No. 20-1057

In the Supreme Court of the United States

ORACLE AMERICA, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under the provision in the Administrative Procedure Act stating that "due account shall be taken of the rule of prejudicial error" when reviewing agency action, 5 U.S.C. 706, a court may deny a bid protest when it determines that the plaintiff was not prejudiced by an allegedly improper term in the agency's solicitation because the plaintiff was ineligible for a contract award under a separate, lawful term of the solicitation.

2. Whether a court may defer to a federal contracting officer's factual determinations, following an investigation, that potential conflicts of interest on the part of certain agency employees did not affect the procurement.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Federal Claims:

Amazon Web Services, Inc. v. *United States*, No. 19-cv-1796 (filed Nov. 22, 2019)

United States Government Accountability Office:

Oracle America, Inc., B-416657 *et al.*, 2018 CPD ¶ 391 (Comp. Gen. Nov. 14, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 975 F.3d 1279. The opinion of the Court of Federal Claims (Pet. App. 40a-120a) is reported at 144 Fed. Cl. 88. Prior orders of the Court of Federal Claims are reported at 143 Fed. Cl. 131 and 146 Fed. Cl. 606. Another prior order of the Court of Federal Claims is not published in the Federal Claims Reporter but is available at 2019 WL 354705.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari

was filed on January 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner protested a Department of Defense (DoD) procurement at the Government Accountability Office (GAO). GAO denied that bid protest. Petitioner then filed a complaint in the Court of Federal Claims. The Court of Federal Claims denied petitioner's protest and granted judgment in favor of the government on the administrative record. Pet. App. 40a-120a. The court of appeals affirmed. *Id.* at 1a-39a.

1. a. This case arises out of the Joint Enterprise Defense Infrastructure (JEDI) Cloud procurement, which is "directed to the long-term provision of enterprise-wide cloud computing services to [DoD]." Pet. App. 2a. The procurement contemplated the award of a single indefinite-quantity contract—called a "task order contract" (if for services) or "delivery order contract" (if for property). See 10 U.S.C. 2304d. Such a contract "does not procure or specify a firm quantity of services [or property] (other than a minimum or maximum quantity)," but instead "provides for the issuance of orders for the performance of tasks [or the delivery of property] during the period of the contract." 10 U.S.C. 2304d(1); see 10 U.S.C. 2304d(2).

Congress has expressed a preference, though not a requirement, that task order and delivery order contracts be awarded to multiple sources, rather than a single source. For example, Congress required the issuance of regulations that "establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts." 10 U.S.C. 2304a(d)(4)(A). But Congress also required any such regulations to "establish criteria for determining when award of multiple

task or delivery order contracts would not be in the best interest of the Federal Government." 10 U.S.C. 2304a(d)(4)(B). Accordingly, the Federal Acquisition Regulation sets forth a list of six circumstances when agencies "must not use the multiple award approach" when awarding indefinite-quantity contracts. 48 C.F.R. 16.504(c)(1)(ii)(B).

Here, the contracting officer determined that three of those circumstances were present, and that the JEDI Cloud procurement should therefore follow the single-award approach. First, the contracting officer found that "based on [her] knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made." Pet. App. 55a (brackets and citation omitted); see 48 C.F.R. 16.504(c)(1)(ii)(B)(2); C.A. App. 100,457-100,459. She explained that "a vendor is more likely to offer favorable price terms and make the initial investment to serve DoD's needs if it can be assured it will recoup its investment through packaging prices for classified and unclassified services." Pet. App. 55a.

Second, the contracting officer found that "the expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards." Pet. App. 55a (brackets and citation omitted); see 48 C.F.R. 16.504(c)(1)(ii)(B)(3); C.A. App. 100,459-100,461. She "observed that administering multiple contracts is costlier and less efficient," Pet. App. 55a, and estimated that over a potential ten-year contract award, a single-award approach would save more than $500 million in administrative costs, C.A. App. 100,460. She also observed based on historical averages that "a task order under [a] single award [approach] takes 30 days to place," but "a task order under [a] multiple

award [approach] takes 100 days"—a difference that would result in cumulative delays of more than 770 years over the estimated 4032 task orders called for by the solicitation. *Ibid.*

Third, the contracting officer found that "multiple awards would not be in the best interests of the Government." Pet. App. 55a (brackets and citation omitted); see 48 C.F.R. 16.504(c)(1)(ii)(B)(6); C.A. App. 100,461-100,464. She explained that "[b]ased on the current state of technology," awarding multiple contracts would (i) "increase security risks"; (ii) "create impediments to operationalizing data through data analytics, machine learning," and "artificial intelligence"; and (iii) "introduce technical complexity in a way that both jeopardizes successful implementation and increases costs." Pet. App. 55a-56a (citation omitted). The deputy director of the Defense Digital Service signed the contracting officer's memorandum, "[a]ttesting to the technical findings that support the [contracting officer's] analysis" that multiple awards would not be in the government's best interests. C.A. App. 100,464.

Congress has further directed that agencies generally may not award single-source task or delivery order contracts estimated to exceed a certain dollar threshold ($100 million in the statute, inflation-adjusted to $112 million here) "unless the head of the agency" makes at least one of four specified determinations "in writing." 10 U.S.C. 2304a(d)(3)(A) (Supp. I 2019)*; see 41 U.S.C.

