No. 19-2326

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORACLE AMERICA, INC.,
Plaintiff-Appellant

v.

UNITED STATES, AMAZON WEB SERVICES, INC.,
Defendants-Appellees

Appeal from the United States Court of Federal Claims in
No. 1:18-cv-01880-EGB, Senior Judge Eric G. Bruggink

RESPONSE BRIEF OF APPELLEE AMAZON WEB SERVICES, INC.

MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 887-3667

DANIEL R. FORMAN
ROBERT J. SNECKENBERG
OLIVIA L. LYNCH
ZACHARY H. SCHROEDER
GABRIELLE TRUJILLO
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2504
DForman@crowell.com

Counsel for Appellee Amazon Web Services, Inc.

CERTIFICATE OF INTEREST

Counsel for Appellee Amazon Web Services, Inc. certifies the following:

1. The full name of the party represented by me is:

   Amazon Web Services, Inc.

2. The name of the real party in interest represented by me (if not identified in response to Question 1) is:

   N/A

3. The parent corporation or publicly held company that owns 10% or more of the stock of Amazon Web Services, Inc. is:

   Amazon.com, Inc., which indirectly owns 100% of Amazon Web Services, Inc.

4. The names of all law firms and the partners or associates that appeared for Amazon Web Services, Inc. in the trial court or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

   CROWELL & MORING LLP: James G. Peyster, Christian N. Curran, and Bridget M. Carr

5. The only pending case that may affect or be affected by this appeal is:

   Amazon Web Services, Inc. v. United States, Court of Federal Claims No. 1:19-cv-01796-PEC

Dated: December 26, 2019

/s/ Daniel R. Forman
DANIEL R. FORMAN
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2504
DForman@crowell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Regulations **Page(s)**

STATEMENT OF RELATED CASES

There have been no prior appeals in this case. A separate case related to the same procurement is currently pending in the Court of Federal Claims as No. 1:19-cv-01796-PEC, and could directly affect or be directly affected by this appeal.

INTRODUCTION

This appeal arises out of the Department of Defense's ("DoD's") Joint Enterprise Defense Infrastructure ("JEDI") procurement for a multi-billion-dollar contract to provide cloud computing services to the armed forces. Four major technology providers—Amazon Web Services, Inc. ("AWS"), IBM, Microsoft, and Oracle—submitted proposals. DoD disqualified IBM and Oracle for their failure to meet specified "gate" criteria, and ultimately awarded the contract to Microsoft.

Prior to the award to Microsoft, Oracle filed bid protests that were rejected by the Government Accountability Office ("GAO") and the Court of Federal Claims ("COFC"). In those protests, Oracle challenged three aspects of the procurement: (1) DoD's decision to award the contract to a single vendor rather than to multiple vendors, (2) the enforceability of DoD's gate criteria, and (3) alleged conflicts of interest involving former DoD employees who were involved in the procurement. Importantly, Oracle alleged two distinct kinds of conflicts: It primarily complained that the former DoD employees had conflicts of interest *while employed at DoD* (so-called "individual" conflicts of interest), and it secondarily asserted that a subset of the individuals later were hired by AWS and provided AWS with competitively useful nonpublic information *while employed at AWS* (a so-called "organizational" conflict of interest, or "OCI").

After GAO denied Oracle's protest, the COFC did the same and granted judgment on the administrative record in favor of DoD and AWS. Oracle appeals that COFC judgment and presents essentially the same objections to this Court.

In this brief, AWS addresses only Oracle's challenge that AWS had a supposed organizational conflict of interest. Oracle's remaining challenges are more appropriately addressed by DoD—indeed, Oracle's individual conflict allegations are the subject of an ongoing DoD Inspector General investigation—and thus are discussed herein only insofar as those challenges provide necessary context for Oracle's organizational conflict allegations.

As explained below, Oracle's organizational conflict challenge fails for two reasons. First, Oracle lacks standing to pursue it. Because Oracle's proposal failed two of the solicitation's threshold gate criteria and there is no allegation—let alone evidence—that any AWS *organizational* conflict affected those gate criteria, Oracle lacks standing to complain about any such conflict. Second, the Contracting Officer ("CO") and the COFC each found, after extensive examination of the record evidence, that AWS had no organizational conflict of interest (and received no competitively useful nonpublic information). Those well-reasoned decisions, supported fully by the factual record, are entitled to deference on appeal.

STATEMENT OF THE ISSUES

1. Whether Oracle lacks standing to challenge a supposed AWS organizational conflict of interest when that alleged conflict was not the reason DoD excluded Oracle from the procurement.

2. Whether Oracle's challenge to a supposed AWS organizational conflict of interest should be rejected because:

   a. The CO's determination that AWS had no organizational conflict of interest was not irrational; and

   b. The COFC's findings that AWS received no competitively useful nonpublic information were not clearly erroneous.

STATEMENT OF THE CASE

Although it was excluded from the JEDI procurement for failure to meet multiple gate criteria, Oracle has persisted with this pre-award protest, in which Oracle alleges (among other things) that AWS had an organizational conflict of interest due to its hiring of two former DoD employees. After a thorough investigation, the CO concluded that AWS had no such organizational conflict of interest. The COFC subsequently granted judgment on the administrative record against Oracle, agreeing with the CO that AWS had no organizational conflict of interest. Oracle's appeal followed.

I. Legal Framework For Conflicts Of Interest

Various statutes and the Federal Acquisition Regulation ("FAR")[1] govern the conduct of individuals employed by and organizations doing or seeking to do business with the federal government. Relevant here are four such provisions. The first three relate primarily, if not exclusively, to individual government employees; the fourth relates to organizations.

A. Individual Conflicts

FAR 3.101-1 provides an overarching principle that "[g]overnment business shall be conducted in a manner above reproach and . . . with complete impartiality and with preferential treatment for none." FAR 3.101-1. It further states that "[t]he general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships." *Id.*

The Procurement Integrity Act ("PIA"), 41 U.S.C. § 2101 *et seq.*, and its implementing regulations prohibit individuals from "knowingly" disclosing or obtaining contractor bid or proposal information or source selection information. *See* 41 U.S.C. § 2102; FAR 3.104-3(a), (b). The PIA also restricts government employees who participate personally and substantially in a federal agency

[1] The FAR is codified at Title 48 of the Code of Federal Regulations.

procurement from engaging in employment discussions with a "bidder or offeror" in that procurement. 41 U.S.C. § 2103; FAR 3.104-3(c).[2]

Similar to but distinct from the PIA's employment restrictions, 18 U.S.C. § 208 makes it a criminal violation for a government employee to "participate[] personally and substantially" in a "particular matter in which, to his knowledge, . . . any person or organization with whom he is negotiating or has any arrangement concerning prospective employment[] has a financial interest." 18 U.S.C. § 208(a); *see also* 5 C.F.R. Part 2635.

