

<b>REDACTED VERSION</b>
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**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
BID PROTEST**

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ORACLE AMERICA, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

AMAZON WEB SERVICES, INC.,

Defendant-Intervenor.

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Case No. 18-1880C

Senior Judge Eric G. Bruggink

**PLAINTIFF'S MOTION TO COMPLETE THE  
SECOND AMENDED ADMINISTRATIVE RECORD**

Plaintiff Oracle America, Inc. ("Oracle"), by its undersigned counsel and pursuant to Court's Scheduling Order, timely requests that this Court direct Defendant United States ("Defendant") to complete the administrative record with information that the Agency possessed when making the challenged determinations, but which Defendant has omitted from the administrative record filed with this Court on May 2, 2019. Oracle has attached hereto a supporting Memorandum of Law explaining the legal and factual bases for its Motion. Neither Defendant nor Defendant-Intervenor have consented to the relief sought herein.

WHEREFORE, Oracle respectfully requests that the Court grant Plaintiff's Motion to Complete the Second Amended Administrative Record.

Dated: May 15, 2019

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of May 2019, I caused a true and correct copy of the foregoing Motion, Memorandum of Law, and Proposed Order to be served by electronic delivery on:

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO  
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Oracle America, Inc. ("Oracle") submits this Memorandum of Law in Support of its Motion to Complete the Second Amended Administrative Record. Oracle's Supplemental Complaint challenges several, targeted, prejudicial legal errors by the Department of Defense ("DoD" or "Agency") in the Joint Enterprise Defense Infrastructure Cloud procurement ("JEDI"), including: violations of laws prohibiting large, single-award, indefinite-delivery, indefinite-quantity ("IDIQ") contracts absent narrow, inapplicable circumstances; adoption of unlawful, unduly restrictive solicitation criteria; an irrational competitive range determination; and a flawed investigation and handling of severe ethical violations by former DoD officials and one of the JEDI competitors, Amazon Web Services, Inc. ("AWS"). Oracle's Motion to Complete the Second Amended Administrative Record focuses on the Contracting Officer's determination that the disregard for numerous ethics and related procurement violations by several officials and AWS did not impact the procurement and that AWS' hiring of the conflicted individuals did not result in an organizational conflict of interest. (AR Tabs 221-23.) By its motion, Oracle does not seek to conduct discovery or to present the Court with new evidence. Rather, Oracle seeks only to ensure that the Court and the parties have the information reviewed by the Agency in connection with the latest conflict-related decisions challenged by Oracle. Indeed, Oracle seeks documents referenced by the Contracting Officer in her reassessment of the now-admitted integrity violations and their impact but not produced as part of the Second Amended Administrative Record ("Second Amended AR"). Oracle counsel has unsuccessfully attempted to resolve the record issues discussed herein without Court involvement.<sup>1</sup>

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<sup>1</sup> The attached exchange reflects the exchanges on the various record issues. (Email Exchange, Ex. A.) Oracle counsel has accepted DoD representations in a number of instances.



## I. INTRODUCTION

In February 2019, DoD learned that the JEDI conflict of interest record previously presented by DoD to the U.S. Government Accountability Office ("GAO") and this Court contained material, false information. Deep Ubhi (the JEDI lead Product Manager and one of four DDS individuals tasked to run JEDI) did not promptly recuse himself from the procurement when Amazon purportedly offered to buy Tablehero as Ubhi, DoD, and even AWS asserted. As it turns out, Amazon had not renewed its offer to buy Tablehero at all. Instead, AWS (during JEDI and with full knowledge of Ubhi's JEDI leadership role) made a hidden job offer to Ubhi, to include a massive \$ [REDACTED] immediate signing bonus payment, a second \$ [REDACTED] bonus payment payable after year one, [REDACTED] shares of Amazon stock (roughly \$950-\$960 per share in the relevant period), and a [REDACTED] salary. (AR Tab 253 at 60719-20.) Stated otherwise, AWS offered a former Amazon employee actively running DoD's \$10 billion JEDI procurement nearly [REDACTED] dollars in cash and stock during a live procurement, not to mention a substantial salary.