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* Until recently, the four determinations in Section 2304a(d)(3) were contained in Subparagraphs (A) through (D). See 10 U.S.C. 2304a(d)(3) (2018). Effective December 20, 2019, Congress redesignated those Subparagraphs as Clauses (i) through (iv) in Subparagraph (A). See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, Div. A, Tit. VIII, § 816, 133 Stat. 1487. For

1908 (requiring inflation adjustment). Here, the Under Secretary, exercising the delegated authority of the head of the agency, made a written determination that a single-source contract was justified for the JEDI Cloud procurement because "the contract provides only for firm, fixed price task orders or delivery orders for * * * services for which prices are established in the contract for the specific tasks to be performed." 10 U.S.C. 2304a(d)(3)(A)(ii)(II); see Pet. App. 56a-57a.

b. In addition to providing for the award of a single contract, the JEDI Cloud solicitation included seven "gate criteria" that an offeror had to meet at the threshold. Pet. App. 61a. One of those has been called "Gate 1.2." *Id.* at 2a. Among other things, Gate 1.2 required an offeror to demonstrate that it had "at least three existing physical commercial cloud offering data centers within the United States, each separated from the others by at least 150 miles," and each supporting certain commercial cloud offerings that had been qualified as meeting certain security requirements "at the time of proposal." *Ibid.* Those requirements represented DoD's longstanding "minimum security level for processing or storing the Department's least sensitive information." *Id.* at 3a. The deputy director explained in a memorandum the agency's view that "if an offeror could not satisfy th[os]e security requirements * * * at the time of proposal, that offeror would not be able to satisfy the more stringent security requirements the offeror would be required to meet shortly after award." *Id.* at 22a-23a. It is undisputed that petitioner did not satisfy the minimum security requirements set forth in

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convenience, this brief uses the current designations, as does the court of appeals' opinion (but not the opinion of the Court of Federal Claims that predated the redesignation).

Gate 1.2 "at the time of proposal." *Id.* at 2a; see *id.* at 3a, 42a.

c. During the solicitation process, potential conflicts of interest on the part of three former agency employees came to light, all of them related to past or future employment with one of the offerors for the JEDI Cloud contract, Amazon Web Services (Amazon). See Pet. App. 11a. Under the applicable regulations, contracting officers must determine whether a "reported violation or possible violation [of certain federal conflict-of-interest statutes] has any impact on the pending award or selection of the contractor." 48 C.F.R. 3.104-7(a). The regulations recognize that the "exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it." 48 C.F.R. 9.505; see 48 C.F.R. 1.602-2 and (b) (providing that "contracting officers should be allowed wide latitude to exercise business judgment" in "ensuring performance of all necessary actions for effective contracting," including "[e]nsur[ing] that contractors receive impartial, fair, and equitable treatment").

The first employee, Deap Ubhi, worked for DoD from August 2016 to November 2017, but both before and after that tenure worked for Amazon. See Pet. App. 28a. The contracting officer found that Ubhi "was involved in marketing research activities for the JEDI Cloud procurement and that he participated in drafting and editing some of the first documents shaping the procurement." *Ibid.* In October 2017, Ubhi recused himself from participation in the JEDI Cloud procurement, but not before he had begun to negotiate his

return to Amazon. *Id.* at 28a-29a. The contracting officer therefore determined that Ubhi "had violated [48 C.F.R.] 3.101-1 and possibly other statutory and regulatory provisions governing conflicts of interest, including 18 U.S.C. § 208." *Id.* at 29a.

The contracting officer determined, however, that Ubhi's "conflict of interest had not tainted the JEDI Cloud procurement," notwithstanding his "troubling" and "'disconcerting'" behavior. Pet. App. 29a (citation omitted). The contracting officer explained that "the restrictions on [Ubhi's] involvement based on his prior employment had expired by the time he began working on the procurement" and that Ubhi had not "shared any information with the team at [Amazon] that was working on the JEDI Cloud procurement." *Id.* at 28a-29a. When he returned to Amazon, Ubhi "did not work on the JEDI Cloud proposal team or in [Amazon's] Federal Business Sector or its DoD Programs section." *Id.* at 29a. The contracting officer also explained that Ubhi's "participation in the procurement was limited," *ibid.*; that his "period of work on the preliminary planning stage of the JEDI Cloud procurement did not introduce bias in favor of [Amazon]," *id.* at 30a; and that he "lacked the technical expertise to substantively influence the JEDI Cloud procurement," *id.* at 78a. Finally, she explained that "most importantly, all the key decisions for the JEDI Cloud procurement, [including] whether to award one or multiple contracts, were made well after Mr. Ubhi recused himself, after being vetted by numerous DoD personnel to ensure that the JEDI Cloud [solicitation] truly reflects DoD's requirement." *Ibid.* (citation omitted).

The second employee, Anthony DeMartino, had been a consultant for Amazon before joining DoD and "was

prohibited by applicable ethics rules from participating in matters involving [Amazon] throughout his tenure at the Department." Pet. App. 35a. DeMartino participated in "ministerial/administrative actions (such as scheduling meetings, editing/drafting public relations, etc.)," which a DoD ethics office determined "did not constitute participating in the JEDI Cloud acquisition itself." *Ibid.* (brackets omitted). The contracting officer found that DeMartino's "involvement in the JEDI Cloud procurement" was "'ministerial and perfunctory,'" that he had "'provided no input into the JEDI Cloud acquisition documents,'" and that his "limited role" "'did not negatively impact the integrity' of the procurement." *Ibid.*

The third employee, Victor Gavin, was offered a job with Amazon in March 2018, which he eventually accepted. Pet. App. 37a. In April 2018, however, Gavin "attended a meeting at which the attendees discussed the Draft Acquisition Strategy for the JEDI Cloud procurement." *Ibid.* The contracting officer recalled that at the meeting, Gavin "did not advocate for any particular vendor but instead advocated for a multiple-award approach." *Ibid.* The contracting officer found that Gavin violated 48 C.F.R. 3.101 and possibly 18 U.S.C. 208, but also found that his "involvement in the JEDI Cloud project did not taint the procurement." Pet. App. 37a. The contracting officer explained that "Gavin had limited access to the Draft Acquisition Strategy, did not furnish any input to that document, did not introduce bias into any of the meetings that he attended, and did not disclose any competitively useful information to [Amazon]." *Ibid.*

d. Petitioner filed a pre-bid protest with GAO. See Pet. App. 3a. As relevant here, petitioner challenged

DoD's decision to award a single-source contract, and alleged that the employees with conflicts of interest improperly tainted the process because they "influenced the procurement by affecting the decision to use a single award and the selection of the gate criteria." *Id.* at 27a.

