



Amazon's Protest of DoD's JEDI Cloud Computing Contract: A Legal Analysis

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In October 2019, after an approximately two-year competitive bidding procurement process, the Department of Defense (DoD) announced that it had awarded a Joint Enterprise Defense Infrastructure (JEDI) cloud services contract to Microsoft Corporation. In November 2019, Amazon Web Services, Inc. (AWS), the only other remaining bidder on the contract, filed a protest with the U.S. Court of Federal Claims (COFC) challenging DoD's award of the JEDI contract. AWS filed its protest under seal but publicly released a [redacted version](#) the following month. AWS [alleges](#) that DoD committed "egregious," "substantial and pervasive errors" in selecting Microsoft over Amazon based on the technical aspects of their proposals that, standing alone, warrant the court's reversal of the award. However, in addition to these merit-based arguments, AWS also [argues](#) that DoD's failure to evaluate appropriately the technical aspects of AWS's and Microsoft's bids was due to the improper "intervention of President Trump, Commander in Chief of the U.S. Military and head of the Executive Branch, in the JEDI procurement and award." AWS [alleges](#) that the President's intervention stemmed in part from the fact that AWS' owner, Jeffrey P. Bezos, also owns the *Washington Post*. On February 13, 2020, the COFC [issued](#) a preliminary injunction barring DoD from moving forward on the contract during the litigation.

Congress may have a keen [interest](#) in the outcome of this litigation, in part due to the significant amount of federal funds at stake—[\\$1 million at minimum, but with the maximum potential of \\$10 billion](#) over 10 years if all options are exercised. Additionally, the litigation could significantly affect DoD's [efforts](#) to modernize its computing infrastructure, which the agency has argued is directly related to its ability to meet the country's warfighting needs and maintain technological advantages over adversaries. This Legal Sidebar outlines the JEDI procurement process and analyzes the legal arguments underlying AWS's bid protest.

Background

Federal procurement statutes and regulations—notably the [Competition in Contracting Act of 1984](#) (CICA) and the [Federal Acquisition Regulation](#) (FAR), the government-wide regulation that generally applies to acquisitions by DoD and other executive branch agencies—establish largely uniform policies and procedures for how federal executive agencies acquire goods and services. The [purpose](#) of these standards is "to deliver on a timely basis the best value product or service to the [government], while

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maintaining the public’s trust and fulfilling public policy objectives,” [such as](#) the promotion of transparency, fairness, and competition. For instance, agencies [typically must](#) conduct [market research](#), such as by issuing Requests for Information (RFI) from potential sources and other interested parties, before soliciting bids and accepting proposals for procurements, and agencies [generally must](#) utilize competitive procedures to acquire goods and services.

Federal law provides [mechanisms](#) for contractors to “[protest](#)” (i.e., object to) contract awards and solicitations for failing to comply with federal law. Among other things, bid protests can [allege](#) violations of law or regulation in how an agency solicits offers for a contract, cancels such a solicitation, awards a contract, or cancels a contract. The [COFC](#) and its appellate court, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), [review](#) final agency procurement actions in accordance with the [Administrative Procedure Act](#) (APA) and will only set aside an agency’s action if it is “[arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.](#)”

Overview of the JEDI Procurement Process

In September 2017, DoD [announced](#) its intent to acquire cloud computing technology to “support unclassified, secret, and top secret information,” “to meet warfighter needs,” and “to maintain[] our military’s technological advantage.” DoD conducted market research on its cloud computing needs and the process by which those needs should be met through issuing an RFI. In March 2018, DoD issued a memorandum outlining the Department’s cloud computing needs and an overview of its acquisition strategy incorporating responses received from the RFI. Shortly thereafter, DoD issued a series of draft Requests for Proposals (RFPs) from industry for the JEDI contract. In late July 2018, after [assessing](#) hundreds of industry comments and questions received in response to the drafts, DoD issued a final JEDI RFP, which established that DoD would select the bid that offered the best value to the government based on nine factors. These included: six technological factors, such as the bidder’s ability to provide cloud computing access in war zones and similar operationally difficult environments; a small business participation factor; a demonstration factor in which the bidder demonstrates the ability to perform the six technological factors with 24-hour’s notice; and finally a contract price factor.