Neither Ubhi nor AWS disclosed the employment discussions or job offer to DoD—not when the employment discussions started, not when the informal job offer occurred, not when the formal offer occurred, and not even when Ubhi accepted the offer.<sup>2</sup> And this is not even the most alarming part of the newly-developed (incomplete) record. Ubhi did not promptly recuse

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<sup>2</sup> AWS claims that its public sector did not know that its commercial sector was making [REDACTED] offers to federal procurement officials and did not even learn of Ubhi's arrival at AWS for months. Given that AWS dealt with Ubhi directly as part of JEDI, this assertion is, at best, improbable. Regardless, it is hardly helpful for AWS to suggest that it does not track the federal officials to which AWS makes job offers. The U.S. Code and Federal Acquisition Regulation ("FAR") require much more. 48 C.F.R. § 3.104-8(b) ("An offeror who engages in employment discussion with an official subject to the restrictions of 3.104-3, knowing that the official has not complied with 3.104-3(c)(1), is subject to the criminal, civil, or administrative penalties set forth in 41 U.S.C. 2105.").



himself. Instead, Ubhi spent weeks as a DoD official (after verbally committing to rejoin AWS) downloading the JEDI Google drive to his laptop, meeting with AWS competitors as a DoD official, requesting and participating in highly-technical DoD cloud meetings, obtaining proprietary submissions from JEDI competitors, zealously advocating for a single source approach favored only by AWS, and shaping the gate criteria. (*See* Section III.) Incredibly, DoD apparently still has no idea what Ubhi downloaded (to include the competitor information in DoD's possession) or what he did with it, yet DoD claims whatever it is (SPAWAR material, SOCOM information, Navy documents, Microsoft proprietary documents, VMware information, etc.), the nonpublic information had no competitive value. (*Compare* Email Exchange at 2 (Response to Request 1), Ex. A *with* AR Tab 221 at 58713 (¶ 72), 58716 (¶ 75).)

Whether AWS asked Ubhi to shape the JEDI procurement and the massive DoD information technology market, to download the Google drive of acquisition sensitive documents, or to gather surreptitiously competitor secrets and inside DoD information hardly matters. Amazon gave Ubhi \$ [REDACTED] in restricted stock units that would move with the company's share price and vest over the next five years. That AWS motivated Ubhi to do its bidding is self-evident. Consider the following Ubhi quotes from the latest batch of previously unproduced DoD Ubhi documents: "build another AWS, with only one customer: DOD," "you know how fast AWS builds regions?", "I'm dead serious. Why wouldn't they just build out an entire region footprint [sic] just for us?" (AR Tab 242 at 60169.)<sup>3</sup> Moreover, it is now clear that not only did Ubhi act as the prime advocate for the single award approach, he also worked behind the scenes to sway key decisionmakers' opinions regarding the single versus multiple

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<sup>3</sup> Slack gives each user a numerical code; the user keys can be found at AR Tab 47a at 2901 and 2973. Slack also uses epoch time. To convert into a date, the Court can use the conversion tool we have used at the following site: <https://www.epochconverter.com/>.

award approach. (*Id.* at 60096-97 (Ubhi: "Jane R is now moved to our side ... and is supportive of a single provider"); *id.* at 60098 ("Enrique and I talk at 1700 ET ... so he'll be on our side by 1800 ET ... so we'll be very very well positioned now."); *id.* at 60107 ("Another quick win: Enrique is totally on our side now.").) Contrary to DoD's arguments, the Slack messages also evidence that well before Ubhi left: "the single [vs.] multiple conversation [was] done. Everyone that matters is now convinced." (AR Tab 242 at 60239 (Van Name).)

The new Slack messages also confirm Ubhi's heavy hand on the gate requirements: "So we need to come up with those 5-8 'differentiators' that help us meet mission better right . . . i.e. high availability, built-in redundancy and fail-over, true elasticity, AIVML managed services available \out of the box\." (AR Tab 242 at 60237.) Many other examples exist even among the written record Ubhi left. What Ubhi did orally will never be known.

Still further, as it now turns out, Ubhi is not the only JEDI official to receive AWS offers during the JEDI procurement. The Contracting Officer has now acknowledged that her initial investigation missed the fact that at least one other federal official (██████████) participated in JEDI after entering employment discussions with AWS and even after accepting an offer from AWS. (AR Tab 222 at 58746-47; AR Tab 223 at 58753-54.)

Even so, the Contracting Officer (belatedly acknowledging that Ubhi and ██████████ violated the FAR and potentially Title 18) claims that Ubhi, ██████████ Anthony DeMartino (who participated in JEDI despite ethics advice to the contrary), and AWS did not impact the procurement. (AR Tabs 33, 221-23.) To support the analysis, the Contracting Officer claims to have reviewed documents such as the "Google drive history" (AR Tab 221 at 58722) and "[t]he recorded document history" that do not appear in the record. (AR Tab 221 at 58720.)