GAO denied petitioner's protest. 2018 CPD ¶ 391. As relevant here, GAO determined that DoD's single-award approach complied with 10 U.S.C. 2304a(d) and 48 C.F.R. 16.504. 2018 CPD ¶ 391, at *6-*9. GAO also determined that the agency "clearly articulated a reasonable basis for the [Gate] 1.2" security criteria, and that petitioner's "complaints regarding [those] criteria are without merit." *Id.* at *11. And GAO rejected petitioner's challenges to the contracting officer's determinations regarding the alleged conflicts of interest. *Id.* at *12-*13.

2. Petitioner filed a complaint in the Court of Federal Claims, which granted judgment in favor of the government on the administrative record. Pet. App. 40a-120a.

a. The Court of Federal Claims found the contracting officer's determination that the applicable regulations required a single-source JEDI contract to be "completely reasonable." Pet. App. 91a; see *id.* at 89a-91a. But the court concluded that DoD erred in finding that "the contract provides only for firm, fixed price task orders" for "services for which prices are established in the contract for the specific tasks to be performed," 10 U.S.C. 2304a(d)(3)(A)(ii) and (II), as required to award a single-source contract exceeding $112 million. See Pet. App. 93a-94a. Although the court acknowledged that the solicitation "provide[d] only for firm, fixed price task orders," the court explained that

the solicitation also contained a "technology refresh provision," under which the awardee could potentially be required to provide "services not contemplated at the time of initial award * * * at a price not 'higher than the price that is publicly-available in the commercial marketplace.'" *Id.* at 93a (citation omitted). That provision, the court held, "appears to be at odds with" Section 2304a. *Id.* at 95a.

The Court of Federal Claims nevertheless found that petitioner was not prejudiced by the decision to award a single-source rather than a multiple-source contract, because petitioner concededly could not satisfy the minimum security requirements in Gate 1.2. Pet. App. 96a-98a. The court explained that those requirements and the attendant security concerns were "explicit" in Gate 1.2, and that it had "no reason to doubt" the conclusion that those "security requirements are the minimum that will be necessary to perform even the least sensitive aspects of the JEDI Cloud project." *Id.* at 97a. Based on its review of the "many" statements and acquisition documents in the record, the court found that "although this criteria presumes a single award, the only logical conclusion is that, if multiple awards were made, the security concerns would ratchet up, not down." *Ibid.* Accordingly, the court concluded that petitioner was "not prejudiced by the decision to make a single award" because it "would not stand a better chance of being awarded this contract if the agency determined that the procurement must be changed to multiple award." *Ibid.*; see *id.* at 106a (concluding that "because [petitioner] could not meet the agency's properly imposed security requirements," the court could "confidently" say that petitioner would not "have had a better

chance of competing for" a hypothetical multiple-source award).

b. The Court of Federal Claims also found the contracting officer's determination that the alleged conflicts of interest "did not taint the process" to be "[r]ational and [c]onsistent" with the applicable regulations. Pet. App. 107a; see *id.* at 107a-119a. The court acknowledged that the "allegations are certainly sufficient to raise eyebrows," and explained that it would be "fully prepared to enforce the agency's obligation to redo part or all of this procurement if the [contracting officer's] conclusion that there was no impact was unreasonable in any respect." *Id.* at 107a-108a. But "after a detailed examination of the record," the court determined that the contracting officer "understood the legal and factual questions and considered the relevant evidence," and that her "work was thorough and even-handed." *Id.* at 108a; see *id.* at 108a-119a (examining in detail each of the contracting officer's conclusions about alleged individual and organizational conflicts, including six different conclusions about Ubhi). In contrast, the court explained that petitioner's challenge to the contracting officer's "thorough and even-handed" findings was based on "cherry pick[ing] * * * a few suggestive sound bites" from the record. *Id.* at 108a.

3. The court of appeals affirmed. Pet. App. 1a-39a.

a. The court of appeals agreed with the Court of Federal Claims that the JEDI Cloud procurement did not "provide[] only for firm, fixed price task orders or delivery orders for services for which prices are established in the contract" for the specific tasks to be performed, and that a single-source contract was therefore unwarranted. Pet. App. 14a (citation and ellipsis omit-

ted). But the court of appeals also agreed that petitioner was not prejudiced by that error. See *id.* at 16a-18a. Specifically, the court determined that the Court of Federal Claims was not "clearly erroneous" in making the factual finding that DoD "would have included Gate 1.2 even if it had modified the solicitation to allow for multiple awards, and that [petitioner] therefore would not have had a substantial chance of securing the contract." *Id.* at 18a.