B. Organizational Conflicts

FAR Subpart 9.5 governs organizational conflicts of interest, of which there are three principal categories: "biased ground rules"; "impaired objectivity"; and "unequal access to information." As relevant, the last category "can occur when a company has access to nonpublic information in performing a government contract that may give it a competitive advantage in a later competition for a government contract." *Turner Constr. Co., Inc. v. United States*, 645 F.3d 1377, 1382 (Fed. Cir. 2011); *see also id.* at 1387 ("an unequal access OCI requires that a firm have access to [1] non-public information that [2] is competitively useful" (citing *Axiom*

[2] Limited sections of the PIA also apply to organizations, but those sections are not at issue in this appeal. Before the COFC, Oracle alleged, initially, that AWS supposedly violated the PIA. After AWS rebutted that argument below (Appx1795-Appx1798), Oracle's COFC reply brief essentially abandoned the issue (*see* Appx2175), and its brief on appeal does not allege that AWS violated the PIA.

Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1377 n.1 (Fed. Cir. 2009))). When an alleged conflict stems not from an organization's performance of another government contract but rather its hiring of a former government employee, the conflict may more appropriately be characterized as an alleged "unfair competitive advantage" under FAR Subpart 3.1; nevertheless, the standard for evaluating such an alleged conflict is "virtually indistinguishable" from the standard for evaluating an alleged FAR Subpart 9.5 unequal access to information conflict. *Interactive Info. Sols., Inc.*, B-415126.2 *et al.*, Mar. 22, 2018, 2018 CPD ¶ 115 (citing decisions); *see also, e.g.*, *IBM Corp. v. United States*, 119 Fed. Cl. 145, 159-61 (2014) (applying FAR Subpart 9.5 analysis to alleged conflict arising from offeror's hiring of former government program manager).

FAR 9.504(a) requires that a contracting officer "(1) [i]dentify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (2) [a]void, neutralize, or mitigate *significant* potential conflicts before contract award." FAR 9.504(a) (emphasis added). "A significant potential conflict is one which provides the bidding party a substantial and unfair competitive advantage during the procurement process on information or data not necessarily available to other bidders." *PAI Corp. v. United States*, 614 F.3d 1347, 1352 (Fed. Cir. 2010) (citation omitted). FAR 9.504(a) thus "requires mitigation of 'significant potential conflicts,' but does not require mitigation of other types of

conflicts, such as apparent or potential non-significant conflicts." *PAI*, 614 F.3d at 1352 (quoting FAR 9.504(a)). "Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it." FAR 9.505.

II. The JEDI Procurement

A. The Solicitation

On September 13, 2017, the Deputy Secretary of Defense directed DoD to accelerate its adoption of cloud architectures and services. Appx5-6. Over the ensuing ten months, organizations across DoD worked together to create the JEDI solicitation. Appx6-14.

Released on July 26, 2018, and subsequently amended, the JEDI solicitation sought a single contractor to fulfill DoD's cloud requirements. Appx18. Relevant here, the solicitation required offerors' initial proposals to address seven threshold gate criteria. Appx19. If an offeror passed all seven gates, it would be eligible for inclusion in a competitive range and further evaluation; if an offeror failed even one gate, however, it would be ineligible for further evaluation or award. *Id.*

In accordance with FAR Subpart 9.5, the JEDI solicitation also required offerors to disclose in their initial proposals actual or potential organizational

conflicts of interest. Appx100789; Appx100307-100308. Specifically, offerors were to disclose any current or past U.S. government contracts or subcontracts they held that would afford them an unfair competitive advantage in the JEDI procurement. Appx100307-100308. For any actual or potential organizational conflict, an offeror was to submit a plan "explaining in detail how the [conflict] will be mitigated and/or avoided." Appx100789.

Finally, just prior to issuing the JEDI solicitation—and separate from the solicitation's organizational conflict of interest provisions—on July 23, 2018, the CO responsible for the JEDI procurement determined that it was not affected by potential *individual* conflicts of five current or former government employees. Appx100683-100687. Among others, the CO's analysis addressed (1) Anthony DeMartino, a former Deputy Chief of Staff to the Secretary of Defense and Chief of Staff to the Deputy Secretary of Defense; and (2) Deap Ubhi, a former DoD Defense Digital Service ("DDS") employee who was involved with JEDI market research activities for seven weeks in September and October 2017. Appx100685 (Mr. DeMartino); Appx100686-100687 (Mr. Ubhi). Mr. DeMartino is not relevant to Oracle's organizational conflict of interest challenge; Mr. Ubhi will be discussed further below.

Offerors' initial proposals were due on October 12, 2018. Appx104303. Four companies—AWS, IBM, Microsoft, and Oracle—submitted proposals.

B. AWS's Multiple Disclosures

In its JEDI proposal and multiple subsequent submissions, AWS explained that it had no actual or potential organizational conflict of interest, and that it had proactively mitigated even the appearance of a potential conflict.

AWS's initial proposal explained that it did not have any actual or potential organizational conflict based on its performance of any other government contracts or subcontracts. Appx124536. Out of an abundance of caution, however, AWS disclosed that it had within the prior year hired two former government employees and proactively firewalled them from disclosing any nonpublic information to AWS's JEDI proposal team. Appx124536-124554.

First, on November 27, 2017, AWS rehired Mr. Ubhi from DDS. *See* Appx124537-124538. Mr. Ubhi had worked in AWS's commercial organization prior to joining DDS. *See id.* AWS's commercial organization is entirely separate from AWS's World Wide Public Sector ("WWPS"), which is the AWS organization that pursues and performs U.S. government contracts such as JEDI. *See id.* Mr. Ubhi's former supervisor recruited Mr. Ubhi back to AWS to focus on AWS's commercial startup business. *See id.*

Based on information provided by Mr. Ubhi, AWS explained that, while he was a DDS employee, Mr. Ubhi was involved in DoD's cloud migration effort that preceded JEDI, but was not involved in the preparation of the JEDI solicitation

(which was released over eight months after Mr. Ubhi rejoined AWS). *See id.*; *see also* Appx124546-124548 (sworn affidavit from Mr. Ubhi). AWS also explained that its rehiring of Mr. Ubhi was unrelated to JEDI and would not benefit AWS's JEDI proposal. *See* Appx124537-124538. For example, AWS highlighted that "[n]either Mr. Ubhi, his team, nor his manager are involved in pursuing or preparing proposals for any government contracts"; Mr. Ubhi's office in California "is physically separate from the activities of the JEDI Proposal Team, most of which occurs in Virginia"; and "Mr. Ubhi does not have physical or electronic access to any files related to AWS's JEDI proposal." *Id.* AWS further explained that, since rejoining AWS, "Mr. Ubhi has not (1) supported AWS WWPS, (2) been involved in any AWS JEDI proposal activities, (3) had any substantive communications regarding the JEDI procurement with any AWS employee, and (4) has not disclosed any non-public information relating to the JEDI procurement to anyone at AWS." Appx124538.

Second, on June 18, 2018, AWS hired Victor Gavin from the United States Navy. Appx124539. Based on information provided by Mr. Gavin, AWS explained that, while at the Navy, Mr. Gavin had met one time with personnel from the military services and DoD and provided information on the Navy's experience with cloud services and input on a high-level strategy document for JEDI. *Id.*; *see*

also Appx124549-124552 (sworn affidavit from Mr. Gavin).[3] Regardless, AWS also explained that, since joining AWS, "Mr. Gavin has not (1) been involved in any AWS JEDI proposal preparation activities, (2) accessed or reviewed any AWS proposal materials, (3) provided any input on AWS's proposal or proposal strategy, or (4) disclosed any non-public information relating to the JEDI procurement to anyone at AWS." Appx124539.

