

## JEDI: Protests Will Likely Delay Contract Performance for at Least a Year

It will likely be more than a year before DOD can begin using its JEDI cloud, according to two government contracting experts interviewed by *The Capitol Forum*. Current and future contract protests may push back the award date, and then also impede DOD's ability to start performing the contract once it is awarded.

This timeline would be significantly longer than DOD has previously indicated. The department recently agreed in a filing in its Court of Federal Claims (COFC) lawsuit with Oracle that it would not award the contract until at least July 19.

"Source selections of this magnitude are complicated, and with the investigation, and protest litigation activities generally, award dates are often impacted," said DOD spokesperson Elissa Smith. "The earliest the contract is likely to be awarded is mid-July. I do not have a specific date at this time."

### Case Update

On April 16, senior COFC judge Eric Bruggink lifted the stay on Oracle's lawsuit against the government and Amazon Web Services (AWS) protesting DOD's JEDI cloud services contract, allowing the drawn-out legal battle over the contract to resume.

The stay was put in place while DOD re-investigated the impact of former lead JEDI project manager Deap Ubhi's alleged conflicts of interest on the procurement process. Oracle alleges that Ubhi and several other DOD officials had biases that caused JEDI to be structured in favor of AWS, both through the contract's controversial single-award format and through specific selection criteria in the RFP. Ubhi worked for AWS before taking the DOD position, and began working at AWS again after leaving DOD.

*The Capitol Forum* recently obtained [new emails](#) between Ubhi and AWS while Ubhi worked at DOD. The *Forum* [has previously written](#) about Ubhi and his relationship and communications with AWS.

Ubhi and AWS did not respond to requests for comment.

Ubhi's conversations and meetings with AWS employees stand in contrast with a February 2018 [email exchange](#) between DOD official Robert Daigle and AWS executive Jennifer Chronis, which *The Capitol Forum* obtained through a FOIA request. Daigle declined to meet with Chronis, citing the need "to ensure a fair and equitable process."

DOD recently stated that there might have been ethical lapses in Ubhi's work on JEDI, which it referred to the DOD Inspector General. According to [Federal News Network](#), the DOD IG is working with the FBI's Public Corruption unit on a preliminary investigation.

According to DOD, despite Ubhi's potential ethical lapses, the JEDI acquisition process was not harmed. The agency also found that AWS' rehiring of Ubhi did not create an organizational conflict of interest (OCI), meaning that AWS did not gain access to unfairly advantageous DOD information about the contract.

These two points will be central to the continuing legal dispute over JEDI.

### **Oracle's Protest at COFC**

At the heart of Oracle's current COFC lawsuit is a single question: whether DOD's internal review of the potential conflicts of interest was adequate and rational. Judge Bruggink has approved a [schedule](#) for the case setting oral arguments for early July and restricting DOD from awarding JEDI until July 19.

If Oracle prevails, there is no guarantee that the contract will be modified. "If the court finds that the agency's decision-making process was not properly documented or was inadequate in some regard, the court generally will not substitute its views for that of the decision maker but rather will remand the matter back to the agency," Bruggink wrote in a January 28 filing.

According to University of Baltimore School of Law professor Charles Tiefer, if the judge required DOD to do yet another conflict of interest examination, it would place the department under excruciating pressure:

On the one hand, they would be practically disrespecting the Court of Federal Claims. The court has a range of measures to counter a Defense Department seen as extremely obstinate. The judge could allow discovery of the Defense Department's records and people, and set it for an evidentiary hearing in open court. On the other hand, the Defense Department has shown a bullheadedness about charging ahead and ramming through this ill-designed single-award contract. The department gives the distinct impression that it has already decided to make the award to Amazon and effectively end all competition for a decade. The department will not likely be deterred from its course.

"I think at some point the court has to be the decider," said Richard Arnholt, an attorney at Bass, Berry & Sims. "It's the right course for a court to send something back if it believes the agency

failed to do something, but when the agency repeatedly does something wrong, you'd think the judge would say 'enough.'”

Oracle's complaint also raised the question of whether AWS created an OCI by rehiring Ubhi. In his January 28 filing, Bruggink stated that the question of whether AWS' rehiring of Ubhi created an OCI was “not ripe” (i.e. not yet relevant for the court to consider) and mentioned that DOD was still looking into the question.