The court of appeals rejected petitioner's contention that the very making of such a finding was contrary to *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), which held that "judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Department of Homeland Security* v. *Regents of the University of California*, 140 S. Ct. 1891, 1907 (2020) (citation omitted). The court explained that *Chenery* "does not invariably require a remand to the agency whenever a court holds that the agency's action was based on legally improper grounds." Pet. App. 16a. Instead, "principles of harmless error apply to judicial review of agency action," and a court may therefore affirm agency action "so long as it is clear that the agency would have reached the same decision if it had been aware that the ground it invoked was legally unavailable, or if the decision does not depend on making a finding of fact not previously made by the agency." *Ibid.*

Applying those principles here, the court of appeals observed that "based on the evidence in the administrative record," the Court of Federal Claims found that DoD "would have stuck with Gate 1.2 even if it had been required to conduct the procurement on a multiple-award basis," in particular because "'if multiple awards were made, the security concerns would ratchet up, not

down.'" Pet. App. 16a-17a (citation omitted). The court of appeals explained that "[i]n light of the Claims Court's careful consideration of the record evidence," its "conclusion that [DoD] would have included Gate 1.2 even if it had modified the solicitation to allow for multiple awards, and that [petitioner] therefore would not have had a substantial chance of securing the contract, is not clearly erroneous." *Id.* at 17a-18a.

b. The court of appeals also agreed with the Court of Federal Claims' conclusion "that the contracting officer's investigation [of the alleged conflicts of interest] was thorough and her 'no effect' determination was reasonable." Pet. App. 24a; see *id.* at 24a-39a. The court of appeals rejected petitioner's suggestion that *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), "sets forth a per se rule that conflicts of interest that violate the federal criminal conflict-of-interest statute invalidate any government contracts to which the conflicts relate." Pet. App. 25a (citation omitted). Instead, the court explained that *Mississippi Valley* "is best read as providing that conflicts of interest invalidate government contracts only if the conflicts materially affect the contracts." *Ibid.* The court also explained that a contracting officer's determination about whether conflicts materially affected a solicitation "will be upheld unless it is 'arbitrary, capricious, or otherwise contrary to law.'" *Id.* at 27a (citation omitted).

The court of appeals ultimately "agree[d] with the Claims Court that the conflict of interest problems" identified by petitioner "had no effect on the JEDI Cloud solicitation." Pet. App. 27a. The court of appeals reviewed the relevant findings with respect to the three

individuals with conflicts, see *id.* at 28a-39a, and rejected each of petitioner's challenges. For example, with respect to Ubhi, the court found "meritless" petitioner's contention that the contracting officer " 'failed to consider an important aspect of the problem'" by not waiting for an inspector-general investigation to conclude, *id.* at 30a-31a; found "facile" petitioner's assertion that the Court of Federal Claims "upheld the contracting officer's determination * * * on a ground different from that adopted by the contracting officer," *id.* at 32a; and found "no force to [petitioner's] argument" that the "no-impact determination 'runs counter to the evidence before the agency,'" *id.* at 33a. The court of appeals reached similar conclusions on petitioner's challenges to the findings with respect to DeMartino and Gavin. See *id.* at 35a-39a.

ARGUMENT

Petitioner contends (Pet. 13-34) that the court of appeals erred in affirming the Court of Federal Claims' holdings that (1) the agency's decision to award a single-source contract did not prejudice petitioner, given that petitioner could not qualify for a contract under Gate 1.2 anyway, and (2) three DoD employees' conflicts of interest in potential violation of 18 U.S.C. 208 did not materially affect the procurement. Those rulings are correct and do not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. a. Assuming for the sake of argument that the agency's single-source solicitation violated 10 U.S.C. 2304a(d)(3), but see pp. 23-25, *infra*, the court of appeals correctly determined that the Court of Federal Claims' no-prejudice finding was not clearly erroneous.

Congress has directed that "[i]n any action" by "an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract," "courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5." 28 U.S.C. 1491(b)(1) and (4). Section 706, which is part of the Administrative Procedure Act (APA), mandates that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. The "APA's reference to 'prejudicial error' is intended to 'sum up in succinct fashion the "harmless error" rule applied by the courts in the review of lower court decisions as well as of administrative bodies.' " *Shinseki* v. *Sanders*, 556 U.S. 396, 406 (2009) (brackets, citation, and emphasis omitted). Harmless-error review generally requires "case-specific application of judgment, based upon examination of the record," without resort to "mandatory presumptions and rigid rules." *Id.* at 407. The party attacking an agency decision ordinarily bears the burden of demonstrating prejudice. *Id.* at 409.

The court of appeals properly applied the "rule of prejudicial error" in this case in finding that petitioner did not demonstrate prejudice. 5 U.S.C. 706. Under longstanding Federal Circuit precedent that petitioner does not directly challenge (cf. Pet. 17), "[t]o establish prejudicial error, a party must show that 'but for the error, it would have had a substantial chance of securing the contract.'" Pet. App. 17a (citation omitted); see *id.* at 17a n.3. Here, the court of appeals correctly affirmed the finding of the Court of Federal Claims that petitioner would *not* have had a "substantial chance" of securing the JEDI Cloud contract even had it been a multiple-source solicitation, for the simple reason that petitioner—*by its own admission*—did not satisfy the

minimum security requirements of Gate 1.2 at the time of the solicitation. *Id.* at 18a; see *id.* at 63a. Under the terms of the solicitation, therefore, the agency would have been *required* to eliminate petitioner from the competition. *Id.* at 60a-61a, 106a; see 10 U.S.C. 2305(b)(1) ("The head of an agency shall * * * make an award based solely on the factors specified in the solicitation."). As petitioner acknowledges (Pet. 9), another offeror was eliminated for failure to satisfy Gate 1.2 at the time of the solicitation. Petitioner provides no sound basis to believe that it would have fared any differently.