In addition to preventing Mr. Ubhi and Mr. Gavin from accessing AWS's JEDI proposal information, AWS implemented information firewalls to prevent them from potentially disclosing any nonpublic information to any members of the AWS WWPS JEDI proposal team. *See* Appx124538-124552. AWS summarized those firewalls in its proposal, obtained commitments from Mr. Ubhi and Mr. Gavin to abide by them, and confirmed with all members of the WWPS JEDI proposal team that neither Mr. Ubhi nor Mr. Gavin had ever provided them any nonpublic information. *Id.*

Finally, in the interest of full disclosure, AWS also included with its proposal a sworn affidavit from Jennifer Chronis, the Director of AWS's DoD Business. Appx124553-124554. Ms. Chronis explained that, prior to the formalization of Mr. Gavin's firewall, she and Mr. Gavin shared "a few informal

[3] As discussed *infra*, the CO would later find that Mr. Gavin attended one additional JEDI-related meeting. Mr. Gavin did not disclose that second meeting to AWS. *See* Appx124549-124552.

conversations in which JEDI came up." Appx124553. For example, they "discussed general DoD acquisition practices and Navy cloud usage based on [Mr. Gavin's] years of experience at the Navy." *Id.* However, Ms. Chronis was unequivocal in confirming that she "did not request, and Mr. Gavin did not provide, any non-public information relating to the JEDI procurement." *Id.*; *see also* Appx124553-124554 ("Given my 17 years of working in federal procurement, I am familiar with organizational conflict of interest rules and would not have requested, or accepted, information from Mr. Gavin that could give AWS an unfair competitive advantage in JEDI. . . . At no time have I sought Mr. Gavin's input on, nor shared any information regarding, the content of AWS's JEDI proposal. . . . Mr. Gavin did not draft, review, or provide any input regarding any portion of AWS's JEDI proposal. Nor has Mr. Gavin provided any input on AWS's overall JEDI strategy.").

On December 7, 2018, the CO requested that AWS have Mr. Ubhi address whether he at any point provided AWS nonpublic information about the JEDI procurement. Appx160689. On December 14, 2018, AWS provided the CO a sworn affidavit from Mr. Ubhi confirming that no one at AWS had ever requested him to provide nonpublic information, and that he had not and would not do so even if requested. *See* Appx160687-160692.

In January 2019, AWS learned for the first time from a redacted pleading in Oracle's pre-award COFC protest that Mr. Ubhi's recusal letter did not reference his intent to rejoin AWS. *See* Appx160702. Mr. Ubhi had previously represented to AWS—on multiple occasions—that he had disclosed his AWS employment discussions to his DoD supervisors and obtained approval from DoD ethics officials to have such discussions. Appx160702-160703. AWS promptly disclosed this discrepancy in a February 12, 2019, letter to the JEDI CO. *See* Appx160698-160704. In that same letter, AWS reiterated that its rehiring of Mr. Ubhi was unrelated to JEDI and that Mr. Ubhi was never asked or in a position to provide AWS, and never did provide AWS, any nonpublic JEDI information. Appx160703-160704.

Upon receiving AWS's February 12 letter, the CO asked AWS a series of additional questions about its hiring and firewalling of Messrs. Ubhi and Gavin. AWS timely answered all questions and provided detailed records and sworn affidavits supporting its responses. *See*, *e.g.*, Appx160711-160725; Appx160726; Appx160735; Appx160783-160833; Appx160999-161024.

C. The CO's Individual And Organizational Determinations

The CO reviewed the information provided by AWS, and conducted her own further investigation of potential conflicts: She reviewed thousands of pages of emails, Slack messages, proposal materials, and affidavits, and also conducted

interviews with eight government officials who were "closely involved in the process and/or physically present during the entire interval of time when Mr. Ubhi was involved with the DoD JEDI Cloud acquisition." Appx158704-158707. Based on that extensive investigation, on April 9, 2019, the CO issued written determinations assessing whether Mr. Ubhi and Mr. Gavin had *individual* conflicts and, separately, whether AWS had an *organizational* conflict.

First, the CO assessed whether Mr. Ubhi's or Mr. Gavin's *individual* conduct while they were government employees violated applicable conflict of interest statutes and regulations. Appx158696-158743 (Mr. Ubhi); Appx158744-158748 (Mr. Gavin).

The CO determined that Mr. Ubhi did not violate the PIA because, *inter alia*:

- AWS's recruitment of Mr. Ubhi began before and was "not related to" any of Mr. Ubhi's efforts on the JEDI procurement;
- "Mr. Ubhi's AWS employment offer, including bonuses and options, [wa]s relatively standard for that industry and d[id] not reflect any special compensation";
- there was "no evidence that AWS ha[d] received nonpublic information from Mr. Ubhi"; and

- even if Mr. Ubhi had disclosed nonpublic information to AWS, "none of the material Mr. Ubhi could have provided [wa]s competitively useful."

Appx158709-158716.

Separately, however, the CO found that Mr. Ubhi did not conduct himself in a manner above reproach, as required by FAR 3.101-1. And she determined that Mr. Ubhi's recusal from DoD may potentially have violated 18 U.S.C. § 208 and its implementing regulations. Appx158707-158709. The CO referred those issues to the DoD Office of the Inspector General ("OIG") for further investigation. *Id.*[4]

The CO determined that Mr. Gavin's conduct while a government employee also did not violate the PIA. Similar to her analysis regarding Mr. Ubhi, the CO found "no evidence that (1) AWS obtained any nonpublic information from Mr. Gavin; or (2) AWS received an unfair competitive advantage based on its dealings with Mr. Gavin or otherwise." Appx158747-158748.

However, in addition to attending the single JEDI-related meeting that he disclosed to AWS, the CO found that Mr. Gavin later attended a meeting at which a draft Acquisition Strategy document was discussed. Appx158746. The CO also attended that meeting and thus was personally aware that "Mr. Gavin did not show

[4] AWS understands that the DoD OIG's investigation regarding Mr. Ubhi (and a DoD OIG investigation regarding Mr. Gavin) remains ongoing. However, the focus of that investigation is Mr. Ubhi's (and Mr. Gavin's) *individual* conduct while a Government employee—not the actions of AWS, which the CO fully investigated and determined did not create an *organizational* conflict of interest.

any bias towards any vendor." *Id.* Still, she concluded that his attendance violated FAR 3.101-1 and possibly 18 U.S.C. § 208 and its implementing regulations, and she referred those issues to the DoD OIG for further investigation. Appx158747.

Second, the CO assessed whether AWS's hiring of Mr. Ubhi and Mr. Gavin created an *organizational* conflict of interest. She summarized the voluminous information she reviewed and found no conflict. *See* Appx158749-158757.[5]

Regarding Mr. Ubhi's employment by AWS, the CO found, *inter alia*, that: AWS's hiring of Mr. Ubhi was unrelated to JEDI; AWS did not receive any nonpublic information from Mr. Ubhi; the "information firewall plan and procedures . . . documented in [AWS's] OCI Mitigation Plan [are] reasonable and effective to maintain the integrity of the procurement process"; and, as detailed in her separate assessment regarding Mr. Ubhi, none of the nonpublic information to which Mr. Ubhi had access would be competitively useful even if disclosed to AWS. Appx158749-158753.

