No. 20-1057

In the Supreme Court of the United States

ORACLE AMERICA, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to Rule 15.8 of the Rules of this Court, the government respectfully files this supplemental brief to alert the Court to important developments since the filing of the government's brief in opposition. This case involves a bid protest by petitioner to the procurement by the Department of Defense (DoD) of a single-award contract for the Joint Enterprise Defense Infrastructure (JEDI) Cloud computing project. On July 6, 2021, DoD canceled the JEDI Cloud solicitation and initiated the termination of the contract that had been awarded to Microsoft (which was ultimately terminated on September 1, 2021). In July, DoD also announced a new multiple-award procurement called Joint Warfighting Cloud Capability (JWCC).

The cancellation of the JEDI Cloud solicitation has rendered this case moot, which is an additional and independent reason that this Court should deny the petition for a writ of certiorari. The petition asserts that

the original single-award JEDI Cloud solicitation was unlawful and tainted by conflicts of interest, and thus seeks to unwind the solicitation and the award of the single-source contract to Microsoft. See Pet. i. In light of the cancellation of the JEDI Cloud solicitation and termination of the Microsoft contract, however, petitioner has effectively received all the relief it could have obtained in its bid protest (and more). And the JWCC solicitation is a new multiple-award procurement that will be conducted afresh in the coming months. Any challenges that petitioner may wish to make to the JWCC procurement should be the subject of a separate proceeding.

Because the bid protest at issue in this case is moot, the lower court's decision does not warrant further review. Nor is this an appropriate case in which to grant the petition and vacate the decision below under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), because the petition did not merit further review even before the JEDI Cloud solicitation was canceled.

1. The JEDI Cloud procurement was "directed to the long-term provision of enterprise-wide cloud computing services to [DoD]." Pet. App. 2a. The procurement contemplated the award of a single indefinite-quantity contract, which "does not procure or specify a firm quantity of services [or property] (other than a minimum or maximum quantity)," but instead "provides for the issuance of orders for the performance of tasks [or the delivery of property] during the period of the contract." 10 U.S.C. 2304d(1); see 10 U.S.C. 2304d(2). Congress has expressed a preference that such contracts, especially those that exceed a certain dollar value, be awarded to multiple sources rather than to a single source, see 10 U.S.C. 2304a(d)(3) and (4)(A), but

also has required the issuance of regulations that "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)(B), and provided specific exceptions to the general preference for multiple awards for large contracts, 10 U.S.C. 2304a(d)(3). DoD determined that multiple JEDI Cloud contracts would not be in the government's best interests and invoked one of the statutory exceptions for large indefinite-delivery contracts. See Br. in Opp. 3-5.

Petitioner challenged that approach in a bid protest, and the Court of Federal Claims agreed that DoD had invoked an inapplicable statutory exception under 10 U.S.C. 2304a(d)(3). See Pet. App. 93a-95a. Nevertheless, that court granted judgment to the government on the administrative record because it found that petitioner was not prejudiced by the decision to award a single contract, see *id.* at 96a-98a, and that the conflicts of interest petitioner alleged did not affect the agency's decision to adopt a single-award approach for JEDI Cloud, see *id.* at 107a-116a. The court of appeals affirmed. See *id.* at 1a-39a.

Petitioner filed a petition for a writ of certiorari on January 29, 2021; the government filed its brief in opposition on May 3, 2021; and respondent Amazon Web Services filed its brief in opposition on June 18, 2021. The petition has been distributed for consideration at the Court's September 27, 2021 conference.

2. On July 6, 2021, DoD announced that it had "canceled the [JEDI] Cloud solicitation and initiated contract termination procedures" to terminate Microsoft's contract. DoD, *Future of the Joint Enterprise Defense*

Infrastructure Cloud Contract (July 6, 2021) (July 6 Announcement).[1] DoD stated that because of "evolving requirements, increased cloud conversancy, and industry advances, the JEDI Cloud contract no longer meets its needs." *Ibid.* DoD's acting chief information officer explained that "JEDI was developed at a time when the Department's needs were different and both the [cloud service providers'] technology and our cloud conversancy was less mature." *Ibid.*

DoD observed, however, that it "continues to have unmet cloud capability gaps for enterprise-wide, commercial cloud services at all three classification levels that work at the tactical edge, at scale." July 6 Announcement. It also observed that "these needs have only advanced in recent years with efforts such as Joint All Domain Command and Control (JADC2) and the Artificial Intelligence and Data Acceleration (ADA) initiative." *Ibid.* Accordingly, DoD "announced its intent for new cloud efforts," namely, the JWCC procurement, which "will be a multi-cloud/multi-vendor Indefinite Delivery-Indefinite Quantity (IDIQ) contract." *Ibid.* The acting chief information officer explained that "[t]he JWCC's multi-cloud environment will serve our future in a way that JEDI's single award, single cloud structure simply cannot do." C. Todd Lopez, DOD News, *DOD Aims for New Enterprise-Wide Cloud by 2022* (July 7, 2021) (July 7 Article).[2]

DoD announced that it "intends to seek proposals from a limited number of sources" for the JWCC procurement, including Microsoft and Amazon, but also

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[1] www.defense.gov/Newsroom/Releases/Release/Article/2682992/future-of-the-joint-enterprise-defense-infrastructure-cloud-contract.