Instead, petitioner speculates (Pet. 18-20) that the agency might have relaxed or eliminated the minimum security requirements in Gate 1.2 had it conducted a multiple-award procurement. Setting aside that such speculation cannot satisfy petitioner's burden to demonstrate prejudice under 5 U.S.C. 706, petitioner's conjecture is belied by the record. As the agency repeatedly explained, the security requirements in Gate 1.2 represented DoD's longstanding "minimum security level for processing or storing the Department's least sensitive information." Pet. App. 3a; see *id.* at 97a (observing that those security requirements were "the minimum that will be necessary to perform even the least sensitive aspects of the JEDI Cloud project"). And the agency made clear that an offeror had to satisfy the Gate 1.2 security requirements at the time it submitted a proposal because "if an offeror could not satisfy th[os]e security requirements * * * at the time of proposal, that offeror would not be able to satisfy the more stringent security requirements the offeror would be required to meet shortly after award." *Id.* at 22a-23a.

Contrary to petitioner's speculation (Pet. 18-20), neither of those truths about data security would dissipate if the agency were to solicit multiple sources for the JEDI Cloud project. See C.A. App. 100,947-100,948, 100,955-100,956. Quite the contrary: the contracting officer and the deputy director both explained that "multiple awards increase security risks," Pet. App. 56a (citation omitted)—a factual finding that petitioner did not challenge below. The Court of Federal Claims likewise found, based on "[m]any of the acquisition documents" in the record, that "use of multiple cloud service providers exponentially increases the challenge of securing data." *Id.* at 97a. The court thus correctly observed that "the only logical conclusion is that, if multiple awards were made, the security concerns would ratchet up, not down." *Ibid.* That is why the court could "confidently" say that DoD would have included the minimum security requirements in Gate 1.2 even had it allowed for multiple awards. *Id.* at 106a. And that is why the court of appeals affirmed that finding on the basis of "the Claims Court's careful consideration of the record evidence." *Id.* at 18a; see *id.* at 17a-18a. The lower courts thus engaged in precisely the "case-specific application of judgment, based upon examination of the record," called for by Section 706. *Sanders*, 556 U.S. at 407.

Finally, petitioner repeatedly suggests (Pet. 10, 17, 20) that the Court of Federal Claims' determination about prejudice relied on factual assertions of the government's lawyer rather than the record evidence. That suggestion is baseless. The colloquy that petitioner quotes (Pet. 10) came during a discussion about whether

the agency would, in a multiple-source solicitation, retain a "surge capacity" requirement in Gate 1.1—not the data-security requirements in Gate 1.2:

> MR. RAYEL: Well, the—what the [Gate] 1.1 is designed to show is that the offeror is able to meet that [specified surge capacity]. * * * [The agency] still needs to be able to have this surge capacity, it still needs the ongoing innovation from the commercial marketplace. So keeping this as a gate criteria is rational.
>
> THE COURT: Well, I'm not with you yet on the surge capacity. Why does one potential awardee have to be able to accommodate 100 percent of the surge capacity unless you're assuming there's only going to be one?
>
> MR. RAYEL: Well, it may be that the agency needs a—needs to quickly get to this surge capacity due to a disaster or something, a war or something to that effect. So they may need to go and do a quick task order to one offeror in that case so—because there will be situations.
>
> THE COURT: I understand that we're on Rayel on the facts as opposed to the administrative record.
>
> MR. RAYEL: Well, yeah, you asked me, Your Honor.

C.A. App. 2296. The surge-capacity requirement in Gate 1.1 was irrelevant to the no-prejudice finding arising from petitioner's inability to satisfy the security requirements in Gate 1.2. Moreover, the answer that prompted the court's quip about "Rayel on the facts" actually *was* in the administrative record. See *id.* at

100,944 (memorandum in the administrative record explaining that a single offeror should be "capable of providing the full scope of services even under surge capacity during a major conflict or natural disaster event" to avoid "risk [to] future military operations").

b. Rather than rebut any of the record evidence or the application of prejudicial-error review to the facts here, petitioner asserts (Pet. 15-20) that such review is foreclosed by *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). That assertion is incorrect. As petitioner observes, "*Chenery* stands for the 'foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action.'" Pet. 16 (citation omitted). But the lower courts here did not "uphold" the single-award approach on some alternative ground that the agency did not rely on. Indeed, they did not "uphold" the single-award approach at all. Instead, the lower courts held that the single-award approach was "not in accordance with law"—but then, in the next step of the analysis, correctly took "due account" of "prejudicial error," as mandated by the APA. 5 U.S.C. 706 and (2)(A).

Chenery has nothing to do with that separate inquiry, which by its nature requires asking a hypothetical question: whether the outcome would have been different had the error *not* been made. Requiring the agency to spell out in advance what it would do if certain of its actions (or a combination of its actions) were found to be improper would entirely defeat the purpose of taking "due account" of "prejudicial error," 5 U.S.C. 706, contrary to Congress's express directive. Unsurprisingly, this Court has never even cited *Chenery* when applying prejudicial-error review under the APA. *E.g.*, *Little Sisters of the Poor Saints Peter & Paul Home* v.

Pennsylvania, 140 S. Ct. 2367, 2385 (2020); *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2573 (2019); *National Association of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659-660 (2007).

Summarizing various decisions of this Court and various circuit courts, the court of appeals recognized that *Chenery* does not require a remand in the following circumstances:

> when the error in question "clearly had no bearing on the procedure used or the substance of decision reached"; if there is no reason to believe that the decision would have been different; if it is clear that the agency would have reached the same result; if the result is "foreordained"; if the court is not "in substantial doubt whether the administrative agency would have made the same ultimate finding with the erroneous finding removed"; or where there is no "significant chance that but for the error, the agency might have reached a different result."

