IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Bid Protest

GOOGLE, INC.,	**AGREED-TO PUBLIC VERSION**
and	
ONIX NETWORKING CORPORATION,	
Plaintiffs,	
v.	**No. 10-743 C** **(Judge Braden)**
THE UNITED STATES,	
Defendant,	
and	
SOFTCHOICE CORPORATION,	
Defendant-Intervenor.	

Plaintiffs' Restated Motion For Judgment On The Refiled And Updated Administrative Record

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Plaintiffs Google, Inc. ("Google") and Onix Networking Corporation ("Onix") hereby submit their Restated Motion for Judgment on the Administrative Record, which was updated and refiled by Defendant on May 12, 2011 pursuant to the Court's Order, dated May 11, 2011, and as a result of the Court's decision in *Google, Inc. et al. v. United States*, 95 Fed.Cl. 661 (2011) ("*Google I*"). In *Google I*, the Court preliminarily enjoined the Department of the Interior ("DOI" or "Defendant") from proceeding with DOI's procurement of agency-wide messaging and collaboration services based on Microsoft Corporation's Business Productivity

Online Suite-Federal ("BPOS-Federal") cloud computing solution pursuant to Request for Quotation No. 503786 (the "RFQ") or any related procurement, solicitation, task order, or activity, and the Court remanded the procurement to the DOI "for additional investigation or explanation" regarding the agency's processes for procuring a unified messaging solution. *Id.* at 680.

In *Google I*, the Court aptly summarized Plaintiffs' protest as follows:

> The gravamen of the October 29, 2010 Complaint and December 30, 2010 Amended Complaint is that the process by which Interior restricted competition exclusively to the Microsoft BPOS-Federal and the Microsoft Desktop and Service Software for messaging and collaboration solutions violated the Competition in Contracting Act, 41 U.S.C. § 253(a) and the FAR, and therefore was arbitrary, capricious, an abuse of discretion and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Id. at 672-73. The Court proceeded to closely examine the facts, recounting the extensive collaboration between DOI and Microsoft that began in early-to-mid 2009 to migrate all of DOI's messaging requirements on a sole-source basis to Microsoft's as yet-to-be-built BPOS-Federal cloud solution, that led to DOI's issuance of two July 15, 2010 standardization decisions upon which the August 30, 2010 RFQ and accompanying "Limited Source Justification" were based. *Id.* at 663-71. Holding that the two standardization decisions, contained in the Administrative Record (both original and as refiled) ("AR") at Tabs 15 and 16, were "quintessential 'non-competitive procedure[s],' that must be justified by the 'contracting officer,'" *id.* at 676, the Court ruled that the standardization decisions violated the Competition in Contracting Act ("CICA") and the FAR. *Id.* at 679. As explained by the Court, it did not appear that the appropriate DOI official had approved the decisions, there was no Secretarial Order endorsing the project as required by the May 4, 2010 "Unified Messaging System Project

Plan" (AR Tab 47, p. 1587), and the decisions did not comply with FAR 6.302-1(a), 6.303-1, 6.303-2, and 6.304. *Id.* at 676-78.

Little has changed since *Google I* was issued on January 4, 2011. Despite the Court's conclusions and remand instructions, and as explained in Plaintiffs' Response to Defendant's Motion to Terminate the Stay of Proceedings, Dissolve the Court's Preliminary Injunction, and Issue a Schedule to Resume Briefing on the Merits of the Case ("Plaintiffs' Response to Defendant's Motion to Dissolve"), Defendant has done nothing to explain away or cure the deficiencies identified by the Court in *Google I.*[1] Instead, the Defendant sought to divert the Court's attention from the "gravamen" of this protest to the flak and publicity over the FISMA certification[2] issue, which as we shall reiterate herein is a red herring in the context of the merits of this case. Indeed, the facts show that long before the issue arose regarding whether the Google Apps for Government security-enhanced version of the Google Apps Premier system is encompassed within the FISMA authorization issued by the GSA on July 22, 2010 (AR Tab 92, pp. 2041-59), the DOI selected the Microsoft messaging solution – a commercial BPOS system subsequently modified for government purposes as BPOS-Federal – and negotiated terms and commitments with Microsoft that preceded the standardization decisions by many months. Moreover, the refiled AR establishes that even after this protest action was initiated in October

[1] As detailed in Plaintiffs' Response to Defendant's Motion to Dissolve, pp. 3-7, it remains questionable that Ms. Suh, DOI's Assistant Secretary for Policy, Management and Budget, was authorized to approve the standardization decisions. Moreover, while Defendant's "side by side analysis" chart in its Notice of Filing the Administrative Record, dated May 12, 2011, cites to four documents (Entry # 16 (citing AR Tabs 15, 55, 58 and 75)) as purporting to be the "Secretarial order endorsing the Unified Messaging Project," clearly none of these documents constitutes the requisite Secretarial Order. Finally, the standardization decisions remain unchanged and, thus, still do not comply with FAR Subpart 6.3 requirements.