Regarding Mr. Gavin's employment by AWS, the CO echoed the findings from her separate analysis and found that AWS's employment of Mr. Gavin "does not create an OCI." Appx158754. She again found the "information firewall plan

[5] The CO also considered AWS's hiring or potential hiring of two individuals not relevant here: Brandon Bouier and Cynthia Sutherland. The CO concluded that neither provided AWS any competitively useful nonpublic information or unfair competitive advantage. Appx158754-158757. Oracle did not challenge those findings before the COFC and has not done so on appeal.

and procedures, as documented in the OCI Mitigation Plan, . . . reasonable and effective to maintain the integrity of the acquisition process." Appx158753-158754.

In sum, the CO found: "no evidence" that AWS received any competitively useful nonpublic information; that "AWS does not have an OCI based on the hiring of these former government employees"; and that AWS's mitigation plan and policies "are adequate to avoid and/or mitigate any perceived conflict of interest." Appx158757.

D. DoD's Proposal Evaluation And Award

Separate from the CO's conflicts investigation and determinations, DoD officials evaluated the four offerors' initial proposals against the solicitation requirements. AWS and Microsoft passed all seven threshold gates; Oracle and IBM each failed at least one gate and thus were not further evaluated. Accordingly, on April 10, 2019, DoD formed a competitive range of AWS and Microsoft. On October 25, 2019, DoD awarded the JEDI contract to Microsoft. *See* https://beta.sam.gov/opp/5c946852be7cfc950e05c6c310ecef97/view#award (last visited Dec. 26, 2019).[6]

[6] AWS has filed a post-award protest that is pending in the COFC. AWS's protest identifies numerous errors in DoD's evaluation and award decision, including impermissible bias against Jeffrey P. Bezos, founder and Chief Executive Officer of AWS's parent company.

III. Oracle's Pre-Award Protests

A. Before the GAO

On August 6, 2018, Oracle filed a bid protest with the GAO challenging the JEDI procurement. As supplemented, Oracle's protest challenged the procurement on three grounds: (1) the legality of DoD's decision to award the JEDI contract to a single vendor; (2) the reasonableness of the threshold gate criteria; and (3) allegations of conflicts of interest. The conflict allegations came in two flavors: (a) Oracle primarily contended that the procurement was tainted by the involvement of Mr. Ubhi and Mr. DeMartino while they were employed by DoD ("individual" conflicts of interest); and (b) Oracle also argued that AWS gained an unfair competitive advantage by rehiring Mr. Ubhi into its commercial organization ("organizational" conflict of interest). AWS did not intervene in the protest.

On November 14, 2018, the GAO denied Oracle's protest, including Oracle's allegations that the procurement was tainted by Mr. Ubhi and Mr. DeMartino. *See* Appx105900-105918. However, because offerors had not yet submitted and DoD had not yet evaluated proposals, the GAO dismissed as premature Oracle's organizational conflict of interest allegation against AWS. Appx105918.

B. Before the COFC

After the GAO denied its protest, Oracle filed suit at the COFC. While this suit was pending, the CO completed her conflicts investigation and DoD excluded Oracle from the competitive range. Appx21-23. Oracle supplemented its challenges to address its exclusion, and updated its conflict allegations to contest the CO's final determinations. After receiving extensive briefing and hearing oral argument, the COFC denied Oracle's motion for judgment on the administrative record, and granted DoD's and AWS's cross-motions. Appx1-62.

The COFC first concluded that DoD's rationale for using a single-award (rather than a multiple-award) procurement was flawed in part. Appx42-45. The court further concluded, however, that Oracle was not prejudiced by this flaw because gate 1.2 was enforceable against Oracle and would not be less stringent under a multiple-award scenario. Appx45-52. Thus, "because Oracle could not meet the agency's properly imposed security requirements," it could not complain about the decision to use a single-award procurement. Appx52.

The COFC then addressed and denied the merits of each of Oracle's conflict allegations. Appx53-62.[7] As the CO had done, the COFC separately analyzed

[7] The court prefaced its conflicts discussion by noting Oracle's contention that "the *individual* conflicts tainted the structure of the procurement, particularly the single award determinations and the substance of the gate criteria." Appx53 (emphasis added). The court made no determination regarding Oracle's standing

(1) the allegations of individual conflicts of interest involving Mr. Ubhi and Mr. Gavin (and Mr. DeMartino) while they were employed by DoD, and (2) the allegations of an organizational conflict of interest resulting from AWS's subsequent employment of Mr. Ubhi and Mr. Gavin. *See* Appx54-59 (individual conflicts); Appx59-62 (organizational conflicts).

First, with respect to the alleged individual conflicts, the court recognized the CO's finding that "there were some violations or possible violations of law" by individual DoD employees, but the court held that the individuals did not "taint" the overall procurement. Appx54-55. The court detailed its findings with respect to Mr. DeMartino (Appx55), Mr. Gavin (Appx55-56), and Mr. Ubhi (Appx56-59) during their tenure at DoD.

Second, the court turned to the allegations of an organizational conflict. The court noted that "Oracle's argument focuses on Mr. Gavin's and Mr. Ubhi's relationship with AWS," and specifically Oracle's challenge that it was irrational for the CO to conclude that AWS did not derive an unfair competitive advantage from information Mr. Ubhi and Mr. Gavin supposedly "brought with them to AWS." Appx60.[8] The court rejected Oracle's argument.

---

to challenge a supposed AWS *organizational* conflict in light of Oracle's failure to satisfy the gate criteria.

[8] The court held that Mr. DeMartino was "not relevant to the AWS organizational conflict of interest analysis" because he "did not leave DoD to work for AWS." Appx55.

After recognizing that a contracting officer is required to exercise "'common sense, good judgment, and sound discretion'" in determining whether an organizational conflict exists (Appx60 (quoting FAR 9.505)), the court held that the CO did so here. The CO "specifically considered" whether Mr. Ubhi and Mr. Gavin could have, and did, communicate competitively useful nonpublic information to AWS; and "[s]he concluded that the information the . . . individuals had [1] *could not offer an unfair competitive advantage* and that, [2] in any event, there is *no evidence that protected information was communicated to AWS*." Appx61 (emphasis added). The court found no basis to disturb those conclusions.

For example, the court held that the information to which Mr. Ubhi and Mr. Gavin had access "concern[ed] 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." Appx61. But "AWS could have contemporaneously gathered such information," as "DoD was not particularly secretive about its cloud services needs or its plan for the solicitation." *Id.* "In fact," the court highlighted, "DoD involved industry from the beginning of this procurement." *Id.*

Similarly, the court recognized that "[a]t the time Mr. Ubhi and Mr. Gavin sought AWS employment, no bids or other source selection information existed." *Id.* And the court found "no real support for [Oracle's] supposition" that Mr. Ubhi

possessed or imparted to AWS any nonpublic information regarding AWS's potential competitors. *Id.* To the contrary, the court found reasonable the CO's conclusion that information Microsoft submitted to DoD "could be accessed publicly," and separately found that "none of the information Oracle points out appears to be sensitive to Microsoft's future offer or approach to tackling the JEDI Cloud project." Appx62.