Leaving aside (for now) that DoD told the Court in January 2019 that DoD could not even create an accurate index for the Google drive without "misleading information" (Kasper Decl. at ¶ 11, Dkt 40-1), if the Contracting Officer reviewed (and indeed apparently relied) on a document history or particular versions of documents, the Agency must produce the documents as part of the record. *See, e.g., Mori Assocs., Inc. v. United States*, 98 Fed. Cl. 572, 575 (2011) (ordering agency to complete record with information in agency's possession that was relevant to challenged decision); *Allied Tech. Grp., Inc. v. United States*, 92 Fed. Cl. 226, 231 (2010) (granting motion to include in record documents reviewed by Technical Evaluation Panel). Numerous other examples of the Contracting Officer claiming to have reviewed documents absent from the record exist. This motion seeks such documents.

## **II. QUESTIONS PRESENTED**

Whether the Court should order Defendant to complete the Second Amended AR with the documents requested by Oracle and possessed by the Agency that are relevant to the conflict-related decisions challenged by Oracle.

## **III. STATEMENT OF FACTS RELEVANT TO THE RECORD OF THE CONTRACTING OFFICER'S REASSESSMENT OF UBHI'S MISCONDUCT AND HIS REHIRING BY AWS.**

1. On July 23, 2018, three days before posting the final JEDI solicitation, the Contracting Officer issued a memorandum for the record indicating that "there were four instances where individuals with potential financial conflicts of interest under 18 U.S.C. § 208 or impartiality restrictions under 5 C.F.R. § 2635.502 were provided with access to procurement sensitive information." (AR Tab 33 at 683.) The Contracting Officer observed that each "individual had either a financial interest in or a covered relationship with Amazon, Inc./Amazon Web Services (AWS)...." (*Id.*) The individuals included Ubhi, a former DDS employee on the

four-person team leading JEDI, who took a job with AWS during the procurement, and DeMartino, a former AWS consultant, who served as the Chief of Staff for the Deputy Secretary of Defense and participated in JEDI contrary to DoD ethics advice. (*Id.* at 683-87.) [REDACTED] was not among the individuals with potential conflicts that the Contracting Officer initially investigated.

2. The Contracting Officer based her initial consideration of Ubhi's alleged misconduct on a false narrative provided to DoD by Ubhi. Specifically, the Contracting Officer believed that Ubhi ended his covered employment relationship with AWS in January 2016, more than a year before he began working on JEDI, and that Ubhi "promptly recused himself from any participation in JEDI" on October 31, 2017 after AWS expressed an interest in purchasing a start-up owned by Ubhi, Tablehero. (AR Tab 33 at 686 (emphasis added).) Not so.

3. In a belated submission from AWS to the Contracting Officer in mid-February 2019, AWS (facing Agency and reported Inspector General and Federal Bureau of Investigation reviews) admitted that neither AWS nor Amazon offered to purchase Tablehero at any time after 2016. (Tab 251 at 60702-03.) Further, AWS, for the first time, advised DoD that AWS had engaged in employment discussions with Ubhi throughout JEDI. (*Id.*) Ubhi's October 31, 2017 Tablehero recusal excuse was pretext to mask the fact that Ubhi and AWS had been negotiating employment since late August 2017.

4. Based on AWS' February 12, 2019 letter, the Contracting Officer re-opened her investigation with regard to Ubhi (Dkt. 60-1 at 2) and the Agency asked this Court to stay Oracle's protest pending the re-investigation. Also, based on AWS' proposal, the Contracting Officer broadened the integrity investigation to include another former government official, [REDACTED] who also participated personally and substantially in JEDI while successfully engaged in

employment discussions with AWS. (AR Tab 222.) On April 9, 2019, the Contracting Officer issued both a Reassessment of Potential Procurement Integrity Act Violation and No-Impact Determination for Ubhi (AR Tab 221) and a No-Impact Determination for [REDACTED]. (AR Tab 222.) The Agency notified the Court and Court reinstated this matter.