Pet. App. 16a (citations omitted). The court of appeals' application of that standard to the bid-protest context—to ask whether petitioner "would have had a substantial chance of securing the contract," *id.* at 17a (citation omitted)—is entirely consistent with those precedents. See *Sanders*, 556 U.S. at 411 (recognizing that prejudicial-error review may require "an estimation of the likelihood that the result would have been different").

The application of prejudicial-error review under Section 706 does not conflict with *Chenery*. And that is particularly true when, as here, the plaintiff cannot demonstrate prejudice in a bid protest because it fails to satisfy an entirely *separate* term of the solicitation—one that the lower courts have already "uph[e]ld * * *

on the grounds that the agency invoked when it" imposed that separate term. *Michigan* v. *EPA*, 576 U.S. 743, 758 (2015). Petitioner's insistence (Pet. 19) that "courts of appeals consistently remand" cases when "the agency's legal error vitiated the single ground upon which the agency's decision rested" is a non sequitur. The "legal error" that the lower courts identified here—namely, DoD's reliance on 10 U.S.C. 2304a(d)(3)(A)(ii) to justify a single-source approach—did not "vitiate" any ground (much less "the single ground") upon which the agency's decision *to impose the minimum security requirements in Gate 1.2* rested. As the lower courts both found, that requirement would not have been relaxed (and would be even more critical) in a multiple-source solicitation. See Pet. App. 14a-24a, 96a-106a.

c. To the extent petitioner contends (see Pet. 17) that the court of appeals erred by reviewing the lower court's prejudice finding for clear error, that contention is incorrect. Clear-error review of prejudice findings in the bid-protest context is appropriate because of the inherently factual nature of the inquiry. See *U.S. Bank National Association* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 966-968 (2018). For that reason, the Federal Circuit has long reviewed prejudice determinations in bid-protest cases for clear error. *E.g.*, *CliniComp International, Inc.* v. *United States*, 904 F.3d 1353, 1359 (2018) (citing cases). To be sure, some APA prejudice inquiries requiring largely legal, not factual, determinations might be reviewable de novo. Cf., *e.g.*, *Little Sisters*, 140 S. Ct. at 2385 (finding no prejudice from agency's mistitling a document, without specifying the standard of review); *Department of Commerce*, 139

S. Ct. at 2573 (finding no prejudice from agency's sending required information to Congress in one document rather than two, without specifying the standard of review).

But when, as here, the prejudicial-error inquiry requires "case-specific application of judgment, based upon examination of the record," *Sanders*, 556 U.S. at 406, it necessarily "immerse[s] courts in case-specific factual issues," *U.S. Bank*, 138 S. Ct. at 967. The answer to the hypothetical question in bid-protest cases—whether the plaintiff would have had a substantial chance of securing a contract—invariably depends on "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Ibid.* (citation omitted).

For example, in determining that petitioner could not demonstrate prejudice given its concession that it could not satisfy the minimum security requirements in Gate 1.2, the Court of Federal Claims carefully reviewed the "many" statements and acquisition documents in the administrative record about the need for Gate 1.2 and its data-center requirements, DoD's minimum security requirements for its least sensitive information, and how the agency's security requirements ultimately would "ratchet up, not down" if there were multiple contracts. Pet. App. 97a; see *id.* at 62a-63a (discussing details of and rationales for the security requirements in Gate 1.2), 97a-100a (same). That is "about as factual sounding as any mixed question gets." *U.S. Bank*, 138 S. Ct. at 968. The court of appeals thus correctly reviewed the prejudice finding for clear error. See *ibid.*

But even if de novo review were appropriate, petitioner has not explained how a fresh look at the record evidence on appeal would have resulted in a different

conclusion as to prejudice. Cf. Pet. App. 18a (emphasizing the Court of Federal Claims' "careful consideration of the record evidence"). Petitioner has conceded at every stage of this case that it did not satisfy the minimum security requirements set forth in Gate 1.2 at the time of the solicitation. Accordingly, any reviewing court would conclude—no matter the standard of review—that far from having a "substantial chance" of securing a contract, petitioner would have had no chance at all. Cf. Pet. 9 (acknowledging that IBM was eliminated from consideration because it could not satisfy Gate 1.2).

d. This case would also be a poor vehicle in which to address the first question presented because the court of appeals' ruling can be affirmed on the alternative ground that the agency's single-source solicitation did not violate 10 U.S.C. 2304a(d)(3) in the first place. As GAO correctly determined, a single-source approach was proper because the agency sought to award an indefinite-quantity contract that "provides only for firm, fixed price task orders" for "services for which prices are established in the contract for the specific tasks to be performed," 10 U.S.C. 2304a(d)(3)(A)(ii)(II). See 2018 CPD ¶ 391, at *10-*12. The Court of Federal Claims and court of appeals incorrectly reached the contrary conclusion by relying on the contract's "technology refresh provision," which contemplates the possibility of future services under the contract. Pet. App. 93a; see *id.* at 14a. According to the lower courts, that provision precludes compliance with Section 2304a(d)(3)(A)(ii) because "'established in the contract'" means "'established' *at the time of contracting*." *Id.* at 95a (emphasis added; citation omitted); see *id.* at

14a ("[T]he prices for those services must be established in the contract *at the time of award*.") (emphasis added).

