

## DOD 'Flaws' Open Door For JEDI Appeal

By **Daniel Wilson**

Law360 (July 31, 2019, 8:43 PM EDT) -- Oracle may have lost its recent protest over the Pentagon's procurement process for the \$10 billion JEDI cloud system contract, but a judge's finding of a "flawed" solicitation could open up several potential avenues for an appeal.

While U.S. Court of Federal Claims Judge Eric G. Bruggink **made clear** that he didn't think Oracle America Inc. had been prejudiced by mistakes the U.S. Department of Defense had made while soliciting bids for the Joint Enterprise Defense Infrastructure deal, those mistakes could form the basis of an appeal.

Given the amount of money at stake, Oracle may be encouraged to glom on to, for example, Judge Bruggink's finding that the DOD's top acquisition official had provided a "flawed" legal justification to support the department's decision to make the JEDI contract a single-award deal, according to PiliroMazza PLLC attorney Lauren Brier. Major defense deals are typically required by law to have multiple awards.

"Oracle may have a leg to stand on as a result of the court's determination that the [official] relied on an exception that did not accurately reflect the structure of the JEDI cloud solicitation," Brier said.

Judge Bruggink found in his July 26 opinion that Oracle couldn't meet a pass-or-fail "gate criteria" required by the DOD, meaning the department's improper legal justification, as well as alleged conflicts of interest involving ties between DOD employees and the perceived front-runner for JEDI, Amazon Web Services Inc., did not actually harm Oracle's chances of winning the contract.

Although Judge Bruggink's ruling reinforced the requirement for protesters to show they actually have been harmed, the form of that prejudice ruling could also be a point of appeal, said Bradley Arant Boult Cummings LLP partner Aron Beezley.

The traditional standard in pre-award contract protests is that the challenger must show a "nontrivial competitive injury," but that was not the standard Judge Bruggink used, Beezley said.

"The court ... found that the traditional pre-award prejudice test was inapplicable and, instead, applied the traditional post-award 'substantial chance of receiving the contract award' standard for prejudice," he said.

If Oracle challenges the prejudice ruling, that could bring into play some earlier Federal Circuit decisions holding that the appropriate standard to consider when a bidder has been excluded is "whether the protester would have had a substantial chance of being included in the competitive range" if not for the agency's errors, Beezley said.

"It will be interesting to see if [those decisions] factor into the parties' arguments before the Federal Circuit, assuming the case gets appealed," he said.

The options that could make an appeal possible don't necessarily mean Oracle will have an easy time convincing an appellate judge. Barbara Kinosky, managing partner at Centre Law and Consulting, a firm specializing in federal government contracting issues, said that Oracle could "have a very difficult time on any appeal," pointing to the broad deference Judge Bruggink gave to a DOD contracting officer's determination that the department had acted appropriately in the JEDI solicitation.

"I think Oracle is probably going to walk away at this point, just because of the deference given to the contracting officer's determination in so many areas: on the technical qualifications, the decision to go single-award, and on [an alleged] organizational conflict of interest," Kinosky said.

Oracle's best way back into contending for JEDI may come instead from pressure on the DOD from Congress or President Donald Trump, or both, to change the structure of the deal to involve multiple vendors.

On July 18, the president said he **would ask for a review** of JEDI — it was not clear who would conduct the review — after receiving complaints that "it wasn't competitively bid."

"Some of the greatest companies in the world are complaining about it, having to do with Amazon and the Department of Defense," he said.

If that review doesn't come up with a result that meets Trump's satisfaction, he could get more directly involved, having previously taken the unusual, if not unprecedented, step of **seeking to broker deals** for the F-35 fighter jet and Air Force One replacement jets.

House appropriators, mostly Democrats, have also proposed holding back funding for JEDI until the DOD details how it intends to implement the multicloud approach it **proposed in February**.

They have been joined by more than a dozen Republican lawmakers, both in the House and the Senate, who have also urged the DOD to either delay the JEDI award pending a DOD Office of Inspector General investigation into the conflict of interest allegations, or to go back to the drawing board and open it up to multiple awardees.

Also, despite the DOD's insistence that it has followed the proper process with JEDI, newly confirmed Defense Secretary Mark Esper said recently that he had "heard from everybody about JEDI Cloud [and] that's one of the things I'm going to take a hard look at."

While it would be unusual for a defense secretary to step into a procurement process, Esper does ultimately have the authority to cancel JEDI, if he chooses, attorneys said.

Even if the DOD ultimately moves ahead with its contract award as planned, without further intervention, the losing bidder — either Amazon or Microsoft Corp., as the **last two left in the competition** — is highly likely to launch a post-award protest, further delaying JEDI, according to both Kinosky and Brier.

"The Court of Federal Claims' decision identified flaws in the procurement, creating some ammo for a post-award protest," Brier said. "Both Microsoft and Amazon have the money to spend on such a protest, as well as the vitriol to challenge a lucrative cloud procurement that may very well expand beyond the JEDI program."

--Editing by Aaron Pelc and Emily Kokoll.