19-2326

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORACLE AMERICA, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

AMAZON WEB SERVICES, INC.,

Defendants-Appellees.

On Appeal From The United States Court Of Federal Claims
Case No. 1:18-Cv-01880-EGB, Senior Judge Eric G. Bruggink

NON-CONFIDENTIAL REPLY BRIEF OF ORACLE AMERICA, INC.

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January 16, 2020

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Oracle America, Inc. certifies the following:

1. The full name of every party or amicus represented by me is:

   Oracle America, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   Oracle Corporation (NYSE: ORCL)

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court and who have not or will not enter an appearance in this court are:

   N/A

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

   On October 25, 2019, the Department of Defense ("DoD") awarded the Joint Enterprise Defense Infrastructure Cloud procurement ("JEDI") contract to Microsoft Corporation ("Microsoft"). On November 22, 2019, defendant-appellee Amazon Web Services ("AWS") filed a bid protest in the U.S. Court of Federal Claims seeking to overturn and enjoin the contract award to Microsoft. AWS challenges the award decision as both flawed and improperly influenced by conflicts of interest and the purported bias of President Trump. *See Amazon Web Servs., Inc. v. United States*, 1:19-cv-01796-PEC (Fed. Cl. Dec. 9, 2019), Dkt.No.26. If this Court agrees with Oracle America, Inc. that the single-award JEDI solicitation is unlawful, the challenged gates violate competition statutes, or that illegal conflicts of interest taint the

procurement, this Court's holding could render moot AWS' post-award protest of the JEDI contract award to Microsoft.

Dated: January 16, 2020

/s/ Craig A. Holman
Craig A. Holman

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INTRODUCTION

After Oracle America, Inc. ("Oracle") filed this appeal, Appellee Department of Defense ("DoD") awarded the Joint Enterprise Defense Infrastructure Cloud procurement ("JEDI") contract to Microsoft Corporation ("Microsoft"). Appellee Amazon Web Services, Inc. ("AWS") has protested that award to the United States Court of Federal Claims ("COFC"), claiming "improper pressure from President Donald J. Trump, who launched repeated public and behind-the-scenes attacks to steer the JEDI Contract away from AWS to harm his perceived political enemy—Jeffrey P. Bezos." (*See Amazon Web Servs., Inc. v. United States*, 1:19-cv-01796-PEC (Fed. Cl. Dec. 9, 2019), Dkt.No.26 at 1-3.) Although AWS has targeted its ire at President Trump, numerous Senators, Representatives, public watchdogs, press commentators, and leading academics have raised concerns about JEDI's mishandling. Indeed, the DoD Office of the Inspector General ("IG") is investigating multiple DoD personnel who participated personally and substantially in JEDI despite prohibited relationships with AWS:

> **Joint Enterprise Defense Infrastructure (JEDI) Cloud Procurement Investigation**
>
> This review examines the award of the JEDI contract, whether any DoD officials engaged in ethical misconduct related to the contract, and

> whether any alleged ethical misconduct affected the integrity of the procurement process.[1]

The Court should not sanction this unlawful, tainted procurement.

First, as COFC agreed, DoD violated the prohibition against large single-award indefinite delivery, indefinite quantity ("IDIQ") contracts, 10 U.S.C. § 2304a(d)(3), by soliciting this 10-year, $10 billion IDIQ contract, with near constant technology refresh requirements, as a single award. Realizing DoD caused COFC to overreach through its "Rayel on the facts" speculation, DoD now declares that COFC misread the statute. A Bloomberg reporter succinctly questioned DoD's use of the exception: "How can the Pentagon request firm fixed prices on services that don't yet exist?"[2] DoD cannot. COFC correctly recognized that DoD violated section 2304a(d)(3)(B).

Regrettably, COFC adopted a contrived DoD prejudice argument. As government counsel admitted at oral argument, the record does not establish what criteria DoD would use if the solicitation sought multiple JEDI awards as the law required. DoD courted error by asking COFC to presume how DoD might act on a multiple-award remand, based on DoD's single-provider record:

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[1] DoD IG Newsletter - November 2019, https://www.dodig.mil/In-the-Spotlight/Article/2007493/dod-oig-newsletter-november-2019/.

[2] Chris Cornillie, *Five Takeaways from GAO's JEDI Decision Denying Oracle*, Bloomberg (Nov. 30, 2018), https://federalnewsnetwork.com/fiscal-2019-federal-contracting-playbook/2019/01/five-takeaways-from-gaos-jedi-decision-denying-oracle/.

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

SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). Notably, DoD policies affirm that DoD approaches structuring multiple-award procurements differently. (Appx105359-105382, Appx105377.) Moreover, the other military cloud procurements in the record do not contain the challenged Gate 1.2 criteria government counsel declared a minimum need. (Appx123613, Appx123432.)

Second, Gate 1.2 violates several competition statutes. Although DoD characterizes the competition as "full and open," the record confirms otherwise. When first announced, JEDI sparked intense interest, with more than sixty companies responding to DoD's market research requests. (Appx104986-104987, Appx105022, Appx100365-100396.) But, due to the solicitation's restrictive gate criteria, only four offerors submitted proposals—two of which (Oracle and IBM) could not meet Gate 1.2 and filed pre-award protests. (*See* Appx158649.)