In sum, the court again emphasized the CO's significant discretion in evaluating potential conflicts and held that "she correctly focused on the significance of the potential conflict and whether it gave AWS any competitive advantage." *Id.* The court further held that the CO's ultimate conclusion—that AWS did *not* have an organizational conflict of interest—was "reasonable and well supported." *Id.*

On July 19, 2019, the COFC entered judgment in favor of the United States and AWS. Appx63. Oracle appeals that judgment.

SUMMARY OF THE ARGUMENT

Before the COFC, Oracle challenged (1) DoD's decision to make a single JEDI award; (2) the legality of the threshold gate criteria; and (3) the CO's handling of two separate types of conflicts—(a) *individual* conflicts involving several former government employees allegedly involved in the procurement; and (b) a supposed *organizational* conflict held by AWS by virtue of its hiring two of

those employees (Mr. Ubhi and Mr. Gavin). Oracle raises the same three challenges in this Court.

For purposes of this submission, AWS responds only to Oracle's unfounded attack on AWS—*i.e.*, the organizational conflict of interest argument—while leaving the others for DoD to respond to. Oracle's argument that AWS had an organizational conflict of interest fails for either of two reasons.

First, Oracle lacks standing to argue in this Court that AWS had an organizational conflict of interest. Oracle does not dispute that its proposal failed the solicitation's threshold gates 1.1 and 1.2. Oracle also has not alleged that a finding of an organizational conflict (or even the exclusion of AWS) would impact those gates. Thus, if this Court agrees with DoD that either of the gates is enforceable, then Oracle is not prejudiced by and lacks standing to challenge any alleged AWS conflict.

Second, even if this Court agrees with Oracle that gates 1.1 and 1.2 are not enforceable (or orders DoD to reopen the procurement on any other ground), Oracle cannot overcome the deferential standard of review on its organizational conflict of interest allegations. Oracle identifies neither any irrationality in the CO's thorough determination that AWS had no conflict nor any clear error in the COFC's numerous factual findings supporting the CO's determination, including that AWS received no competitively useful nonpublic information. Thus, should

the procurement be reopened, AWS must be allowed to compete for the JEDI award.

For either of these reasons, the judgment below should be affirmed insofar as it upheld the CO's determination that AWS did not have an organizational conflict of interest.

STANDARD OF REVIEW

This Court reviews the grant of a motion for judgment on the administrative record de novo, applying the same "arbitrary and capricious" standard of review as did the COFC. *Tinton Falls Lodging Realty, LLC v. United States*, 800 F.3d 1353, 1358 (Fed. Cir. 2015); 28 U.S.C. § 1491(b)(4) (adopting the standard in 5 U.S.C. § 706). "[T]he inquiry is whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and, if so, whether the error is prejudicial." *Glenn Def. Marine (ASIA), PTE Ltd. v. United States*, 720 F.3d 901, 907 (Fed. Cir. 2013); *see also* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error.").

The COFC's legal determinations, including its interpretations of statutes and regulations, are subject to de novo review, while its factual findings are reviewed only for clear error. *Tinton*, 800 F.3d at 1357-58 (citing *CMS Contract Mgmt. Serv. v. Mass. Hous. Fin. Agency*, 745 F.3d 1379, 1385 (Fed. Cir. 2014)). A finding is "clearly erroneous" only when "the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

ARGUMENT

I. Oracle Lacks Standing To Challenge A Supposed AWS Organizational Conflict of Interest.

The Tucker Act, 28 U.S.C. § 1491(b)(1), "imposes more stringent standing requirements than Article III." *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009). To establish standing in a bid protest, a protester must show both that it "(1) is an actual or prospective bidder, and (2) possesses the requisite direct economic interest" in its protest allegation. *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006). In a typical pre-award bid protest challenging the terms of a solicitation, a prospective bidder need only allege a "non-trivial competitive injury which can be addressed by judicial relief." *Weeks*, 575 F.3d at 1363. However, where an offeror has been excluded from the competitive range, it must show a "substantial chance" that it would have received the contract award but for the alleged error. *Orion Tech., Inc. v. United States*, 704 F.3d 1344, 1348-49 (Fed. Cir. 2013).

Here, if the gate criteria are enforceable—an issue to be addressed by DoD—then Oracle lacks standing to assert that AWS had an *organizational* conflict of interest. It is undisputed that DoD excluded Oracle from the competitive range because Oracle failed gate 1.1. Appx22; Appx39. Oracle also

conceded, and the COFC agreed, that Oracle's proposal would have failed gate 1.2. Appx39. Oracle has not alleged—nor could it prove—that excluding AWS from the procurement on a prospective basis would in any way affect Oracle's failure under gates 1.1 and 1.2.[9] Thus, unless Oracle can first establish that gates 1.1 and 1.2 were both unenforceable, Oracle cannot establish any non-trivial competitive injury from, let alone a substantial chance of award but for, any alleged AWS organizational conflict of interest.

Accordingly, if this Court affirms the COFC's judgment that the gate criteria are enforceable, it should dismiss for lack of standing Oracle's assertion of a supposed AWS organizational conflict of interest. If, on the other hand, this Court should agree with Oracle and reverse the COFC's decision regarding the enforceability of the gate criteria (or on any other issue), the appropriate remedy would be to order DoD to reopen the procurement, and to allow AWS to compete in that reopened procurement. The organizational conflict alleged by Oracle is without merit, and is no barrier to AWS's continued participation, as explained next.

---

[9] To be sure, Oracle contended below that one of the *individual* conflict of interest allegations (Mr. Ubhi's JEDI participation while at DoD) somehow affected the gate criteria. *See* Appx1991-1992. But Oracle never argued in the COFC that the alleged *organizational* conflict (*i.e.*, AWS's employment of Mr. Ubhi and Mr. Gavin) had, or could have had, any effect whatsoever on the gate criteria. It certainly makes no such argument in its principal brief in this Court, and may not do so for the first time on reply.

II. The CO And COFC Correctly Concluded That AWS Had No Organizational Conflict Of Interest.

In its appellate brief, Oracle intentionally conflates two *distinct* conflict of interest arguments—those involving allegations of *individual* conflicts while Mr. Ubhi and Mr. Gavin (and Mr. DeMartino) were employed by DoD, and those involving allegations of an *organizational* conflict after Mr. Ubhi and Mr. Gavin were hired by AWS. Both the CO and the COFC treated these arguments as distinct, as they involve different statutes, different regulations, different facts, different time periods, and different standards of review. *See* Appx158696-158757 (CO); Appx54-62 (COFC). In this Court, however, Oracle devotes most of its argument to the alleged *individual* conflicts of interest, and does not treat the *organizational* conflict allegations separately.

AWS responds below to each of Oracle's arguments potentially bearing on an alleged AWS organizational conflict (while leaving DoD to respond to the allegations of individual conflicts). In short, Oracle all but ignores this Court's highly deferential standard of review, fails to identify anything irrational in the CO's discretionary determination that AWS did not have any conflict, and does not even attempt to show that the COFC's factual findings were clearly erroneous.