Experts disagree over whether the question is now ripe, since DOD has determined that it does not believe AWS has an OCI that would necessitate the company's removal from the bidding process.

“A challenge to a conflict of interest, or unfair competitive advantage, would not ordinarily be ripe until the individual who benefits from that unfair advantage wins,” Arnholt said. “But in this case I think it would probably be appropriate for the court to review that determination now.

“In the realm of abstract theory, a federal trial judge could say that he won't look at bias because it might become moot by someone other than Amazon winning the award. But in reality this claim is presented now as squarely as it will be presented at the time of award. From all appearances, Amazon is going to win. Holding the bias question until award just temporarily ducks the inevitable issue,” Tiefer said.

Terry O'Connor, a partner at Berenzweig Leonard, believes that the issue is still not ripe and would need to be settled in a post-award protest.

## **Oracle and IBM are Out**

DOD's April 15 statement on the conflict of interest investigation also included an update on the JEDI bidders: Oracle and IBM have been excluded from the competition, leaving AWS and Microsoft as the only remaining candidates.

In many ways this is not a surprise—AWS is widely considered the frontrunner for the contract, and some industry observers see Microsoft as the only potentially viable challenger. However, the exclusion of Oracle and IBM at this stage has one important consequence: it would prevent either company from filing a protest after JEDI is awarded.

“If Oracle has been excluded from the competitive range, it would not have standing to challenge an award made to Microsoft or Amazon,” Arnholt said. “If you are excluded from the competitive range, you must challenge the exclusion.”

According to Arnholt, Oracle and IBM had 10 days from the date of the announcement to protest their exclusion at GAO. However, they can push back the deadline by requesting a formal debriefing from DOD.

“If Oracle or IBM protests its exclusion from the competitive range at GAO, this would stay award of the contract,” Arnholt said. “It’s a 10 year, \$10 billion contract—they’re going to fight like hell and delay as much as they can.”

GAO has up to 100 days to rule on protests, and the agency often uses most of that allotted time. A new protest by Oracle or IBM could delay the awarding of JEDI past the July 19 date that DOD recently agreed to in its current COFC lawsuit.

IBM declined to comment on whether it intends to protest its exclusion from the competitive range. Oracle did not respond to a request for comment. Oracle Executive Vice President Ken Glueck recently told [Bloomberg News](#) that Oracle will continue to challenge JEDI at COFC and before lawmakers on Capitol Hill.

### **Post-Award Protests**

According to all three experts interviewed by *The Capitol Forum*, no matter who ultimately wins JEDI, there will likely be further protests. Any company that loses can argue that the contract was awarded improperly. And any post-award protest will delay the implementation of the contract, even though a winner will have been selected.

“Let’s say Amazon wins, and Microsoft files a protest at the GAO. Under the statute, an automatic stay of performance would go into effect,” Arnholt said. “The procurement could not continue until the GAO protest was resolved.”

And as Oracle has demonstrated with its pre-award protests, if the post-award protest were denied, the protester could get two bites at the apple by following up at COFC. Protests filed at COFC do not automatically trigger a statutory stay, but Arnholt said that the government will quite often agree to a voluntary stay.

Finally, COFC decisions can still be appealed to the Court of Appeals for the Federal Circuit (CAFC), further prolonging the process. Both Arnholt and O’Connor believe it could easily be more than a year before JEDI is fully underway.

“If the parties took all the time allotted by the rules for each step in the process, it’s easily eight months to even a hearing,” O’Connor said. “I also looked at the three protest decisions the CAFC

has handed down in the past two years, and it was typically at least 13 months from COFC decision to CAFC decision in protests. The most recent one took 16 months.”

“I’m not sure what the reasons are for DOD wanting one vendor on this,” Arnholt said. “You’ve got four companies. If DOD were to award four contracts, and then have competition for task orders under those contracts, that would allow them to put the JEDI contract in place very quickly, and then they would have battles over task orders going forward.”

Arnholt pointed out that all task orders valued under \$25 million cannot be protested at all, and that even task orders above that threshold can only be protested at GAO and not COFC.