5. Information that AWS submitted in response to questions by the Contracting Officer during the reopened investigation confirm that AWS and Ubhi negotiated Ubhi's reemployment throughout JEDI, without disclosure to DoD or recusal by Ubhi. Specifically, in August 23, 2017, Ubhi advised his former AWS manager that Ubhi would consider AWS' offer to "craft [his] own role" to rejoin AWS. (AR Tab 221 at 11 (¶ 42).) Detailed discussions with the AWS manager followed in late September 2017 and, by October 4, 2017, Ubhi had committed to return to AWS. (AR Tab 259 at 60913.) On October 25, 2017, Ubhi received his offer confirmation letter including a \$[REDACTED] base salary, with a signing bonus of \$[REDACTED] paid in the [REDACTED] and a second bonus of \$[REDACTED] paid during the second year of employment, plus [REDACTED] shares of Amazon.com stock that will begin to vest on the first anniversary of employment. (AR Tab 253 at 60719-20.) Ubhi apparently counter-signed the document on October 27, 2017. (AR Tab 221 at 58711 (¶ 65.ii.h).) Ethics laws prohibited Ubhi's participation in JEDI from its inception. Instead, Ubhi embarked on a successful campaign to drive JEDI toward a single award approach and gather competitively valuable information.

6. Even after Ubhi verbally committed to return to AWS (in early October), Ubhi did not recuse himself. Instead, Ubhi stepped up his efforts to obtain valuable DoD JEDI information, to misappropriate JEDI competitor information, and to shape JEDI for AWS.

7. Despite how limited DDS now attempts to portray Ubhi's role in JEDI, the contemporaneous record documents demonstrate otherwise. For instance, in Ubhi's own words to the DDS JEDI acquisition team, "I'm reviewing and writing more documents than a college professor!" (AR Tab 242 at 60251.)

8. Ubhi led DoD to the single award decision. In new record Slack communications inexplicably withheld from GAO and the prior record before this Court, DoD has now disclosed further contemporaneous evidence of Ubhi's success in driving the single award determination. For example, the new documents show Ubhi repeatedly lobbying Jane Rathburn, the lead support to Under Secretary of Defense for Acquisition and Sustainment Ellen Lord (who signed the single source determination). In one Slack conversation, Ubhi reports "we just won this conversation" because "Jane R is now moved to our side and is supportive of a single provider." (AR Tab 242 at 60096-97.) Ubhi later instructed the DDS team to "check your email, and see Jane coming to the light." (*Id.* at 60150.) Sharon Woods (DDS counsel) responded: "That is great about Jane. I tried to plant more seeds on that this morning. Seems like maybe all the data points are coming together for her. Your one pager should really drive it home!" (*Id.* at 60151.) In subsequent communications about the "single cloud one pager" or "SPAWAR brief" (*id.*), Ubhi noted the document "puts multi vs. single to bed once and for all hopefully (at least from a technical standpoint)." (*Id.* at 60166.)

9. Ms. Rathbun was not Ubhi's only target. Soon Ubhi bragged that "Enrique [Uti from DIUX] and [Ubhi] talk at 1700 ET," "so he'll [Enrique] be on our side by 1800 ET" and "so we'll be very very well positioned now." (*Id.* at 60096-98.) Later that evening, Ubhi reported: "Another quick win: Enrique is totally on our side now." (*Id.* at 60107.) In a later communication (still from the Slack messages produced only in the Second Amended AR), Ubhi

indicated to Woods that he was not worried about the "single vs. multiple" awardee approach because "it's such a false choice, it'll become apparent to everyone soon," and "if there are people in the building [Pentagon] that [he] need[s] to go see and school, or ally, let's do that too." (*Id.* at 60176.)

10. Beyond converting individuals to the single-award position, DDS also tasked Ubhi with speaking at a CESG meeting in October 2017 to "tackle the question of one versus multiple cloud providers." (*Id.* at 60100.) It should not be surprising that Ubhi was given this role, as the Contracting Officer recognized that even those within DDS looked to Ubhi to explain the single vs. multiple award debate. (*See* Tab 221 at 58739; *see also* AR Tab 47c at 3114 (Woods saying to Ubhi: "I get nervous when I hear these arguments about multiple clouds. I really need to better understand from you why only one provider makes sense."); AR Tab 242 at 60100 (Woods to Ubhi: "The CAPE thing is the one versus multiple cloud conversation. Bob Daigle of CAPE is pushing the issue, but this is the meeting where you will get to present your one pager. This was the one we discussed that you would do in person next week.").)