Gate 1.2 mandates that each offeror have, at the time of proposal submission, no fewer than (i) three existing datacenters (ii) within the United States (iii) that are separated by at least 150 miles, (iv) capable of automated failover, and (v) each "supporting at least one IaaS and one PaaS offering that are FedRAMP Moderate 'Authorized.'" (Appx100792, Appx100661 (Q26-27), Appx100947.) Although the

JEDI contract does *not* require the *awardee* to use FedRAMP authorized offerings during performance and *offerors* were *not* required to bid the *three* datacenters used to clear the gates, each offeror had to satisfy *all five* conditions by proposal submission to compete. (Appx105488-105489.) DoD, which is part of the government FedRAMP system, knows which companies hold such authorizations and in what datacenters. DoD thus knew when it imposed Gate 1.2 that only two cloud companies could meet it: AWS and Microsoft. The solicitation thereby notified the technology community that DoD would consider only AWS and Microsoft for award as plainly as if DoD had said just that.[3]

The crux of COFC's ruling and DoD's argument to this Court follows: "Even if the agency knew that as of early 2018 only certain firms would survive the gate criteria, it nevertheless chose to accept proposals from all responsible sources [and therefore did not violate the Competition In Contracting Act ("CICA")]." (Appx52.) DoD's characterization, akin to an argument this Court rejected in *National Government Services, Inc. v. United States*, renders numerous CICA provisions inoperable. 923 F.3d. 977, 985-86 (Fed. Cir. 2019). CICA mandates a written justification and approval ("J&A") where an agency writes solicitation terms

[3] May Jeong, *"Everybody Immediately Knew That It Was For Amazon": Has Bezos Become More Powerful In D.C. Than Trump?*, Vanity Fair (Aug. 13, 2018), https://www.vanityfair.com/news/2018/08/has-bezos-become-more-powerful-in-dc-than-trump.

knowing that only a few companies can compete. 10 U.S.C. §§ 2304(c)(1), (f); 48 C.F.R. §§ 6.302-1, 6.303. No such J&A exists here.

Third, DoD admits violations of Federal Acquisition Regulation ("FAR") 3.101-1 and apparent violations of 18 U.S.C. § 208 (now the subject of the ongoing IG investigation). DoD, however, asserts that JEDI may proceed based on the Contracting Officer ("CO") Procurement Integrity Act ("PIA") no-impact determination. The PIA, however, is a *separate* statute under which Congress empowered the CO to assess impacts of PIA violations. 48 C.F.R. §§ 3.104-2(b), 3.104-7; *Express One Int'l, Inc. v. U.S. Postal Serv.*, 814 F. Supp. 93, 101-02 (D.D.C. 1992) (invalidating contract award: "Whether or not Mr. Cole's conduct comports with the [PIA] is not controlling…."). Following DoD's flawed lead, COFC declared "the even narrower question before the court is whether the CO's conclusion of no impact is reasonable." (Appx53.)

Unlike the PIA, Congress has *not* empowered *any* agency official to proceed despite 18 U.S.C. § 208 violations:

> Neither *Section 434* [predecessor to section 208] nor any other statute empowered his superiors to exempt him from the statute, and we are convinced that it would be contrary to the purpose of the statute for this Court to bestow such a power upon those whom Congress has not seen fit to so authorize. Congress undoubtedly had a very specific reason for not conferring such a power upon high-level administrators.

United States v. Miss. Valley Generating Co., 364 U.S. 520, 561 (1961).[4] Even COFC recognized that the conflicts plaguing JEDI arose in part from "lax oversight," illustrating why Congress did *not* empower agencies to excuse section 208 violations: "Through lax oversight, or in the case of Ubhi, deception, DoD was apparently unaware.... [O]ne would hope the agency would be more alert...." (Appx53.) Yet, COFC broke from precedent and allowed the CO to judge the impact of a problem facilitated by "lax oversight" of the CO and other officials.

DoD attempts to downplay the conflicted individuals' involvement abound. For instance, the CO underpins much of her no-impact finding on the proposition that: "Ubhi did not have the technical expertise to substantially influence JEDI Cloud requirement[s]" and also could not understand the technical information he accessed. (Appx158719-158720 (¶¶ 90-91).) But the CO testified to Ubhi's technical expertise before the Government Accountability Office ("GAO"): "[T]he technical expert that was pegged to … support aspects of this was Deap Ubhi." (Appx105571; *see also* Appx105445.) This Court need not assess the CO's credibility—Congress understood pressures would exist and thus imposed an objective test for section 208 violations.

DoD also asserts that the Microsoft award moots certain of Oracle's conflict arguments. (DoD.Br.60-61.) DoD's "no harm, no foul" characterization is wrong.

[4] All emphasis to quoted material has been added unless otherwise noted.

As a legal matter, it lacks relevance whether the awardee "appears entirely innocent;" the need for cancellation "is dictated by the public policy manifested by the statute." *Miss. Valley*, 364 U.S. at 565. This result is not sought to punish Microsoft, it is required "to protect the public" and other offerors. *Id.* at 563-65. As a factual matter, the procurement is not more trustworthy because AWS' henchman got caught and someone else received the contract. Microsoft's gain does not rectify the loss to the public or the numerous competitors unlawfully blocked from this corrupted procurement.

ARGUMENT

I. DoD Violated 10 U.S.C. § 2304a(d)(3)(B) To Oracle's Competitive Prejudice.

DoD claims a remand is unnecessary because DoD's unlawful single-award approach purportedly did not deprive Oracle of the opportunity to compete. (DoD.Br.36-41.) Specifically, DoD asks this Court to sanction COFC's speculation that a multiple-award solicitation would include the same Gate 1.2 conditions as DoD's single-award solicitation contains. Realizing that COFC violated a basic administrative law principle, DoD alternatively urges that COFC misinterpreted the statute.