DoD [received](#) proposals from Oracle America, Inc., International Business Machines Corporation (IBM), AWS, and Microsoft. However, DoD eliminated IBM and Oracle from contention in March 2019 after determining that their initial proposals were technically deficient. In the Spring and Summer of 2019, DoD evaluated both Microsoft’s and AWS’s proposals under all nine factors and engaged in final discussions with both companies. In October 2019, DoD awarded Microsoft the JEDI contract.

Amazon’s Merits-Based Allegations

In its bid protest, AWS alleges seven violations of law related to DoD’s award of the JEDI contract to Microsoft. Counts One through Four are merit-based alleged violations of the [APA](#). Under Counts One and Two, AWS argues that DoD acted arbitrarily and capriciously by failing to evaluate fairly both AWS’s and Microsoft’s proposals under the JEDI solicitation. [According to AWS](#), “DoD . . . unreasonably, repeatedly deviat[ed] from the RFP’s evaluation criteria in order to indicate falsely that Microsoft’s cloud solution is in the same league as AWS’s market-leading solution,” and that, had DoD assessed the two proposals rationally, “DoD would have awarded the JEDI Contract to AWS.” In [Count Three](#), AWS alleges DoD acted arbitrarily and capriciously in violation of the APA by taking “affirmative steps to deprive AWS of its competitive advantage over Microsoft . . . [to] justify its award to a technically inferior competitor.” AWS cites, among other issues, the fact that, absent any apparent technical justification for doing so, DoD determined that AWS could not use the classified cloud apparatus it uses for other existing government contracts for the JEDI proposal and failed to consider AWS’s past performance as [required](#) under the FAR. In the heavily redacted [Count Four](#), AWS alleges that DoD violated the APA by acting arbitrarily and

irrationally when making its “best value for the government” decision due to “numerous prejudicial errors” made when evaluating the proposals.

AWS’s Bad Faith-Based Allegations

AWS final three allegations relate to the President’s actions, which allegedly improperly and unlawfully affected DoD’s JEDI procurement decisions to AWS’s detriment. In [Count Five](#), AWS alleges that the President’s “bias against AWS” prompted DoD procurement personnel to act arbitrarily, capriciously, and unlawfully when evaluating AWS’s and Microsoft’s proposals, ultimately causing AWS to be “unfairly deprived” of the JEDI contract. AWS alleges in [Count Six](#) that DoD violated acquisition laws and regulations that prohibit conflicts of interest. These alleged conflicts of interest stem from “repeated” instances of Administration personnel, such as former Defense Secretary Mattis, losing their jobs when they “do not follow President Trump’s directives.” According to AWS, “[t]he fact that the [JEDI contract] decision makers knew that their continued employment likely depended on selecting Microsoft” violated both a criminal law, [18 U.S.C. § 208](#), and federal regulation, [5 C.F.R. § 2635.403\(c\)](#), which bar DoD and other federal employees from substantively taking part in government actions that would affect them financially. Furthermore, AWS argues that DoD procurement personnel failed to evaluate both their and Microsoft’s proposals impartially in violation of [FAR § 3.101-1](#) or in accordance with the contract solicitation’s evaluation standards in violation of [FAR § 15.305](#). Finally, in [Count Seven](#), AWS contends that DoD violated an implied contract of good faith and fair dealing by failing “to consider all bids fairly and honestly” through the alleged arbitrary, capricious, and irrational procurement actions.