A. Oracle Disregards The Deference Owed Both The CO's Determination And The COFC's Findings.

"[T]he identification of OCIs and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion." *Axiom*, 564 F.3d at 1382 (citing FAR 9.505). A contracting officer must "[i]dentify and evaluate potential [OCIs] as early in the acquisition process as possible," and "[a]void, neutralize, or mitigate significant potential conflicts before contract award." FAR 9.504(a). "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." *Turner*, 645 F.3d at 1384 (quoting FAR 9.505); *see also* FAR 9.505 ("Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract."). Thus, a contracting officer's organizational conflict of interest determination will not be overturned unless it is "arbitrary, capricious, or otherwise contrary to law." *PAI*, 614 F.3d at 1352 (citing *John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1300 (Fed. Cir. 1999)); *see also id.* ("To demonstrate that such a determination is arbitrary or capricious, a protester must identify 'hard facts'; a mere inference or suspicion of an actual or apparent conflict is not enough." (quoting *C.A.C.I., Inc.-Fed. v. United States*, 719 F.2d 1567, 1581 (Fed. Cir. 1983))).

In light of these discretionary standards, this Court has consistently upheld contracting officer determinations addressing alleged conflicts of interest. For example, in *PAI*, the contracting officer executed a written determination that no significant conflict existed. 614 F.3d at 1350. In particular, she determined that although the awardee and its subcontractor had access to nonpublic information, that information had no competitive value because it, *inter alia*, involved "constantly changing requirements," was "quickly outdated," and "had been effectively offset by other information disclosed in the solicitation." *Id.* at 1350-51. On review, this Court agreed with the COFC that, "[i]n light of the considerable discretion given to contracting officers in identifying and mitigating significant potential conflicts, . . . the contracting officer in this case complied with the FAR requirements." *Id.* at 1353. This Court also emphasized that the protester failed to identify any "hard facts" establishing that the awardee "gained a substantial and unfair competitive advantage through unequal access to information." *Id.* (citing *C.A.C.I.*, 719 F.2d at 1581).

Similarly, in *Axiom*, the contracting officer identified a potential unequal access to information conflict, but determined that the awardee's mitigation plan adequately addressed it. 564 F.3d at 1377-78. Although the COFC rejected the proposed mitigation plan, this Court noted the contracting officer's and agency's "extensive analysis" of the issue and, applying deferential arbitrary and capricious

review, found nothing unreasonable in the contracting officer's determination. *Id.* at 1377, 1383-84. Accordingly, this Court reversed and upheld the contracting officer's analysis. *Id.* at 1383-84.

This Court also has recognized the importance of COFC findings of fact in reviewing conflict determinations. For example, in *Turner*, this Court upheld a COFC decision enjoining an agency from taking corrective action in response to a GAO decision finding a supposed conflict. 645 F.3d at 1379. The GAO had inferred that the awardee "may have had access" to nonpublic information. *Id.* at 1385. The COFC, however, found that the GAO "'failed to cite any hard facts'" establishing the awardee's access to nonpublic information, let alone any "'access to anything of competitive worth.'" *Id.* "In contrast, the [COFC] concluded that the CO carefully assessed the information that [the awardee] may have had access to and determined that this information 'not only lacked competitive utility but was also disclosed to all of the offerors.'" *Id.* Relying on the COFC's thorough fact-finding, this Court held that the contracting officer's analysis was rational, and that the COFC did not err in upholding that analysis. *Id.* at 1385-87.

Here, as summarized in the background above, the CO thoroughly investigated potential conflicts and determined that AWS did not gain any unequal access to information or unfair competitive advantage from Mr. Ubhi or Mr. Gavin. Likewise, the COFC reviewed the CO's analysis and the voluminous

administrative record, and made numerous factual findings supporting the CO's conclusions. Yet Oracle all but ignores the standard of review applicable to these rulings. Oracle notes in passing that "the [PIA] and FAR Part 9 (contractor-side conflicts) contemplate deference to the CO" (Blue Br. 30) and that "[s]ome of the rules . . . allow for CO discretion" (Blue Br. 50). But Oracle never acknowledges in the relevant part of its argument the deference given by this Court (and the COFC) to the CO's discretionary determination that AWS had no organizational conflict of interest. And Oracle does not even allude to the deference owed COFC factual findings.

On these facts, the standard of review dooms Oracle's challenge. This Court is not authorized to review the facts (and inferences) de novo, as Oracle proposes. Rather, the CO's determination can be set aside only if it is irrational, and the COFC's factual findings cannot be overturned unless they are clearly erroneous. As discussed in the following sections, Oracle fails to identify any irrationality in the CO's analysis or any clear error in the COFC's findings.

B. The CO's Determination Was Rational.

The CO, after a full investigation, determined that AWS had no organizational conflict based on its rehiring of Mr. Ubhi or its hiring of Mr. Gavin. Appx158749-158754. Among other things, the CO found that neither Mr. Ubhi nor Mr. Gavin disclosed any competitively useful nonpublic information to AWS.

See id.; Appx158757. Oracle has not identified any "hard facts" establishing that the CO's discretionary determination was irrational, arbitrary and capricious, contrary to law, or unsupported by the administrative record. Accordingly, there is no basis for disturbing it.

1. Mr. Ubhi.

Although Oracle's brief focuses on Mr. Ubhi's conduct while he was a government employee, Oracle includes two paragraphs in which it appears to maintain that AWS's rehiring of Mr. Ubhi created an organizational conflict. *See* Blue Br. 57-58. Specifically, Oracle challenges the CO's finding of "no evidence that . . . [Mr.] Ubhi obtained or disclosed any competitively useful nonpublic information [to AWS]." *Id*. Oracle, however, fails to address the full scope of the CO's analysis and identifies nothing irrational in her conclusion that AWS had no organizational conflict.

For example, Oracle ignores one central basis for the CO's determination: that Mr. Ubhi, after he was rehired by AWS, never actually shared information regarding JEDI with AWS's JEDI proposal team and was never in a position to do so. Appx158750-158753. Neither Mr. Ubhi nor anyone on his commercial team at AWS were involved in proposals for any government contracts, and Mr. Ubhi was subject to both informal and formal firewalls that ensured he could not disclose nonpublic information to AWS's WWPS JEDI team. *Id.* Based on these

facts—and a thorough review of affidavits from numerous AWS employees, all demonstrating that Mr. Ubhi disclosed no nonpublic information and was entirely excluded from AWS's JEDI proposal—the CO concluded that "AWS did not receive any nonpublic information or documentation . . . from Mr. Ubhi." Appx158753.

This finding, standing alone, precludes an organizational conflict. Oracle identifies no decision of this Court, the COFC, or even the GAO finding an organizational conflict when a contracting officer concludes that no nonpublic information was shared with a proposal team (or anyone else at a company). To the contrary, decisions involving such facts have consistently *upheld* contracting officer determinations of no conflict. *See, e.g.*, *Turner*, 645 F.3d at 1385-87; *Threat Mgmt. Grp.*, B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84 (protest denied where protester "never alleged that the individual in question [with alleged nonpublic information] participated in the preparation of the firm's proposal"); *Cleveland Telecomms. Corp.*, B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105 ("[T]here is no evidence that [the two former government officials with alleged nonpublic information] had any involvement in the preparation of the awardee's proposal."); *Creative Mgmt. Tech., Inc.*, B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 (similar); *see also, e.g.*, *Archimedes Glob., Inc.*, B-415886.2, June 1, 2018, 2018 CPD ¶ 179 (overturning contracting officer's exclusion of company based on "the appearance

of a conflict of interest" where the record contained "no evidence to show that the [allegedly conflicted] individuals provided [the company] with competitively useful, non-public information, or otherwise participated in preparing the [company's] proposal").