A. COFC Improperly Presumed How DoD Would Structure a Multiple-Award Procurement on Remand.

Supreme Court precedent prohibits the reviewing court from upholding an erroneous agency decision under the Administrative Procedure Act ("APA") based

on a discretionary judgment that the agency did not make. *I.C.C. v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282-83 (1987). This straightforward principle compels reversal and remand to DoD. The JEDI record focuses on the structure of a single-award procurement under which *one* offeror must deliver the *entire* range and volume of task orders. The record lacks any DoD determinations regarding how DoD would structure the solicitation where multiple providers perform different tasks. That DoD did not consider what gate criteria, if any, it would impose in a multiple-award solicitation is dispositive and renders DoD's reliance on *Bannum, Inc. v. United States*, 404 F.3d 1346 (Fed. Cir. 2005), misplaced. In assessing whether an error is harmless, a court may not substitute its judgment for the agency's. *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981).

DoD's rebuttal argument fails for several independent reasons. First, DoD has not meaningfully refuted Oracle's demonstration that COFC inappropriately applied the substantial chance rather than non-trivial competitive injury prejudice test. DoD argues that an "adequate factual predicate" to apply the higher prejudice test exists based on the evaluation that occurred during the DoD-delayed protest. In DoD's view, it can use a post-Complaint, ongoing evaluation both to change the prejudice standard and create evidence to support its arguments. The Court should reject DoD's unsound position. Regardless, Oracle satisfies either test.

Second, DoD erroneously claims that COFC determined how DoD would design a multiple-award solicitation on remand using evidence and not government counsel's supposition. (DoD.Br.39 (citing Appx100462).) But the memorandum DoD cites addresses the CO's rationale for a single-award approach. (Appx100455-100467.) Absent from the memorandum is how DoD would structure a multiple-award solicitation—including the minimum security requirements, the number of datacenters needed, or the time of application—for multiple contractors to perform JEDI. (*Compare* DoD.Br.39 *with* Appx100462.)

COFC did not cite the CO's single-award memorandum for the supposition that a multiple-award solicitation would include Gate 1.2 in any event. (Appx45-46.) Rather, COFC cited the Gate Memorandum (Appx46 (citing Appx100947)), a memorandum government counsel admitted to COFC (i) describes DoD's purported minimum needs under "a single award" and (ii) does not state DoD's needs "would be the same if there were multiple awards." (Appx2296, Appx100944-100947.)

Moreover, government counsel's attempt to spin Gate 1.2 as some sort of unavoidable, mandatory minimum applicable to all DoD cloud procurements contravenes record facts that:

- JEDI contract performance does not require FedRAMP authorization. (Appx105495-105496.)

- "Offerors are not typically required to have FedRAMP authorization prior to award." (DoD.Br.35-36.)
- FedRAMP policy guidance prohibits imposing authorization as a bid condition. (Appx105291-105292.)
- *None* of the cloud procurements in the record—selected by DoD for JEDI research—contain anything like the five-prong Gate 1.2. (*See e.g.*, Appx123613, Appx123432.)
- DoD directs components to craft solicitations to maintain competition. (Appx105359-105382, Appx105377, Appx105383.)
- DoD used the gates to limit protests, lessen competition, and "get to one." (Appx100504, Appx105473, Appx103123.)

Remand offered DoD ample discretion to alter the restrictive Gate 1.2 in any number of ways to permit multiple awards consistent with the law. Merely changing the application date beyond proposal submission would have altered the field (to include Oracle) without transgressing the false minimum government counsel announced. COFC, at government counsel's behest and contrary to precedent, substituted a judicial judgment for how DoD would craft a multiple-award solicitation on remand. *Chenery*, 318 U.S. at 88.

Third, DoD's brief mischaracterizes the "Rayel on the facts" exchange as relating to Gate 1.1 only. (*Compare* DoD.Br.40-41 *with* Appx2294-2297.) Not so.

After conceding that the record does ***not*** address DoD's needs in a multiple-award scenario, government counsel stated:

> But … we can look at what the requirements are, what the justifications are and say, is this likely to change in a multiple award scenario? And I think the answer is no for both 1.1. and 1.2, in particular. I mean, the agency needs security whether it has one or two or three contractors.

(Appx2296, Appx2296-2297 (COFC: "Why is that [Gate 1.2] not linked to the number of the offerors? Mr. RAYEL: Because we need the security regardless of whether there is a—whether there is one offeror or two offerors or three offerors or contractors I should say").) But DoD's research shows *at least three different* multi-cloud technical approaches. (Appx123159.) Here, despite recognizing "some aspects of the gate criteria are driven by the agency's insistence on using a single provider," COFC allowed post-hoc supposition to displace agency discretion on remand regarding the multiple-award structure. (Appx46.)

Fourth, DoD and COFC focus on the wrong question. The harm to Oracle stemming from the illegal single-award decision does not turn on whether a multiple-award solicitation would have security requirements. The salient question is whether Oracle can compete under a revised solicitation designed for multiple JEDI contract awardees. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334 (Fed. Cir. 2001). As Oracle's opening brief demonstrated, the answer is yes. The record establishes that Oracle is one of the largest cloud providers, supports government cloud customers, *and* offers FedRAMP authorized services.

(Appx156807 (showing three Oracle FedRAMP Moderate datacenters offering PaaS and two FedRAMP High datacenters offering IaaS), Appx123151 (DoD-sponsored research noting, "best advantage may increasingly come from multiple providers" and identifying Oracle), Appx100869.) Oracle's proposal and declaration confirm that Oracle would satisfy even Gate 1.2 (and the other challenged criteria) in a rebid. (Appx156791-156792, Appx156807-156808, Appx123981.)[5]

DoD's final attempt to defend COFC contravenes the decision and the record, and reinforces that APA law required remand. DoD contends that Oracle suffered no prejudice from the illegal single-award determination because DoD may seek to justify a single-award approach using the public-interest exception in 10 U.S.C. § 2304a(d)(3). (DoD.Br.43.) But COFC rejected this argument as "sophistical." (Appx45.) DoD's supposition also lacks record support. Notably, although the CO's single-award rationale predated the Determination and Findings ("D&F"), the Under Secretary did not find that a single-award approach served the public interest. (*Compare* Appx100455-100467 *with* Appx100318-100320.)[6] At best for DoD, this

[5] DoD errantly asserts that Oracle offered new evidence on appeal. (DoD.Br.44-45.) To establish its ability to compete under a revised solicitation, Oracle cited its proposal, protest documentation, and the FedRAMP marketplace, a public government-run website also cited in the record before COFC and GAO. (Oracle.Br.38-39, Appx1180-1181, Appx1227-1232, Appx104906-104908.)