11. Following the CESG meeting and Ubhi's presentation, Woods reported: "It went well. Single is assumed now," and told Ubhi that she was: "Really glad you were here this week." (AR Tab 242. at 60229; *see also id.* at 60239 (Van Name asserting: "The single [vs.] multiple conversation is done. Everyone that now matters is convinced.").)

12. Also throughout the time Ubhi finalized his AWS employment and highly lucrative compensation package, Ubhi was hard at work securing competitively valuable information from AWS' JEDI competition and learning non-public information from the JEDI end users regarding DoD's needs and requirements, particularly relating to the tactical edge.

13. In fact, two days after orally committing to rejoin AWS, Ubhi traveled to SPAWAR for an internal meeting with Trudy Morgan about the tactical edge, whom Ubhi described as "schooling [him] on the tactical edge." (Tab 47c at 3172.) Ubhi messaged others at DDS about Morgan's "compelling takes on looking at hybrid options, i.e. Azure Stack." (*Id.* at 3174.) Ubhi participated in numerous other internal JEDI needs meetings during October 2017. (*See* AR Tab 47a at 2941 (Ubhi offering to "huddle" on technical requirements); *id.* at 2802 (Ubhi arranging a meeting with Air Force personnel); AR Tab 47b at 3065-75 (referencing Ubhi Navy JEDI meeting); AR Tab 242 at 60140 (discussing call with Air Force); *id.* 60158 (discussing three "in-depth tech docs" from the Air Force); *id.* at 60233-34 (discussing CIO slides).)

14. Also throughout October 2017—after orally committing to rejoin AWS, Ubhi set up meetings and met with potential JEDI competitors as a DoD official, conducting "highly technical" meetings regarding anticipated offeror JEDI approaches and capabilities. (AR Tab 221 at 58713-14 (§ 72.iii) (Microsoft meeting on October 19, 2017); *id.* at 58714 (§ 72.iv) (VMware meeting on October 24, 2017); *id.* at 58715 (§ 72.v) (Google meeting on October 26, 2017); *see also* Tab 247 at 60373 (Ubhi September 21, 2017 email stating "Yo I wanna be in those Azure meetings when they happen, please."); *id.* at 60397-401 (Ubhi reviewing Microsoft Whitepaper marked "Microsoft Proprietary – Shared under NDA"); *id.* at 60527 (Ubhi receipt of VMWare information marked "VMware Confidential and Acquisition Sensitive – DO NOT FORWARD"); *id.* at 60602-20 (Ubhi receipt of information with marking "This document contains VMware Trade Secrets and is provided for information and evaluation purposes only."); *id.* at 60626, 60628-31, 60634 (Google slides provided to Ubhi with marking "proprietary and confidential").)



15. During this same period, Ubhi worked on the JEDI gate requirements. (AR Tab 47c at 3123 (Woods and Ubhi discussing JEDI metrics: "Let me put the metrics [we select] in this context. The agreed upon measures drive what acquisition strategy will be approved. So if multiple cloud providers can meet the metrics, then we don't get to one. The metrics solve the problem."); AR Tab 242 at 60237 (Ubhi discussing need for high availability, redundancy, elasticity, etc.).)

16. The Agency employed Google Team Drives to maintain and create all JEDI acquisition information. (AR Tab 221 at 58699.) "Files created and edited through the office suite [of Google docs, Google sheets, and Google slides] are saved in Google Drive." (*Id.*) At some point prior to rejoining AWS, Ubhi synced the Google Team Drives to his laptop. (Dkt. 40-1 at 6.) "In making its no impact and OCI determinations, DoD did not consider all of the documents Mr. Ubhi may have synced to his laptop in order to work offline while he was working on the JEDI procurement." (Email Exchange at 2 (Response to Request 1) (emphasis added), Ex. A.)


17. As part of the re-opened investigation, the Contracting Officer conducted in-person or phone interviews with seven DDS personnel and the DoD Standards of Conduct Office's ("SOCO") counsel to (1) ascertain whether anyone at DDS knew the information in the Contracting Officer's prior July 2018 memorandum was inaccurate, (2) "determine if the new information concerning Mr. Ubhi's AWS employment would lead anyone to adjust their opinion about whether Mr. Ubhi attempted to influence critical decisions," and (3) obtain other previously unknown information. (AR Tab 221 at 58706 (¶ 45).) Although the Contracting Officer states that "each interviewee was asked primarily the same questions," neither the

specific questions asked to the interviewees nor a record of the conversations appear in the Second Amended AR.