Oracle also asserts that Mr. Ubhi was privy to "competition-sensitive information" while at DDS and that "[t]he record is silent as to what [Mr.] Ubhi did with the JEDI files" he supposedly "synched" to his computer. Blue Br. at 58. And Oracle complains that "[t]he CO ultimately only considered a handful of documents on the Google drive and left everything else [Mr.] Ubhi created, reviewed, revised, and downloaded unconsidered." *Id.* But as a threshold matter, this Court has explained that "the CO 'should avoid . . . unnecessary delays . . . and excessive documentation.'" *Turner*, 645 F.3d at 1384 (quoting FAR 9.504(d)). It was thus not arbitrary or capricious for the CO to consider a subset of the information to which Mr. Ubhi had access. Moreover, to the extent Oracle means to insinuate that Mr. Ubhi shared any files with AWS—whether those that the CO specifically reviewed or otherwise—the record is *not* silent: The CO made express findings that Mr. Ubhi did not share any competitively useful nonpublic information—from *any* source—with AWS. Appx158712; Appx158753; Appx158757. Whatever else might have happened to the files supposedly on Mr. Ubhi's computer has no relevance to the organizational conflict question.

Finally, although the Court would not know it from Oracle's brief, the CO's analysis included multiple pages and several appendices specifically addressing the information to which Mr. Ubhi had access and the myriad reasons why that information was either publicly available or not competitively useful. *See* Appx158712-158716; Appx158724-158735; *see also* Appx158753. Other than caricaturing the CO's decision as "declaring . . . the vast government information worthless" (Blue Br. 57), which she did not do, Oracle has nothing to say about the actual information she reviewed and on which she based her decision. In this respect, the facts here parallel those in *PAI*, where this Court found nothing irrational in the contracting officer's determination of no conflict. *See* 614 F.3d at 1350-51 (upholding contracting officer determination that alleged nonpublic information had no competitive value because it, *inter alia*, involved "constantly changing requirements," was "quickly outdated," and "had been effectively offset by other information disclosed in the solicitation"); *see also, e.g.*, *IBM*, 119 Fed. Cl. at 161 (upholding contracting officer determination that, even if former government employee had access to nonpublic, proprietary information, the information was "too stale" to provide her new employer a competitive advantage).

In every respect, Oracle's insinuation that Mr. Ubhi supposedly possessed government secrets and conveyed them to AWS is based on nothing but speculation. Contrary to the stringent standard for overturning a contracting

officer's no-conflict determination set forth in *Axiom*, *PAI*, and *Turner*, Oracle identifies no "hard facts" indicating that competitively useful nonpublic information was actually shared with AWS, let alone with AWS's WWPS JEDI proposal team. Accordingly, as in *Axiom*, *PAI*, and *Turner*, the CO's *discretionary* determination that AWS's rehiring of Mr. Ubhi did not create an organizational conflict of interest should be upheld.

2. Mr. Gavin.

The four paragraphs that Oracle devotes to Mr. Gavin (Blue Br. 62-64) are no more persuasive. As with Mr. Ubhi, the CO conducted a detailed review of the information to which Mr. Gavin had access and whether Mr. Gavin may have provided any competitively useful nonpublic information to AWS. After completing that review, she determined that Mr. Gavin attended a total of two meetings related to JEDI, and the only information to which he had access that may have been competitively useful—a draft Acquisition Strategy—was revised before DoD even issued the JEDI solicitation. Appx158754. In light of the entire record—including the sworn affidavits of Mr. Gavin, Ms. Chronis, and AWS's JEDI proposal team lead—the CO found that "Mr. Gavin did not provide any nonpublic information to AWS" and that his employment with AWS "does not create an OCI." *Id.* She also found it "immaterial" that the firewall for Mr. Gavin was not implemented immediately, and she "assessed the information firewall plan

and procedures, as documented in the OCI Mitigation Plan . . . to be reasonable and effective to maintain the integrity of the acquisition process." *Id.*

Notwithstanding the CO's thorough findings, Oracle contends that because Mr. Gavin had high-level conversations with Ms. Chronis before formalization of the firewall, it must be "presumed" that (1) Mr. Gavin disclosed competitively useful nonpublic information to AWS, and (2) AWS then used that information in its JEDI proposal. Blue Br. at 62-64. Oracle's authorities, however, do not support the application of any such "presumption" in the circumstances of this case. In *NetStar-1 Government Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (2011), the COFC found a conflict because the awardee's employees had direct access to the protester's pricing information, which was decisive in the agency's award decision; the contracting officer did not identify or address that significant conflict prior to award; and the declarations the awardee ultimately provided after award were not from the relevant individuals and did not address whether all members of the awardee's proposal team had access to the protester's proprietary information. In *International Resources Group*, B-409346.2 *et al.*, Dec. 11, 2014, 2014 CPD ¶ 369, the awardee hired a former government official who then worked on the awardee's proposal, and the agency failed to conduct a detailed inquiry into the former official's access to competitively useful information.

Here, by contrast, the CO specifically investigated AWS's hiring of Mr. Gavin and rightly found that he neither worked on nor provided any information for AWS's JEDI proposal. Appx158753-158754. Thus, there was and could be no unequal access conflict. *See Turner*, 645 F.3d at 1385-87; *Archimedes Glob., Inc.*, B-415886.2, June 1, 2018, 2018 CPD ¶ 179; *Threat Mgmt. Grp.*, B-407766.5, Mar. 28, 2013, 2013 CPD ¶ 84; *Cleveland Telecomms. Corp.*, B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105; *Creative Mgmt. Tech., Inc.*, B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61. Moreover, Oracle fails to identify any "hard facts" contradicting the CO's record-based findings. *See Turner*, 645 F.3d at 1385-87; *PAI*, 614 F.3d at 1352. Accordingly, Oracle's invocation of an inapposite "presumption" is not only legally unfounded but, indeed, a concession that it has no evidentiary basis for asking this Court to set aside the CO's determination.

* * *

In sum, Oracle fails to identify any irrationality in the CO's determination that AWS's hiring of Mr. Ubhi and Mr. Gavin did not create an organizational conflict of interest. For that reason alone, the decision below should be affirmed as it relates to AWS.

C. The COFC's Findings Were Not Clearly Erroneous.

In addition to the CO's discretionary determination, Oracle has to contend with the COFC's findings, based on an extensive administrative record, that the

JEDI-specific information to which Mr. Ubhi and Mr. Gavin had access was either already public or not competitively useful. This Court reviews factual findings based on the administrative record for clear error. *Turner*, 645 F.3d at 1383 (citing *PAI*, 614 F.3d at 1351). Factual findings are not clearly erroneous unless this Court "is left with the definite and firm conviction that a mistake has been committed." *U.S. Gypsum*, 333 U.S. at 395.