[6] Congress could have drafted section 2304a(d)(3) to have the agency head consider the same considerations set forth in FAR 16.504(c)(1)(ii)(B) that the CO considers, but Congress "chose not to do so." 75 Fed. Reg. 13416-01, 13419-13420 (Mar. 19, 2010). The two-step process Congress mandated "encourage[s] competition" and

argument proves that upon declaring the single-award approach unlawful, COFC should have granted judgment for Oracle and remanded to the agency to decide in the first instance how to proceed.

B. COFC Correctly Interpreted Section 2304a(d)(3)(B).

Alternatively, DoD argues that the Court should overturn COFC's interpretation of section 2304a(d)(3)(B). (DoD.Br.45-48.) COFC, however, applied the statute's plain language.

Statutory interpretation "begin[s] with the language of the statute." *Kingdomware Techs., Inc. v. United States*, 136 S.Ct. 1969, 1976 (2016) (quotation omitted). When, as here, "the statutory language is unambiguous and the statutory scheme is coherent and consistent," the plain language controls. *Id*. Congress prohibits single-award IDIQ contracts over $112 million absent one of four narrow exceptions. Here, DoD relied on the second exception, which states:

> No task or delivery order contract in an amount estimated to exceed [$112 million] (including all options) may be awarded to a single source unless the head of the agency determines in writing that … (B) the contract provides only for firm fixed price … orders for … (ii) services for which prices are established in the contract for the specific tasks to be performed.

10 U.S.C. § 2304a(d)(3)(B).[7]

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ensures that the "highest levels of the agency" agree to "use of a single-award task- or delivery-order contract greater than $100 million." *Id*. at 13421.

[7] Recent legislation amends section 2304a(d)(3) slightly but does not alter the exception at issue. Pub. L. 116-92, § 816 (Dec. 20, 2019).

COFC rightly focused on the "established in the contract" and "specific task" language, concluding that "[i]n an ordinary reading, prices for the specific services must be 'established' at the time of contracting." (Appx44.) But the JEDI contract contains a bespoke technology refresh clause (H2) that works as an evergreen mechanism to add new cloud services during contract performance that did not exist at award "to keep pace with advancements in the industry." (Appx106673-106674 (internal J&A for clause H2), Appx100740-100741; Oracle.Br.4-5.) The JEDI team justified inclusion of clause H2 because the cloud "offerings are not static and will be updated overtime [sic] both in terms of available services and applicable pricing." (Appx1008721 (Q1115).)

The record shows that clause H2 would result in "daily or weekly" updates to the cloud services and prices, even during the competition. (Appx100660 (Q17), Appx100668 (Q86-87).) Consequently, COFC recognized the "logical disconnect" between (i) the statutory exception, requiring that prices are "established in the contract" for "specific tasks" in order to forego a multiple-award contract and task-order competition, and (ii) clause H2, which contemplates continually adding to the contract, without the benefit of competition, new and updated services that did not exist and were not priced at the time of the single award. (Appx44.) As COFC explained:

> It should go without saying that the exception must be true at the time of award—no task order contract exceeding $112 million "may be

> awarded"—and exception (B)(ii) speaks of prices and specific tasks as "established in the contract," not that "will be" established in the future. Given the tenor of the language employed in describing the need for cloud computing, Section H2 is not a trivial addition.

(*Id.*)

DoD argues the exception applies because the JEDI contract provides only for fixed price orders, notwithstanding that the CO may persistently add new services to the contract without competition. (DoD.Br.45-48.) DoD's reading renders the language "for which prices are established in the contract for the specific tasks to be performed" superfluous. *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1288-89 (Fed. Cir. 1999). DoD ignores the present tense of the verb "are established in the contract" and the fact that the statute prohibits making an award that will forego task-order competition unless the circumstances in the exception already exist. *See generally e.g., Nickell v. Beau View of Biloxi, L.L.C.*, 636 F.3d 752, 756 (5th Cir. 2011) (interpreting exemption to statute at time of sale based on plain language and verb tense); *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 769-70 (9th Cir. 2008) (phrase "is held" limits scope to land already held).

Finally, DoD's suggestion that COFC's interpretation infringes DoD's ability to modify a large single-award IDIQ contract during performance is a red herring. OMB has identified such technology refresh clauses as contributing to the single-award IDIQ restrictions. (Appx105310 (discussing misuse of "technology

refreshment" clauses).) Moreover, DoD falsely equates clause H2 with the separate, standard changes clause. But if updating and adding "new services" to the JEDI contract for order from a single awardee to keep pace with technology advancements were a simple modification covered by the changes clause, DoD would not have drafted and justified clause H2, which DoD itself described as a "special requirement." (Appx106673-106674.) Enforcing the single-award prohibition here does not prevent DoD from using the *separate* changes clause; it prevents DoD from awarding to a single company a decade long, $10 billion IDIQ contract with a technology refresh provision designed to constantly add new services at unestablished prices without competition.