But the statute does not contain the additional, italicized restriction that the lower courts read into the text. Instead, the statutory text requires only that any service actually provided under the contract be pursuant to a firm, fixed price task order, and that those orders be for "services for which prices are established in the contract." 10 U.S.C. 2304a(d)(3)(A)(ii)(II). The latter requirement is satisfied as long as a price is established in the contract *at the time the service is performed* under the task order. As the Court of Federal Claims acknowledged, every future service under the contract, including under the technology-refresh provision, would be provided under "only firm, fixed price task orders," and would be provided at a fixed price specified in the contract that could not be changed without the government's approval. Pet. App. 94a. That is all the statute requires. As GAO correctly explained, a requirement that every potential future service and price be listed in the contract at the time of the award (as opposed to the time the service is performed) would in effect "preclude any modifications to single-award [indefinite-quantity] contracts" awarded pursuant to Section 2304a(d)(3)(A)(ii). 2018 CPD ¶ 391, at *7. That would make such long-term contracts, especially ones (as here) involving advanced and rapidly changing computing technology, practically unworkable.

The government preserved the foregoing Section 2304a(d)(3) argument in the lower courts, see, *e.g.*, Gov't C.A. Br. 45-48, and that argument provides an alternative basis for affirming the judgment below. At a minimum, the presence of the antecedent question

whether the single-source approach even violated Section 2304a(d)(3) in the first place makes this a poor vehicle for determining whether petitioner was prejudiced by any such violation.

Petitioner suggests (Pet. 20) that review is nevertheless warranted because the court of appeals and Court of Federal Claims have "repeatedly upheld unlawful procurement decisions" for lack of prejudicial error. But 28 U.S.C. 1491(b)(4) expressly requires courts to review agency decisions in bid-protest actions under "the standards set forth in section 706 of title 5"—which in turn explicitly states that "due account *shall* be taken of the rule of prejudicial error." 5 U.S.C. 706 (emphasis added); see *Shapiro* v. *McManus*, 577 U.S. 39, 43 (2015) (observing that "the mandatory 'shall' normally creates an obligation impervious to judicial discretion") (citation and ellipsis omitted). Petitioner neither quotes the text of Section 706 nor explains how courts may refuse to undertake the prejudicial-error analysis that Congress has commanded.

For the same reason, this Court should not grant review simply to prevent "a judicially identified statutory violation" from "remain[ing] uncorrected." Pet. 23. The APA reflects Congress's judgment that courts must not set aside every agency decision that is "not in accordance with law," but only those for which the plaintiff can demonstrate prejudice. 5 U.S.C. 706; see *Attorney General's Manual on the Administrative Procedure Act* 110 (1947) (explaining that "errors which have no substantial bearing on the ultimate rights of the parties will be disregarded"). That judgment, and the decision to make Section 706 applicable to bid protests, must be respected rather than disregarded.

2. Petitioner also objects (Pet. 25-28) to the court of appeals' ruling that conflicts of interest in violation of 18 U.S.C. 208 in connection with a procurement do not automatically invalidate the procurement. That ruling was correct and does not warrant further review.

a. At the threshold, the no-prejudice finding discussed above is also sufficient to dispose of petitioner's conflict-of-interests challenge. None of the alleged conflicts affected the development of the minimum security requirements in Gate 1.2. Petitioner does not allege that DeMartino or Gavin played any role in developing those requirements. Nor did Ubhi have any meaningful impact on the development of those requirements, as illustrated by the fact that they were added to the solicitation only after the first public draft was released in March 2018, which itself was several months after Ubhi had already left DoD. See Pet. App. 69a, 114a-115a; C.A. App. 106,083-106,084. It is thus clear that the agency would have imposed the minimum security requirements in Gate 1.2 even if those three employees had not had any alleged conflicts of interest.

Because petitioner could not meet those security requirements, and thus could not qualify for a contract in any event, it has no legally cognizable interest in attempting to undo the procurement on any grounds, including alleged conflicts of interest. See Pet. App. 119a-120a ("Because the court finds that Gate Criteria 1.2 is enforceable, and because [petitioner] concedes that it could not meet that criteria at the time of proposal submission, we conclude that it cannot demonstrate prejudice as a result of *any other possible errors*.") (emphasis added); cf. *Energy Transportation Group, Inc.* v. *Maritime Administration*, 956 F.2d 1206, 1211 (D.C. Cir.

1992) ("There could be no real injury—certainly no injury 'fairly traceable' to the allegedly illegal act—unless the plaintiff would have had some chance of prevailing in a bidding free of the alleged illegalities.").

b. Setting aside petitioner's failure to demonstrate prejudice, the court of appeals correctly rejected petitioner's attempt to impose a "per se rule that conflicts of interest that violate" 18 U.S.C. 208 "invalidate any government contracts to which the conflicts relate." Pet. App. 25a. In support of that per se rule, petitioner relies (Pet. 25-28) on this Court's decision in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). That reliance is misplaced. *Mississippi Valley* held that a contract was voidable by the government because the agent who represented the government in contract negotiations had a private financial interest in the transaction, in violation of the federal conflict-of-interest statute. See *id.* at 523-524, 563-566. Critically, the Court held only that the contract was *voidable* by the *government*—not that it was void ab initio or even voidable by anybody else. See *id.* at 566; see also *United States ex rel. Siewick* v. *Jamieson Science & Engineering, Inc.*, 214 F.3d 1372, 1377 (D.C. Cir. 2000). That alone defeats petitioner's reliance on *Mississippi Valley* for a per se rule.

Moreover, *Mississippi Valley* did not hold that *any* violation of a criminal conflict-of-interest statute related to contract negotiations would render the contract voidable by the government, no matter how little effect the conflicted individual had on the contract terms. The Court had no occasion to address that question because the agent in *Mississippi Valley* was "the real architect of the final contract," 364 U.S. at 552, and "it was quite

likely that the contract would never have come into fruition had he not participated on behalf of the Government," *id.* at 554. Accordingly, the Court's statement that "contracts which are tainted by a conflict of interest on the part of a government agent *may* be disaffirmed by the Government" must be viewed in light of its context: "a contract which *resulted* from an illegal transaction." *Id.* at 563-564 (emphases added).