[2] www.defense.gov/Explore/News/Article/Article/2684754/dod-aims-for-new-enterprise-wide-cloud-by-2022.

noted that it "will immediately engage with industry and continue its market research to determine whether any other U.S.-based" company "can also meet [its] requirements." July 6 Announcement. DoD emphasized that neither Microsoft nor Amazon "will automatically win awards," and that "Microsoft and Amazon will not be the only companies approached by [DoD]." July 7 Article. Instead, the acting chief information officer stated that "he will also be reaching out to IBM, Oracle and Google." *Ibid.* He further stated that new JWCC contracts "are expected to be awarded by April 2022," with performance periods "consisting of a three-year performance base period and two one-year option periods." *Ibid.*; see General Services Administration, Presolicitation Contract Opportunity, *Joint Warfighting Cloud Capability (JWCC)* (July 6, 2021) (GSA Notice).[3] And he expressed his "hopes that by early 2025 [DoD] will have moved on to the next step: a full and open, competitively awarded multi-vendor contract providing cloud capability to [DoD]." July 7 Article.

On July 8, 2021, the Court of Federal Claims dismissed as moot a related bid protest by Amazon, a respondent in this case, in light of DoD's cancellation of the JEDI Cloud solicitation and termination of Microsoft's contract. D. Ct. Doc. 274, at 1-2, *Amazon Web Services, Inc.* v. *United States*, No. 19-cv-1796 (Fed. Cl. July 8, 2021).

3. The cancellation of the JEDI Cloud solicitation has rendered this case moot.

a. This case is moot because it involves a protest to a procurement that has been terminated. Any determination of the merits of the legal issues presented by the

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[3] sam.gov/opp/54ce941a25a14932809b5d83ac52a09a/view.

petition would thus be untethered from an actual controversy or any concrete harm to petitioner. See *Alvarez* v. *Smith*, 558 U.S. 87, 93 (2009) (explaining that a case is moot when the parties' "dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights" because "a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of" Article III).

The cancellation of JEDI Cloud means that any injuries petitioner allegedly suffered in the solicitation process are no longer redressable. The most that petitioner would have been entitled to had it prevailed in this case would have been the termination of the contract with Microsoft and a remand to the agency to conduct anew the JEDI Cloud procurement. Thus, in its reply to the government's brief in opposition, petitioner complained (at 4) that "[a]bsent this Court's intervention, the JEDI contract will proceed for the next decade as an illegal single-source award." But that contract has been terminated and JEDI Cloud has been canceled altogether. Accordingly, there is no additional relief that a federal court could order even if petitioner were to prevail on the questions presented in this case.

As lower courts have long recognized, the cancellation of a solicitation generally renders moot any pending bid protests with respect to that solicitation. See, *e.g.*, *Veterans Contracting Group, Inc.* v. *United States*, 743 Fed. Appx. 439, 440 (Fed. Cir. 2018) (finding an appeal in a government-contracting case moot once "the government terminated the contract" because the requested remedy "to award, or at least to consider awarding, the contract at issue to" the plaintiff was "now beyond the power of this court to grant"); *Square*

One Armoring Service, Inc. v. *United States*, 123 Fed. Cl. 309, 325 (2015) (observing that "ample precedent exists for dismissing as moot plaintiff's challenge to the original evaluation and award based on [the federal agency's] decision to cancel the Solicitation and reprocure the requirement"); *id.* at 325-326 (citing additional cases); see also *FMS Investment Corp.* v. *United States*, 138 Fed. Cl. 152, 157 (2018) ("[The Department of Education] has cancelled the solicitation at issue in this bid protest and terminated for convenience its contract awards * * * . As such, [the unsuccessful bidders'] complaints challenging [the Department's] evaluation of proposals and award decisions are now moot."); cf. *Galen Medical Associates, Inc.* v. *United States*, 369 F.3d 1324, 1333 (Fed. Cir. 2004) (agreeing that the plaintiff's "complaints regarding the initial solicitation were rendered moot when the VA vacated the award and agreed to amend the solicitation").