II. Gate 1.2 Violates Procurement Law to Oracle's Competitive Prejudice.

All agree that DoD did not follow the J&A process that Congress requires whenever an agency (i) has a reasonable basis to conclude that its minimum needs are available from only a few sources, 10 U.S.C. §§ 2304(c)(1), (f), 48 C.F.R. §§ 6.302-1, 6.303, or (ii) seeks to impose a pre-award qualification requirement. 10 U.S.C. § 2319(a). Further, no dispute exists that the solicitation did not permit offerors to show they could meet the challenged qualification requirements before the specified award date. *Id*. § 2319(c). DoD has no answer other than to argue the implausible: the JEDI competition was full and open and Gate 1.2 is not a qualification requirement.

A. The JEDI Competition Was Not Full and Open.

As discussed, DoD necessarily knew when it issued the solicitation imposing Gate 1.2 that only two cloud providers, AWS and Microsoft, could pass the gate. This undisputed fact triggers the J&A requirements and distinguishes this case from those cited by DoD.[8]

DoD's imposition of Gate 1.2 is indistinguishable from a solicitation stating that only AWS and Microsoft may compete. Such a competition would undoubtedly trigger the J&A requirements, and the same holds here. Any contrary result provides an end-run to CICA through creative solicitation crafting, relegating the statutory J&A requirement for a limited competition to virtual irrelevance. *Cf. Manning Elec. & Repair Co. v. United States*, 22 Cl. Ct. 240, 245 (1991) (recognizing "a detailed description of an item, which is found to be produced by only one manufacturer, is equivalent to the use of a brand name and should be treated as such.").

Moreover, DoD cannot escape the fact that it imposed its gated evaluation and selected criteria specifically to limit competition based on concerns about schedule

[8] None of DoD's cited cases involved a challenged criterion known by the agency to limit the competition to two offerors. *See CHE Consulting, Inc. v. United States,* 552 F.3d 1351 (Fed. Cir. 2008) (seeking relief from consolidation of services); *Apogee Eng'r*, B-415976, May 1, 2018, 2018 CPD ¶ 150 (seeking relief from subcontractor clearance requirement); *Armstrong Elevator Co.*, B-415809, Mar. 28, 2018, 2018 CPD ¶ 120 (seeking relief from past performance requirements); *Maersk Line., Ltd.*, B-406586, B-406586.2, 2012 CPD ¶ 200 (seeking relief from citizenship requirement).

delays from too many proposals and protests. (Appx100496, Appx100504.) But full and open competition and protests are not risks—Congress provided for both to enhance the federal procurement system and protect the public's interest. CICA and the FAR specify the processes that an agency must follow to restrict competition and DoD neglected them here.

B. Gate 1.2 Is a Qualification Requirement.

DoD's substantive rebuttals boil down to inaccurate assertions that (i) Gate 1.2 is a specification and (ii) applying 10 U.S.C. § 2319 here would nullify the FAR requirements to perform a responsibility determination. Both fail. DoD does not grapple with the fact that the Gate 1.2 criteria, e.g., three existing FedRAMP Moderate datacenters, are not a JEDI contract specification. Instead, DoD imposed Gate 1.2 as a "mechanism to validate" that the offerors' "core architecture" would likely "be able to meet the JEDI Cloud requirements." (Appx100955.) DoD concedes that the JEDI contract will not require the awardee to complete the FedRAMP authorization process or even deliver the three datacenters used to meet the gate. (Appx105495-105496, Appx100853 (Q233).) The pre-award assurance demonstration of non-contract requirements triggered section 2319, and DoD's disregard of the J&A and other section 2319 obligations render Gate 1.2 unenforceable. *W.G. Yates & Sons Constr. Co. v. Caldera*, 192 F.3d 987, 992-93 (Fed. Cir. 1999).

DoD's second argument fares no better. Preliminarily, whether a procuring agency properly imposes a qualification requirement, the CO must still perform a pre-award responsibility determination. 48 C.F.R. § 9.103(b). A qualification requirement, covered by a different statute, does not substitute for a responsibility determination. *Id*. §§ 9.200-9.207. Moreover, a finding for Oracle does not equate to a ruling that all pass-fail criteria are qualification requirements. As discussed, the challenged gate is not a JEDI specification and thus constitutes a qualification requirement under section 2319.

Finally, Oracle did not waive any aspect of its Gate 1.2 objection at GAO, COFC, or this Court. As Oracle explained to COFC, DoD seeks to bend the *Blue & Gold* prudential waiver rule beyond its breaking point. The waiver rule requires contractors to object to solicitation defects prior to award. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). The rule prevents an "inefficient and costly" process in which a contractor could compete, see if it won the competition, and, if not, then challenge a solicitation defect. *Id*. at 1314.

DoD does not dispute that Oracle's GAO filings timely *and* extensively objected to Gate 1.2 as violating CICA, improperly limiting competition, and constituting an unlawful pre-qualification requirement well before the proposal deadline. (Appx104933-104943, Appx105158-105173.) Oracle thus satisfied *Blue & Gold's* rule. DoD also admits that Oracle cited section 2319 in its GAO post-

hearing comments and in its COFC complaint. (Appx105798-105799, Appx105826-105839, Appx141-142, Appx199-206.)[9]

Nevertheless, DoD asks this Court to expand *Blue & Gold* and declare Oracle's citation to section 2319 untimely *despite* Oracle's timely objection to Gate 1.2 as an unlawful "pre-qualification requirement." DoD offers no authority for its claim that a protester must cite every relevant authority in its opening pleading or lose the right to cite, and none exists. Such a rule would contravene notice pleading rules (e.g., COFC Rule 8 "short and plain statement") and render meaningless any further briefing of an issue. Sensibly, COFC has rejected such arguments even where entirely new contentions arose. For instance, in *Palantir Techs. Inc. v. United States*, a case Oracle cited to this Court and to COFC (Oracle.Br.46, Appx2012), Judge Horn rejected extending the waiver rule even where arguments before GAO and COFC differ: "The court agrees … no case has been identified that would bar Palantir USG's complaint in this court because the allegations in count two were not brought before the GAO." 128 Fed. Cl. 21, 42-44 (2016).

