict of interest problems of those three individuals *had no effect* on the JEDI Cloud solicitation.” Pet. App. 27a (emphasis added). With respect to Mr. Ubhi, for example, the court of appeals explained that Oracle’s argument that the “no-impact determination ‘runs counter to the evidence before the agency’” has “no force,” as it “far outruns the limited evidence Oracle cites to support it.” Pet. App. 33a. Similarly, the court of appeals explained that none of the evidence Oracle cited with respect to Mr. DeMartino “establish[ed] that [he] was significantly involved in crafting the substance of the procurement.” Pet. App. 36a. The court of appeals further noted that “Mr. Gavin did not ‘assist in crafting the single award determinations or the technical substance of the evaluation factors.’” Pet. App. 38a (quoting Pet. App. 110a).

In short, Oracle presents no recurring questions of importance regarding its accusations of personal conflicts of interest. (And, to reiterate, Oracle presents no questions at all in this Court regarding alleged organizational conflicts involving AWS.) Rather, the issues raised in Oracle’s petition are fact-bound challenges that were thoroughly explored and resolved by the responsible officials, reviewed by the

lower courts, and correctly decided. Nothing that transpired with respect to those DoD employees warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL R. FORMAN
ROBERT J. SNECKENBERG
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2504

MARK A. PERRY
Counsel of Record
KELLAM M. CONOVER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

*Counsel for Respondent
Amazon Web Services, Inc.*

June 18, 2021