To support these bad-faith allegations, AWS’s protest [outlines](#), among [other things](#), a series of negative tweets and public statements the President directed at Amazon, Bezos, and the *Washington Post*, which AWS argues was motivated in part from negative press coverage he has received from the *Post*. The protest [cites](#) his references to the *Washington Post* as an “enemy of the people” that Bezos purchased to use as a “tax shelter” and “lobbyist weapon.” The bid protest also [cites](#) a July 2019 [press conference](#) during which the President stated that he was going to “be asking [DoD] to look very closely” at the JEDI procurement process due to “tremendous complaints about the contract with the Pentagon and with Amazon.” Two weeks after that press conference, newly [confirmed](#) Defense Secretary Mark Esper, “announced that he ordered a re-review of the JEDI RFP process,” citing concerns about the procurement process raised by “folks in the administration” and “people in the White House,” [according](#) to news reports cited by AWS. As the President and Defense Secretary were making these statements, DoD procurement personnel altered JEDI requirements in ways that AWS [argues](#) were detrimental to AWS’s proposal and were not technically justified. AWS [contends](#) that these changes were made by DoD employees who were “subject to the President’s influence on multiple fronts,” and that, “[n]o matter how much [they] may have tried to discharge their duties impartially . . . no amount of compartmentalization, segregation, or anonymization could have isolated the decisions-makers from the clear and unmistakable conflict of interest that stemmed from the very highest levels of power in DoD.”

Legal Analysis

To succeed on its merits-based allegations, AWS would have to overcome the heavy burden of proof and significant deference the COFC typically applies when evaluating negotiated “best value” contracts. As the protestor, AWS holds the burden of proving that DoD violated the APA’s arbitrary, capricious, abuse of discretion, or noncompliance with the law standard. The COFC generally will [set aside](#) a procurement decision “if it lacked a rational basis or if the agency’s decision-making involved a clear and prejudicial violation of statute, regulation or procedure.” The APA standard for bid protests is “[highly deferential](#)” to the procuring agency. The level of deference is even greater in a negotiated, “best value” procurement like DoD’s JEDI contract “[because](#) the contracting officer engages in what is inherently a judgmental process” and “[ha\[s\]](#) substantial discretion to determine which proposal represents the best value for the

government.” The court does not replace the reasoned judgment of contracting officers or provide relief unless the protester has shown that a substantial mistake impaired the procurement process.

While the APA standard in this context is highly deferential to procurement officials, “such deference is not unlimited. Whenever a procurement decision is without a rational basis or is based upon a clear violation of law, that decision must be set aside.” This can occur, [for instance](#):

when the agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The burden applicable to AWS’s bad-faith based allegations is arguably even higher. To succeed on these allegations, AWS would have to show that procurement personnel acted contrary to law in violation of the APA by exercising bad faith in awarding the contract to Microsoft. However, under COFC [jurisprudence](#), government personnel are presumed to act in good faith and overcoming that presumption requires a high burden of proof [based](#) on “clear and convincing evidence[, which] has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is *highly probable*” [emphasis in original]. The Federal Circuit, in the 2002 decision *Am-Pro Protective Agency, Inc. v. United States*, explained that proving bad faith in this context generally requires “evidence of some specific intent to injure the plaintiff.” The *Am-Pro* court synthesized relevant case law, stating:

[I]n *Gadsden v. United States*, the court compared bad faith to actions which are “motivated alone by malice.” In *Knotts [v. United States]*, the court found bad faith in a civilian pay suit only in view of a proven “conspiracy . . . to get rid of plaintiff.” Similarly, the court in *Struck Constr. Co. v. United States*, found bad faith when confronted by a course of Governmental conduct which was “designedly oppressive.” But in *Librach [v. United States]*, the court found no bad faith because the officials involved were not “actuated by animus toward the plaintiff.”

Despite these high burdens, the COFC [granted](#) AWS’s motion for a preliminary injunction preventing DoD from moving forward on the contract during the litigation, which required a court determination that AWS is [likely to succeed](#) on the merits of its claims. The parties in the litigation, including Microsoft as intervenor, have jointly [requested](#) that the COFC rule on these allegations on an expedited basis. The parties expect to submit all filings necessary to brief the court fully on the protest by early March.

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