But for additional citations, Oracle's objections to Gate 1.2 and requests for agency correction did *not* change. Both before and after the proposal deadline Oracle challenged Gate 1.2 as violative of CICA, unduly restrictive, and as an

[9] DoD did not object at GAO to Oracle's section 2319 citation. Instead, DoD waited six months into the COFC action to raise this contrived argument.

improper "prequalification requirement." (Oracle.Br.44-46, Appx2012, Appx2281-2282.) No basis exists to expand *Blue & Gold* to the circumstances here.

C. Gate 1.2 Violates CICA's Prohibition on Unduly Restrictive Specifications.

Gate 1.2 also fails due to the timing of when DoD required offerors to demonstrate compliance—i.e., *at the time of proposal submission*. DoD cannot rebut the record evidence showing that (i) DoD's need for a single provider to have three datacenters does *not* occur until after contract award (Appx100947 (requiring three "in the unlikely circumstance that two datacenters are simultaneously affected"), Appx100675 (Q157) ("three unclassified data centers must be online and available thirty days after … the post award kick-off event")), (ii) the JEDI contract does not require FedRAMP authorized services (Appx105495-105496), and (iii) DoD did not require offerors to bid the offerings or datacenters used to meet the gate. (Appx100853 (Q233).) Accordingly, other less restrictive means were available for DoD to validate the security of each offeror's existing and planned architecture even under a single-award scenario, as evidenced by the other cloud contracts in the record.

III. Numerous Prohibited Government Conflicts, All Tied To AWS, Corrupted The Procurement And Require Reversal.

The issue is straightforward: whether COFC legally could permit DoD to excuse evidence of 18 U.S.C. § 208 violations by procurement officials and proceed

with an "infected" procurement. *Miss. Valley*, 364 U.S. at 563. The *Mississippi Valley* decision and related cases answer with a resounding "no." *Id.* at 548-63; *Quinn v. Gulf & W. Corp*., 644 F.2d 89, 93-94 (2d Cir. 1981); *K&R Eng'g Co. v. United States*, 616 F.2d 469, 351-53 (Ct. Cl. 1980).

A. COFC Erred by Deferring to the CO and Ignoring the Evidence of Section 208 Violations.

COFC observed that "the CO reached the obvious conclusion that Mr. Ubhi violated" FAR 3.101-1 and "reasonably" referred to the IG the issue of whether Ubhi likewise violated section 208 and its implementing ethics regulations. (Appx56.) COFC similarly described the CO's conclusion that "Mr. Gavin violated FAR 3.101-1, and possibly violated 18 U.S.C. § 208" as "well supported." (Appx55.) Nevertheless, COFC ignored the section 208 issues and errantly relied on the CO's inapplicable PIA determination. (Oracle.Br.52-54.) COFC's refusal to consider the section 208 violations broke from precedent and sanctioned a corrupt procurement still under IG investigation. *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567, 1576-78 (Fed. Cir. 1983) (conducting *de novo* section 208 analysis in bid protest); *Express One*, 814 F. Supp. at 97 (rejecting "special deference" on protested government conflict); *TRW Envtl. Safety Sys., Inc. v. United States*, 18 Cl. Ct. 33, 67-68 (1989) (allowing agency to override violation "would be senseless and self-defeating").

DoD does not now (nor has it ever) argued that evidence of section 208 violations is lacking here. Instead, DoD demands deference where the law provides

none. DoD invites legal error asking this Court to conclude that FAR 3.104 provides COs unfettered discretion to assess and waive *all* conflicts of interest, including section 208 violations. (DoD.Br.50-52.) But FAR 3.104-2 distinguishes the PIA from the "other statutes and regulations," like 18 U.S.C. § 208 and its implementing regulations. FAR 3.104-7, in turn, authorizes the CO to review only PIA violations. DoD likewise conflates section 208 violations with *contractor* organizational conflicts of interests ("OCI") covered in FAR Part 9.5. (DoD.Br.50-52.) But section 208 and its implementing regulations set an "objective standard of conduct" for agency officials that other officials cannot waive, relax, or alter. *Miss. Valley*, 364 U.S. at 548-49, 565.

As the Supreme Court explained, section 208 addresses a type of corruption that, if condoned, destabilizes our democracy. *Id.* at 562 ("The statute is directed at an evil which endangers the very fabric of a democratic society."). Because bad actors conceal their misconduct, the law does not require additional evidence of corruption beyond the section 208 violation: "The court will not inquire what was done. If that should be improper it probably would be hidden, and would not appear." *Miss. Valley*, 364 U.S. at 550 n.14 (*quoting Hazelton v. Sheckells*, 202 U.S. 71, 79 (1906)). Instead, the violation itself evidences the corruption to be redressed. *K&R*, 616 F.2d at 475. This Court, accordingly, should decline DoD's invitation to

use *separate* statutes and regulations to override section 208, ethics regulations, and *Mississippi Valley* and its progeny cases. *Express One*, 814 F. Supp. at 101-02.

DoD exposes its severe misunderstanding when it declares "nonsensical" that "conflicts of interest involving *AWS* must necessarily void a contract with *AWS's competitor, Microsoft.*" (DoD.Br.53 (italics in original).) These are *DoD* conflicts, not merely AWS conflicts. Through "lax oversight" *at least* two (and seemingly three) *DoD officials* participated in JEDI in violation of section 208. Further, section 208 and the public protection Congress conferred are not concerned with the innocence of the contract recipient. *Miss. Valley*, 364 U.S. at 565-66; *Express One*, 814 F. Supp. at 102 (noting that awardee "may possibly be an unfortunate victim" but confirming that the public's interest "demand[ed] that the contract be overturned").