18. Based on statements purportedly made in the interviews, the Contracting Officer concludes that (i) Ubhi's influence and edits to JEDI documents were minimal (AR Tab 221 at 58720 (¶ 92)), and (ii) Ubhi did not influence any JEDI Cloud processes or decisions. (*Id.* at 58719-20.)

19. During the reassessment, the Contracting Officer also purportedly reviewed documents in the Google drive (*see e.g., id.* at 58707) as well as the history of those documents (*see e.g., id.* at 58720 (¶ 92), 58721-22 (¶¶ 95.ii-ix)) and made the sweeping conclusion that "all of the critical and foundational documents for the JEDI Cloud acquisition were not in existence at the time of Mr. Ubhi's recusal," and that "[t]he documents that did exist were simply too premature to be considered a foundational document." (*Id.* at 58722 (¶ 97).) Previously, DoD suggested that this type of effort could take hundreds of hours and yield misleading information. (Kasper Decl., Dkt. 40-1 at *passim*.) For instance, DoD told the Court that the Google drive would show whoever uploaded the document to the Google drive as its author, even if someone else created the document. (*Id.*)

20. Repeatedly, after identifying various documents in the JEDI Google drive, the Contracting Officer states when the JEDI acquisition team purportedly created the document based on her "review of Google Drive history." (*Id.* at 58722 (¶ 95.ii ("From personal knowledge and confirmed by Google Drive"), ¶ 95.iv ("Based on my recent review of Google Drive history"), ¶ 95.v ("Based on review of Google Drive history"), ¶ 95.vi ("confirmed by Google Drive history on this particular document"), ¶ 95.vii ("Confirmed by my recent review of



Google Drive history on this particular document"), ¶ 95.ix ("Confirmed by my recent review of Google Drive history on this particular document").)

21. After conceding that Ubhi attended "internal meetings that provided insight into the DoD users' individual needs, problems, and lessons learned from working on the cloud" (*id.* at 58715), the Contracting Officer asserted that none of the nonpublic JEDI-related information Ubhi learned or developed as "a critical member of the team" (AR Tab 242 at 60334), was competitively useful "because the acquisition was in its predecisional planning phase." (AR Tab 221 at 58716 (¶¶ 75-76).)

22. The Second Supplemental AR does not contain all of the JEDI documents that existed during Ubhi's tenure nor the Google drive history of documents that the Contracting Officer repeatedly references and relies on in the reassessment.

23. Also absent from the Second Supplemental AR are the document versions showing the edits made by Ubhi that the Contracting Officer references in the reassessment. (AR Tab 221 at 58720 (¶ 92).) Although the record contains a table at Tab 258 that the Second Amended AR index classifies as "DoD Analysis of Edits Made To Certain Documents in Google Drive," DoD did not include any of the underlying information from which DoD created the table in the record. (Second Amended AR Index at 18 (emphasis added).)

24. In the end, although concluding that the information reviewed for the reassessment showed that Ubhi's misconduct during JEDI violated FAR 3.101-1 and possibly 18 U.S.C. § 208 and its implementing regulations, the Contracting Officer determined that Ubhi's misconduct did not negatively impact the procurement:

This determination is based upon the fact that after a thorough investigation, I found no evidence that (1) Mr. Ubhi's participation in the preliminary stages of the JEDI Cloud acquisition planning had any substantive impact on the procurement decisions or documents; (2) Mr. Ubhi's participation in the

preliminary stages of the JEDI Cloud acquisition planning introduced any bias in favor of AWS on the procurement decisions or documents; or (3) Mr. Ubhi obtained or disclosed any competitively useful nonpublic information.

(AR Tab 221 at 58723.)


25. Correspondingly, the Contracting Officer asserted that AWS' hiring of Ubhi during JEDI did not create an organizational conflict of interest. (AR Tab 223 at 59752, 58757.)

#### IV. ARGUMENT

**A. The Court Should Order DOJ To Complete The Second Amended Administrative Record With Materials Reviewed And Considered By The Agency For The Ubhi Conflict Reassessment But Not Produced To The Court.**

The Second Amended AR lacks critical information that the Agency had in its possession when the Agency made the conflict-related determinations challenged in Oracle's Supplemental Complaint. The Court, accordingly, should direct DoD to complete the record with the missing documents identified herein.