To the extent that the new JWCC solicitation is relevant, its multiple-award nature confirms that petitioner's current challenge is moot. The first question presented in the petition for a writ of certiorari asks whether the court of appeals erred in refusing to remand the case to the agency after a finding "that the single-bidder award violated federal law." Pet. i. Similarly, the second question presented involves conflicts of interest—in particular, those of former DoD employee Deap Ubhi, who left the agency in 2017—that allegedly tainted the agency's decision to adopt a single-award approach for JEDI Cloud. See *ibid.*; see also Pet. 27 (emphasizing that "Ubhi pushed hard for the single-award approach"); Pet. 32 ("From the start, Ubhi engaged in 'loud advocacy for a single award approach' and soon became its foremost champion."); Pet. 33 ("No

de novo review of these facts could conclude that Ubhi's conduct was immaterial to the single-award structure of JEDI."). Unlike JEDI Cloud, however, JWCC adopts a multiple-award approach. See July 6 Announcement. And DoD has made clear that although the agency intends to approach Microsoft and Amazon, if "additional vendors can also meet [DoD's] requirements, then [it] will extend solicitations to them as well," including "Oracle." July 7 Article. That is precisely what petitioner sought in its bid protest with respect to the JEDI Cloud solicitation, underscoring that the issues raised in that protest are moot.

b. This case does not fall into the "exception to the mootness doctrine for a controversy that is 'capable of repetition, yet evading review.'" *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted). "That exception applies 'only in exceptional situations,' where (1) 'the challenged action is in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Ibid.* (brackets and citation omitted). Neither of those exceptional situations is present here.

First, the JEDI Cloud solicitation was intended to be a long-term procurement for an indefinite-quantity contract with more than 4000 task orders spanning up to a decade. See C.A. App. 100,460. Unlike the "short-term contracts" at issue in *Kingdomware*, therefore, the long-term JEDI Cloud procurement would not have been "fully performed" in "too short [a time] to complete judicial review of the lawfulness of the procurement." 136 S. Ct. at 1976. And the same will be true of the JWCC procurement, which anticipates contracts

with performance periods of up to five years. See GSA Notice.

Second, petitioner provides no reason to expect that it will again bid on a single-award indefinite-quantity contract despite an inability to satisfy certain threshold requirements, and then be denied relief in a bid protest because courts determine that the agency would have imposed the same threshold requirements in a multiple-award procurement. See Pet. App. 96a-98a. Unlike the "Rule of Two" at issue in *Kingdomware*, therefore, the "legal issue in this case" is not "likely to recur in future controversies between the same parties in circumstances where the period of contract performance is too short to allow full judicial review before performance is complete." *Kingdomware*, 136 S. Ct. at 1976.

c. To be sure, "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013). But the purpose of that exception to mootness is to prevent a defendant from "engag[ing] in unlawful conduct, stop[ping] when sued to have the case declared moot, then pick[ing] up where he left off, repeating this cycle until he achieves all his unlawful ends." *Ibid.* Here, DoD canceled the JEDI Cloud solicitation and terminated Microsoft's contract because "evolving requirements, increased cloud conversancy, and industry advances" meant that the "JEDI Cloud contract no longer meets [DoD's] needs." July 6 Announcement. Nothing in DoD's announcement or in the record in this case suggests that DoD canceled JEDI Cloud solely to moot this case with the intention of "pick[ing] up where [it] left off" as soon as the litigation ends. *Already*, 568 U.S. at 91. Nor is there any reasonable basis to conclude that DoD will resurrect JEDI Cloud in the future.

See July 7 Article (explaining that "JEDI's single award, single cloud structure simply cannot" "serve [DoD's] future" needs). Accordingly, "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (citation omitted). And to the extent the JWCC solicitation is relevant, it will employ a multiple-award, not a single-award, approach. See July 6 Announcement.

4. Mootness is an additional and independent reason to deny the petition for a writ of certiorari. As this Court has observed, federal courts may not "decide the merits of a legal question not posed in an Article III case or controversy." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994). Because the petition no longer raises any requests for relief that a federal court could provide, the injuries petitioner complains of are no longer redressable, and plenary review of the merits of the legal issues raised in the petition would be inappropriate and inconsistent with Article III. See *New York State Rifle & Pistol Association* v. *City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (holding that a "claim for declaratory and injunctive relief with respect to the City's old rule [was] moot" after the state and city amended the challenged statute and rule, respectively); *Princeton University* v. *Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (similar, after university amended the challenged regulation).

Nor is this an appropriate case in which to grant the petition for a writ of certiorari in order to summarily vacate the court of appeals' judgment and remand with instructions that petitioner's bid protest be dismissed as moot. See *Munsingwear*, 340 U.S. at 39. Vacatur under *Munsingwear* is appropriate only if, among other

things, the petition for a writ of certiorari would have merited this Court's plenary review had it not become moot. See Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-29 n.34 (11th ed. 2019); see also, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States,* cert. denied, 435 U.S. 942 (1978) (No. 77-900); Gov't Br. in Opp. at 6-8, *Electronic Privacy Information Center* v. *Department of Commerce*, cert. denied, 140 S. Ct. 2718 (2020) (No. 19-777). Because this case did not merit further review before cancellation of the JEDI Cloud solicitation, see Br. in Opp. 14-32, it does not merit *Munsingwear* vacatur now.

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For the foregoing reasons and those in the government's brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2021