Finally, DoD suggests that *Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993), alters the holdings of *Mississippi Valley* and *K&R*. (DoD.Br.52-53.) It does not. *Godley* did not involve a section 208 violation. *Godley* distinguished *Mississippi Valley* and *K&R* on the basis that those cases involved government officials with *conflicting incentives.* 5 F.3d at 1475 & n.1. *Godley* recognized that *Mississippi Valley* involved a corrupted bargain because the involved official was a "'profit-sharer'" in a company positioned to benefit from the project and therefore

"'could expect to benefit from any [resulting] agreement....'" *Id.* at 1475 n.1 (quoting *Miss. Valley*, 364 U.S. at 555.)

Ubhi and Gavin have the same conflict as the government official in *Mississippi Valley*, i.e., a financial interest in a prospective contractor. Ubhi joined AWS as a Senior Manager and Gavin as a Principal for Federal Technology. (Appx158702, Appx158746.) In addition to a substantial salary and massive signing bonuses, Ubhi received [redacted] shares (then worth over [redacted] dollars) of Amazon stock. (Appx160719-160720.) The CO inexcusably did not care about Gavin's employment terms, which given his senior executive position also would include significant salary, bonuses, and stock. (Appx1001 (n.33), Appx158711.)[10]

In *Godley*, this Court expressed the general rule that "a Government contract tainted by fraud or wrong-doing is void *ab initio*." *Godley,* 5 F.3d at 1476. The Court recognized this "rule protects the integrity of the federal contracting process and safeguards the public from undetectable threats to the public fisc." *Id.* The rule applies here.

[10] The financial interest that section 208 prohibits is present here. Public reports show that on day one the "JEDI award sent Microsoft shares up 3% in after-hours trading Friday [the award date]; Amazon's stock was down 0.8%." *Microsoft wins Pentagon's $10 Billion JEDI cloud contract, beating Amazon*, MarketWatch (Oct. 28, 2019), https://www.marketwatch.com/story/microsoft-wins-pentagons-10-billion-jedi-cloud-contract-beating-amazon-2019-10-25.

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B. The CO's No-Impact Determinations Cannot Survive APA Review.

Even if COFC properly limited its review to the rationality of the CO's PIA determination, this Court still should reverse because the CO's no-impact rationales are unfounded. Oracle also appealed COFC's decision upholding: (1) the CO determination that Ubhi's misconduct had "no impact" on JEDI, (2) the CO's inadequate investigation of the DeMartino conflicts, and (3) the CO's finding that AWS obtained no competitive advantage by hiring Gavin. For each, Oracle showed that the CO's initial decision cannot withstand APA review and that COFC's reasoning contradicted the CO's rationale, the record, or both. (Oracle.Br.54-64.) DoD disclaims the COFC opinion and defends only the CO's conclusions. (DoD.Br.53n.8.) Conversely, AWS defends only itself against the charge that it obtained a competitive advantage from hiring Gavin and Ubhi. (AWS.Br.28.) Each attempted defense lacks merit.

1. The Record Undermines the CO's No-Impact Determination Regarding Ubhi.

DoD acknowledges that the CO's no-impact determination for Ubhi relied on three findings, but abandons two, defending only the CO's finding that all of the key JEDI decisions, including the single award, were made "well after Mr. Ubhi recused himself." (DoD.Br.54-57 & n.10, Appx158719.) This CO finding, however, runs counter to the record and COFC's decision.

Contemporaneous communications reveal Ubhi's systematic and successful efforts to sway DoD to adopt the single-award approach.[11] (Oracle.Br.17-19, 56-58.) DoD asks this Court to ignore all evidence of Ubhi's influence over the single-award decision based on the CO's mid-litigation finding that the single-award discussion continued after Ubhi rejoined AWS. (*Compare* Oracle.Br.56-57 *with* DoD.Br.54-56.) COFC reached the opposite conclusion that the single-award determination appeared to occur before Ubhi's involvement. (Appx59 ("single award from the beginning").) Regardless, as the Supreme Court recognized in *Mississippi Valley*, the prohibition against conflicts applies to all personnel that participate personally and substantially, and *not* merely to final decisionmakers. *Miss. Valley*, 364 U.S. at 554-55. All agree that Ubhi participated personally and substantially in JEDI. (Appx104862, Appx158709.)

Similarly, the record reveals that during his personal and substantial participation as one of four individuals leading the JEDI effort, Ubhi (i) edited

[11] AWS suggests that COFC's characterization of the Slack messages as "unedifying," meant "not instructive." (AWS.Br.42.) But COFC manifestly intended the primary meaning of "unedifying," i.e., distasteful, as it also labeled the messages "banal, puerile, profane," and "ill considered." (Appx31, n.10.) The Slack messages provide unavoidable evidence of Ubhi's efforts to further expand his role in JEDI as and after he accepted AWS employment, and his impact on the team leading JEDI. (Appx102881, Appx103043, Appx103049, Appx103063-103064, Appx103068-103070, Appx103160-103162, Appx103167-103174, Appx160095-160107, Appx160145-160147, Appx160169-160170, Appx160229, Appx160239, Appx160237, Appx160276, Appx160279, Appx160309, Appx160373-160376.)

material that DoD ultimately included in the solicitation (Oracle.Br.20-21n.20, 57), (ii) contributed to drafts of the Joint Requirements Oversight Council Memorandum ("JROCM"), which the CO deemed "essential to begin the process of drafting the Statement of Objectives and the RFP" (Appx160345-160347, Appx160777, Appx158715-158716 (¶73)), and (iii) discussed and drafted "differentiators" that became the gate criteria and other solicitation provisions. (*See, e.g.*, Appx160237 (Ubhi: "So we need to come up with those 5-8 'differentiators'…"), Appx160089.) DoD's characterization of the differentiators as "high level ideas" cannot change the salient fact that the differentiators Ubhi discussed, e.g., "high availability, built-in redundancy and fail over, true elasticity," are reflected in the challenged gate criteria. (*Compare* Appx160237 *with* Appx100791-100792.)