Mississippi Valley thus does not support the per se rule that petitioner presses. Instead, as the court of appeals has correctly recognized, "[i]llegal acts by a Government contracting agent do not alone taint a contract and invoke the void *ab initio* rule. Rather, the record must show some causal link between the illegality and the contract provisions." Pet. App. 25a (quoting *Godley* v. *United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993)). The court of appeals has further recognized that under *Mississippi Valley*, "[d]etermining whether illegality taints a contract involves questions of fact." *Ibid.* (citation omitted). Here, the contracting officer, the Court of Federal Claims, and the court of appeals all agreed based on the evidence in the record that the alleged conflicts of interest on the parts of Ubhi, DeMartino, and Gavin did not as a factual matter taint the procurement.

c. As with the issue of prejudicial error, petitioner's suggestion (Pet. 29-31) that courts should review conflict-of-interest determinations de novo is meritless. Like all similar agency decisions reviewed "pursuant to the standards set forth in section 706 of title 5," 28 U.S.C. 1491(b)(4), an agency's "findings" and "conclusions" with respect to whether particular conflicts of interest affected the procurement process may be "set aside" only if they are "arbitrary" or "capricious,"

5 U.S.C. 706(2)(A). That is a deferential standard of review in which a court may not "substitute its judgment for that of the agency." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted); see *Camp* v. *Pitts*, 411 U.S. 138, 141 (1973) (per curiam).

For that reason, this Court has held that de novo review is appropriate under the APA in "only" two "narrow" circumstances: (i) "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate"; and (ii) "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414-415 (1971). Petitioner does not allege that either of those circumstances is applicable here, and this Court should reject petitioner's invitation to create a third exception to ordinary APA review.

Indeed, such an exception would be in tension with the Federal Acquisition Regulation. Congress has expressly directed the issuance of "a single Government-wide procurement regulation." 41 U.S.C. 1303(a)(1). That regulation, codified in Title 48 of the Code of Federal Regulations, charges contracting officers with "[e]nsur[ing] that contractors receive impartial, fair, and equitable treatment." 48 C.F.R. 1.602-2(b). More specifically, it requires contracting officers to determine whether a "reported violation or possible violation [of certain federal conflict-of-interest statutes] has any impact on the pending award or selection of the contractor." 48 C.F.R. 3.104-7(a). At the same time, the regulation makes clear that "contracting officers should be allowed wide latitude to exercise business judgment" in performing their tasks. 48 C.F.R. 1.602-2. And it rec-

ognizes that the "exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it." 48 C.F.R. 9.505. De novo review of a contracting officer's determinations whether conflicts of interest under Section 208 had any impact on a procurement would be in serious tension with those provisions. See *Axiom Resource Management, Inc.* v. *United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009).

Petitioner correctly observes (Pet. 29-30) that no statute expressly charges administrative agencies with administering Section 208. But neither DoD nor the contracting officer attempted to administer that criminal prohibition. Instead, the question here is whether *a procurement* was irretrievably tainted by an agency employee's potential violation of Section 208. On that question, the agency reasonably applied the same policies and procedures that it would apply with respect to violations of other conflict-of-interest statutes. As the applicable regulation makes clear, governmental procurement officials "may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the [regulations] nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority." 48 C.F.R. 1.102(d). So it does not matter whether a particular statute expressly *authorizes* agencies to assess the impact of conflicts on a procurement; it matters only if a statute *prohibits* such an assessment. See *Tyler Construction Group* v. *United States*, 570 F.3d 1329, 1333 (Fed. Cir. 2009). Petitioner has not identified any statute, regulation, or other law that

would prohibit a contracting officer from assessing the impact of a Section 208 violation on a procurement.

Despite petitioner's contrary assertion (Pet. 31), petitioner could not prevail even under de novo review. The Court of Federal Claims indicated that it independently believed that the conflicts had no impact on the procurement: "We think that the conclusion the [contracting officer] in effect asks us to draw, that these individuals were bit players in the JEDI Cloud project, *is correct*." Pet. App. 109a (emphasis added). Petitioner provides no sound basis to second-guess that considered judgment based on the evidence in the record.

Instead, petitioner simply reprises (Pet. 27, 31-33) its tactic of "cherry pick[ing] from the vast amount of communications and isolat[ing] a few suggestive sound bites." Pet. App. 108a. For example, Petitioner continues to assert (Pet. 32) that Ubhi was the "foremost champion" of the single-source approach—despite Ubhi's own contemporaneous statement that "[l]argely, the multiple vs single cloud conversation, in my opinion, is a total red herring," C.A. App. 158,742, and despite the record evidence demonstrating that "all the key decisions for the JEDI Cloud procurement, [including] whether to award one or multiple contracts, were made well after Mr. Ubhi recused himself, after being vetted by numerous DoD personnel to ensure that the JEDI Cloud [solicitation] truly reflects DoD's requirement," Pet. App. 78a (citation omitted); see *id.* at 115a (observing that the Deputy Secretary of Defense remained "open to the first cloud contract['s] being single source OR multiple source" in November 2017, and that the single-source question was "vigorously debated" within DoD as late as April 2018) (brackets and citations omitted); see also C.A. App. 105,405, 158,722 (showing that

the first draft of the solicitation was written after Ubhi had left DoD). Nor does petitioner even attempt to explain (cf. Pet. 27, 31-33) how Gavin's or DeMartino's conflicts could have affected the procurement. In any event, the factbound question whether the conflicts of Ubhi, DeMartino, or Gavin tainted the procurement here would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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