The COFC did not clearly err in its factual findings. To the contrary, the COFC made a reasoned finding that any possible information AWS may have received through its employment of Mr. Ubhi and Mr. Gavin had no impact on the procurement. Based on a detailed review of the administrative record and the information to which Messrs. Ubhi and Gavin had access, the COFC concluded that any information that they *could have* provided to AWS was neither competitively useful nor nonpublic. Moreover, the COFC found no evidence that either employee had *actually* provided any such information to AWS.

First, the COFC found that the information to which Messrs. Ubhi and Gavin had access was *not competitively useful*. The COFC noted that Mr. Ubhi and Mr. Gavin had limited exposure to some early JEDI planning as DoD employees. However, the information available to them concerned DoD's general need for cloud computing services, the disadvantages of not having access to a cloud, a list of cloud services DoD would need, and processes for closure in the

procurement—none of which was competitively useful. Appx61. There is no way AWS could have been competitively advantaged even if it somehow received that information.

Second, the COFC concluded that the information regarding the JEDI procurement to which Mr. Ubhi and Mr. Gavin had access was *not nonpublic* because "DoD was not particularly secretive about its cloud services needs or its plan for the solicitation." Appx61. The COFC found that AWS could easily have gathered on its own initiative from public sources any information that Messrs. Ubhi and Gavin could have provided. *Id*. This information was available to AWS through publicly released documents, including a November 2017 JEDI summary, industry meetings with DoD, and the draft and final solicitation packages. *Id.*; *see also* Appx56 ("By the time Mr. Gavin began working at AWS, the draft [solicitation] had been released, providing AWS access to the relevant information that also appeared in the draft Acquisition Strategy."). Additionally, DoD met with potential JEDI offerors, including AWS, in November 2017—nine months before DoD would issue the JEDI solicitation—and provided those potential offerors the same information that Mr. Ubhi and Mr. Gavin could have provided AWS. Appx61. Thus, that information, even if disclosed, could not have provided AWS an unfair competitive advantage in the procurement.

Likewise, any information about competitors that Mr. Ubhi and Mr. Gavin could have provided was available through public sources and thus was neither nonpublic nor competitively useful. The COFC, after reviewing the administrative record, found that "AWS had access to the information [about competitors] with or without Mr. Ubhi." Appx62. The COFC also concluded that any knowledge of Microsoft's "proprietary" information that Mr. Ubhi might have gained through an early one-on-one meeting between Microsoft and the DoD JEDI team was publicly available and was not sensitive to Microsoft's JEDI proposal. *Id.* *Publicly available* information afforded AWS no *non*public competitive advantage.

Finally, the COFC reviewed the record—including the Slack messages on which Oracle relies, which the COFC found "unedifying" (Appx31)—and determined that even if Mr. Ubhi or Mr. Gavin possessed competitively useful nonpublic information, there was no evidence that they *actually provided* that information to AWS. Appx61-62. Thus, again, AWS could not have gained an unfair competitive advantage if it never actually received any information.

With respect to whether Mr. Ubhi's employment by AWS created an organizational conflict of interest, Oracle literally ignores the COFC's extensive findings. The two paragraphs it devotes to this subject (Blue Br. 57-58) contain no reference or citation to the COFC's opinion, and the few references to the COFC's Ubhi-related findings elsewhere in Oracle's argument have nothing to do with the

asserted organizational conflict. *See* Blue Br. 53-55 (addressing only the COFC's findings with respect to Mr. Ubhi's conduct while a DoD employee). Therefore, Oracle has waived any challenge to the COFC's findings that Mr. Ubhi's employment by AWS did not create an organizational conflict.

With respect to Mr. Gavin, Oracle acknowledges that the COFC made the "independent determination that [Mr.] Gavin lacked any competitively-valuable information when he joined AWS." Blue Br. 64 (citing Appx56, Appx61). Oracle then argues that this "contradicts the CO's own findings." Blue Br. 64 (citing Appx158746-158747). Presumably, Oracle is referring to the CO's assertion that the draft Acquisition Strategy discussed during a meeting Mr. Gavin attended while a DoD employee "may be competitively useful, even though the estimates and language therein changed" after Mr. Gavin left DoD. Appx158747. However, even assuming *arguendo* that the COFC's independent determination could be read as inconsistent with the CO's assertion, nowhere does Oracle contend that the COFC's determination was *clearly erroneous*. Nor does Oracle dispute the COFC's finding that the draft solicitation—which had been publicly released by the time Mr. Gavin began working at AWS—"provid[ed] AWS access to the *relevant* information that also appeared in the draft Acquisition Strategy." Appx56 (emphasis added). Those findings, which Oracle has not and cannot now

challenge, are entitled to deference, and further preclude Oracle's request for an unfounded "presumption" of an organizational conflict of interest.

Ultimately, Oracle asks this Court to infer, based on Oracle's suspicion and innuendo, that Mr. Ubhi and Mr. Gavin both possessed and disclosed to AWS competitively useful nonpublic information. But Oracle has not shown—and cannot show—that the COFC's contrary findings were clearly erroneous. Accordingly, the COFC's findings that AWS's hiring of Mr. Ubhi and Mr. Gavin created no organizational conflict of interest should be affirmed.

D. AWS Cannot Be Excluded From The Procurement.

Oracle has only one reason to continue beating the "AWS has an organizational conflict" drum, despite having lost this argument before both the CO and the COFC: Oracle hopes that if the procurement is reopened, AWS will be excluded so that Oracle will have to face one fewer competitor. Precedent, however, makes clear that mere allegations of a disqualifying conflict will not suffice.

In *Turner*, for example, after the GAO erroneously concluded that the protester had a disqualifying conflict, the COFC enjoined the agency from following the GAO's irrational decision and instead ordered the agency to reinstate the protester's award; this Court affirmed. 645 F.3d at 1385-87. Similarly, in *C.A.C.I.*, this Court reversed a lower court decision enjoining an award due merely

to "inferences of actual or potential wrongdoing" based on "suspicion and innuendo, not on hard facts." 719 F.2d at 1582; *see also Archimedes Glob., Inc.*, B-415886.2, June 1, 2018, 2018 CPD ¶ 179 (finding decision to exclude offeror unreasonable absent "hard facts" of any actual conflict of interest).

Here, the CO and COFC each found that AWS did not have an organizational conflict or enjoy any unfair competitive advantage. Accordingly, should DoD be ordered to reopen the JEDI procurement for any reason, AWS must be allowed to compete in that reopened procurement.

CONCLUSION

The Court should affirm the judgment of the COFC insofar as it upheld the CO's discretionary determination that AWS did not have an organizational conflict of interest.

December 26, 2019

Respectfully submitted,

/s/ Daniel R. Forman

DANIEL R. FORMAN
ROBERT J. SNECKENBERG
OLIVIA L. LYNCH
ZACHARY H. SCHROEDER
GABRIELLE TRUJILLO
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2504
DForman@crowell.com

MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 887-3667

Counsel for Appellee Amazon Web Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2019, I served a copy of the foregoing brief on all counsel of record via the CM/ECF system.

/s/ Daniel R. Forman

DANIEL R. FORMAN
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2504
DForman@crowell.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a) because it contains 9,617 words, excluding the parts of the brief exempted by Federal Circuit Rule 32(b).

2. This brief complies with the typeface and type style requirements of Rules 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a monospaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: December 26, 2019

/s/ Daniel R. Forman

DANIEL R. FORMAN
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2504
DForman@crowell.com