The CO's failure to confront the record contradicting the no-impact determination evidences the decision's irrationality.

2. The CO's Determination Regarding DeMartino Resulted from an Inadequate Review.

DoD does not dispute that the CO reached the initial (and only) no-impact determination about DeMartino *without*:

- consulting the DoD Standards of Conduct Office ("SOCO"), which unbeknownst to the CO had previously advised DeMartino to avoid matters involving AWS;

- obtaining any records and statements of DeMartino or his superiors regarding the scope of his JEDI involvement or interests in AWS; or
- reviewing any of the documents DoD later produced before GAO and COFC revealing that DeMartino's JEDI role exceeded that which the CO understood at the time of her initial decision.

(Oracle.Br.24-26, 59-62.) Nevertheless, DoD seeks to defend the CO's inadequate review by spinning the few record documents that DoD eventually produced regarding DeMartino. (DoD.Br.58.)[12] DoD's reliance on documents the CO did not consider reinforces Oracle's objection.

3. The CO Relied on Inaccurate Declarations to Excuse AWS' Conflict from Hiring Gavin.

COFC wrongly upheld the CO's finding that AWS did not obtain an unfair competitive advantage by hiring Gavin, notwithstanding the record facts that (1) Gavin obtained competition-sensitive information when he improperly participated in a JEDI meeting after negotiating employment with AWS, and (2) Gavin and AWS' JEDI team lead Jennifer Chronis discussed JEDI before AWS instituted any firewall. (Oracle.Br.62-64.) This is the only COFC ruling that AWS attempts to defend.

AWS errantly suggests that this Court must defer to COFC. (AWS.Br.29-32.) This Court, however, cannot defer to COFC because COFC provided a different

[12] DoD also miscites FAR 9.504(d). (DoD.Br.59.) The provision does not apply to government official conflicts and ethics violations.

rationale than the CO. *See OMV Med., Inc. v. United States,* 219 F.3d 1337, 1344 (Fed. Cir. 2000) (reversing bid protest where COFC provided contrary rationale). COFC assumed Gavin did not have access to competitively-valuable information, contradicting the CO's finding that Gavin did. (Oracle.Br.63-64; Appx158746 (¶16), Appx158747 (¶¶24-25).)

Because the CO knew Gavin had competitively-valuable information, and Gavin and Chronis both admitted to discussing JEDI before AWS implemented any firewall, DoD and AWS rely on the self-serving Gavin and Chronis declarations asserting that Gavin did not disclose competitively-valuable information. But self-serving declarations disclaiming wrongdoing do not suffice as a matter of law. *See NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 526 (2011) ("there is no indication that an agency's failure to adhere to the FAR's requirements regarding OCIs may be remedied by the expediency of obtaining *post hoc* declarations") (italics in original), *aff'd*, 473 F. App'x 902 (Fed. Cir. 2012).

Reliance on the declarations also fails as a factual matter. The CO knew the declarations were inaccurate and incomplete. The CO noted that Gavin's declaration (i) concealed his improper involvement in the meeting where he obtained competition-sensitive JEDI information (*see* Oracle.Br.24), and (ii) incorrectly averred that he "had no access to … information that could provide a competitor an unfair competitive advantage." (Appx158754.) Similarly, Chronis qualified her

statement that Gavin did not share nonpublic information based on her misunderstanding that Gavin did not have any such information to share (Appx160813), which the CO knew to be false (Appx158746-158747, Appx158754). The CO could not reasonably rely on the declarations.

C. Appellees' Mootness Arguments Fail.

Finally, DoD and AWS advance a series of baseless mootness and prejudice arguments targeting portions of Oracle's conflict arguments. For instance, DoD argues that the Microsoft award moots any unfair competitive advantage to AWS from hiring Ubhi and Gavin. (DoD.Br.60-61.) But, well-settled law provides that "a defendant claiming that its voluntary compliance moots [an objection] bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 190 (2000); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (voluntary cessation does not moot action where city could retake prior course after dismissal). DoD cannot meet that burden here. DoD does not know how the AWS protest will end.

DoD and AWS also argue that a ruling in DoD's favor on the enforceability of Gate 1.2 should end some or all of Oracle's conflict arguments. DoD even erroneously states that COFC reached such a conclusion. (DoD.Br.49.) Not so. Even after (incorrectly) holding Gate 1.2 enforceable, COFC recognized that it still

had to address the merits of each conflict issue given Oracle's allegations that "the individual conflicts tainted the structure of the procurement." (Appx53, Appx39.) Accordingly, even if Gate 1.2 is enforceable, the Court still must reverse COFC's erroneous conflicts analysis. *Express One*, 814 F. Supp. at 101-02.

CONCLUSION

For the foregoing reasons and those stated in Oracle's opening brief, the Court should reverse COFC's decision, vacate the judgment, and enter judgment and a permanent injunction against the JEDI contract or remand the matter for further proceedings before COFC.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, a true and correct copy of the foregoing Non-Confidential Reply Brief of Plaintiff-Appellant Oracle America, Inc. was served upon counsel of record via email through the Court's CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Federal Circuit Rule 32(a). The Brief contains 6,995 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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