"A complete administrative record is the predicate to meaningful and effective judicial review...." *Joint Venture of Comint Sys. Corp. v. United States*, 100 Fed. Cl. 159, 168 (2011) (recognizing "[t]he court's review function is undermined when an agency assembles a record that consists solely of materials that insulate portions of the decision from scrutiny or that it deems relevant to specific allegations raised by a protester"). This is so because this Court bases its review "on an examination of the 'whole record' before the agency; that is, all the material that was developed and considered by the agency in making its decision." *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 342 (1997) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). A complete record must "contain[] the information relied upon by the agency as it made its decision, as well as documentation of the agency's decision-making process." *Kerr Contractors, Inc. v. United States*, 89 Fed. Cl. 312, 335 (2009).



Where a party seeks to have the Government add evidence to the record generated or considered by the agency during the procurement and decisionmaking process, the Court considers such a request as one to complete the record. *Joint Venture of Comint Sys. Corp.*, 100 Fed. Cl. at 167; *see also, e.g., Tauri Grp., LLC v. United States*, 99 Fed. Cl. 475, 480-82 (2011) (ordering agency to complete record with documents agency relied on during evaluation, individual evaluation worksheets, documents referenced in agency declarations filed in support of decision); *Kerr Contractors*, 89 Fed. Cl. at 335 (granting motion to include agency's responses to questions about solicitation in record); *Ala. Aircraft Indus., Inc.-Birmingham v. United States*, 82 Fed. Cl. 757, 765 (2008) (granting motion to include civil and criminal settlement agreements between awardee and government in record because documents "were available to agency at time it made its decision and underpinned a part of its consideration of [the awardee's] past performance").

A comparison of the challenged Ubhi no-impact reassessment and the documents included in the Second Amended AR establishes that the Agency has omitted material information the Agency had available to it and purportedly considered when making the challenged Ubhi conflict-related decisions. In prior communications with Government counsel, Oracle requested that Defendant complete the record with the below referenced documents to no avail. (*See* Email Exchange, Ex. A.) Oracle, accordingly, requests that the Court order Defendant to produce the following documents and complete the record.

1. The JEDI Google drive documents and Google drive history. The Contracting Officer's no-impact reassessment makes several conclusions based on her review of documents in the Google drive and the "review of Google Drive History." (*See e.g.*, AR Tab 221 at 58720, 58721, 58722.) First, she concludes "all of the critical and foundational documents for the JEDI

Cloud acquisition were not in existence at the time of Mr. Ubhi's recusal," and states that "the documents that did exist were simply too premature to be considered a foundational document." (*Id.* at 58722.) Second (and relatedly), the Contracting Officer concludes that "based on the history of the documents, Slack conversations, and interviews with connected individuals," that Ubhi's "influence and direct edits to the documents" related to JEDI "were minimal." (*Id.* at 58720.) Finally, the Contracting Officer concludes that none of the material Ubhi learned or developed while participating on JEDI was "competitively useful." (*Id.* at 58712-16.) The Second Amended AR, however, does not contain the information relied on by the Contracting Officer to make these conclusions.

For instance, despite repeatedly referencing the "Google Drive history," the Second Amended AR does not include the "history" of the critical and foundational documents or the documents that did exist in the Google drive at the time Ubhi participated personally and substantially in the acquisition. Indeed, just months ago, DoD told this Court it could not even provide a Google drive index without misleading the Court. (Kasper Decl., Dkt. 40-1 at 6.) DoD further told the Court it would take hundreds of hours to restore the documents to their state on a particular time. (*Id.* at 4-5.) Still further, DoD told the Court that the Google drive would reflect as the document's author whoever uploaded the document (not the creator). (*Id.*) Yet, the Contracting Officer, without providing any documentary support, suggests that she has conducted this previously problematic analysis.

Whatever may be said for the change in position, the Agency must provide the relevant documents. Although the Second Amended AR includes an undated "DoD analysis of edits made to certain documents in the Google Drive," that analysis is simply a table of "filenames" from the drive, an acquisition team member, the date, and type of edit. (AR Tab 258.) The

Agency has not provided in the Second Amended AR the underlying material from which the Agency constructed the table. The Agency also has not explained how and why the Agency included certain documents in the analysis (but not in the record) and how the Agency determined which individual performed which type of edit.<sup>4</sup>

In any event, because the Contracting Officer purportedly analyzed edits made by Ubhi to documents in the JEDI Google drive (AR Tab 221 at 58720-21) and based her conclusions on that analysis and also made sweeping conclusions about the information Ubhi accessed and when JEDI documents were created, no legitimate basis exists for DoD to refuse to produce the underlying documents available to Ubhi and all documents created or edited by Ubhi.

The Court should also require the Agency to produce the Google history repeatedly referenced by the Contracting Officer because the Contracting Officer's findings set forth in the reassessment contradict other record documents. For example, based on her "recent review of the Google Drive history," the Contracting Officer states that DoD did not create the acquisition strategy until 25 January 2018. But in the recently produced Slack messages in Tab 242, on a message with a time stamp of October 27, 2017, the DDS acquisition team including Ubhi are discussing the request of the Deputy Secretary of Defense for "a (rough) copy of the acquisition strategy," which they provided that same day. (AR Tab 242 at 60306.)

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<sup>4</sup> It is unclear how the Contracting Officer selected the referenced documents because the additional Slack messages produced in the Second Amended AR identify other documents to which Ubhi contributed that the Contracting Officer's reassessment does not mention. (*See e.g.*, AR Tab 242 at 60308 (Ubhi noting that he is "dropping dimes in the document like steph curry").) Among other documents not included in the Second Amended AR, the Slack messages reference a single cloud one pager and SPAWAR brief that Ubhi helped develop to drive the single cloud approach. (*Id.* at 60151.) To the extent the filename called "Pros & Cons – Multi vs Single – table" is related to the one-pager or SPAWAR brief referenced in the edit table, the Slack messages contradict the table as they show Ubhi participated heavily in the development of the documents. (*Compare* AR Tab 258 at 60780-81 *with* AR Tab 242 at 60100, 60101, 60108, 60151, 60166.)

2. Documents Related to the Interviews Referenced in the Contracting Officer's No-Impact Reassessment. During the re-opened investigation the Contracting Officer conducted five in-person interviews and three phone interviews "with individuals who are apropos as they 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." (AR Tab 221 at 58706.) The Contracting Officer states that the "interviews cover[ed] a range of investigative topics suitable to each individual's role" (*id.*), and that "[e]ach interviewee was asked primarily the same questions, with the exception of Mr. Rishel," Senior Attorney, DoD SOCO. (*Id.* at 58707.) The no-impact reassessment does not attach the questions that the Contracting Officer asked each interviewee, notes of the responses, or recordings of the interviews. (*Id.* at *passim*.) Nevertheless, the Contracting Officer makes several conclusions based on the interviews, including without limitation that (i) "Ubhi's influence and direct edits to documents were minimal" (*id.* at 58720), and (ii) Ubhi "wielded no undue or overarching level of influence" in JEDI decisions. (*Id.* at 58719.) In order for the Court to meaningfully assess the rationality of the Contracting Officer's conclusions, DoD should produce the questions asked of the interviewees as well as any documentation reflecting the factual statements made by them.

DOJ has refused to produce this information relied on by the Contracting Officer, claiming any interview notes are "drafts" that DoD need not include as part of the administrative record. (Email Exchange at 3 (Response to Request 8), Ex. A.) DoD's argument lacks legal and factual merit.

The underlying notes of the questions asked and notes of the factual statements made by the interviewees are not deliberative. *See generally Martins v. United States Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106 (N.D. Cal. 2013) (granting asylum attorney FOIA





request for prompt release of asylum officer's notes from interview with clients finding the notes were not deliberative, rather the notes contained factual information); *McGrady v. Mabus*, 635 F. Supp. 2d 6, 17-19 (D.D.C. 2009) (finding that United States Navy "Master Brief Sheets," which contain personnel data and summaries of individuals' performance evaluations and which the Selection Board uses to determine which Navy officers should be promoted, are not deliberative in nature because, while they are "used as a tool in the decision-making process, and serve as an important factor in the final promotion decision, ... [t]hey reveal only the data used during the process, not the substance of the deliberations"). Rather, any such interview notes would reveal the information learned by the Contracting Officer and used during the investigation, and not the substance of any deliberations related to the Contracting Officer's determination.

Accordingly, given the questions the Contracting Officer asked and the factual statements made by the interviewees were referenced and relied on by the Contracting Officer during the no-impact reassessment, the Court should order Defendant to produce the documents to complete the record for effective and meaningful judicial review.

## V. CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests that this Court grant Plaintiff's Motion to Complete the Second Amended Administrative Record.

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