[2] FISMA is the Federal Information Security Management Act of 2002. *See generally* AR Tab 14KK, "GAO Report on Information Security: Federal Guidance Needed to Address Control Issues with Implementing Cloud Computing," describing FISMA and other requirements related to securing federal information systems and data.

2010, there was continuing confusion among DOI and Microsoft officials about what BPOS-Federal cloud solution was being built for DOI (for all customers or DOI's own implementation) and regarding its configuration, and DOI was frustrated with delays in completion or submission of the FISMA certification and accreditation ("C&A") package for BPOS-Federal and with the "overall appearance of sloppy execution by Microsoft." AR Tab 65, p. 1778.

Confusion, uncertainty and frustration. This is what can happen where, as here, agencies flaunt the requirements of CICA and ignore the safeguards established at FAR Subpart 6.3 for justifying a sole-source procurement. The DOI has consistently claimed that its actions leading up to and culminating in the July 15, 2010 standardization decisions[3] were necessitated by (a) the need for enhanced security in its cloud-based messaging solution (*i.e.,* data storage and computing infrastructures that are physically and logically dedicated to DOI or to federal government customers only (AR Tab 11)), (b) only Microsoft's alleged ability to satisfy those security needs, and (c) Google's refusal to provide a system either dedicated to DOI alone or

[3] Defendant and Defendant-Intervenor contend, of course, that the standardization decisions are nothing more than internal policy documents – beyond the scrutiny of the Court – and that the August 30, 2010 "Limited Source Justification" and RFQ are the only procurement documents subject to the Court's review because they, unlike the standardization decisions, will result in a contract award and obligation of appropriated funds. *See* Defendant's Reply to Plaintiffs' Response to Defendant's Motion to Dissolve, p. 7, and Reply of Softchoice Corporation in Support of its Motion to Terminate the Stay of Proceedings, Dissolve the Court's Preliminary Injunction, and Dismiss the Action ("Softchoice Reply"), pp. 3-5. This argument lacks credibility for several reasons. First, the Court recognized in *Google I* that the"Limited Source Justification" and RFQ were nothing more than the means by which the DOI would implement its decision to procure the Microsoft cloud-based system. *Google,* 95 Fed.Cl. at 676 and 679. Second, the record indicates there will be a contractual agreement (if one doesn't exist already) between DOI and Microsoft resulting from the standardization decisions. AR Tab 32, p. 1051; Tab 33, p. 1106. Perhaps most telling, DOI's Mr. Corrington obviously considered the standardization decisions as equivalent to a contractual commitment, and not just a "policy decision." Tab 65, p. 1778.1 ("this might be a good time to reference the standardization memo as it demonstrates that we have made a commitment to BPOS."). Finally, the fundamental flaw in Defendant's and Defendant-Intervenor's position is that, if the Court were to adopt their reasoning, agencies then would have free rein to avoid the mandates of CICA and FAR Subpart 6.3 merely by calling any document that identifies a need and specifies a product or vendor to satisfy that need a "standardization decision."

restricted to federal government agencies.[4] The DOI's claims are not substantiated by any comparative analyses of the security controls in Google's and Microsoft's cloud offerings or by relative empirical data establishing that Google's community cloud (consisting of federal, state and local governments) is any less secure than Microsoft's community cloud (consisting of federal governments only). Instead, the DOI's alleged "minimum" need – developed nearly a year after DOI selected the "Microsoft Dedicated Hosted Exchange service to deliver a single e-mail system to all DOI users" (AR Tab 33, p. 1098) – is based on (a) commercial reports that principally assess generic and irrelevant cloud models, *i.e.*, public versus private clouds instead of the government community cloud options available in the marketplace, (b) DOI's risk assessment based on those largely irrelevant reports, (c) a superficial and inaccurate "market research" report by contractor [redacted], and (d) the *post hoc* arguments of counsel regarding the alleged lesser security concerns of state and local governments.

As set forth herein and based on the record as a whole, Plaintiffs respectfully request that the Court permanently enjoin the DOI from proceeding with its illegal and ill-conceived sole-source procurement of the Microsoft BPOS-Federal messaging solution.

I. STATEMENT OF FACTS

The Court's decision in *Google I* detailed the relevant facts as of January 4, 2011 when the decision was issued. *See Google,* 95 Fed.Cl. at 663-72. Those facts are supplemented herein to reflect documents and information contained in the updated and refiled AR.

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[4] In response to the Court's query during the May 4, 2011 conference call with the parties, Google's product offering has not changed since the initiation of this bid protest action. The Google Apps for Government system is available to federal, state and local government customers, and each customer's data is logically separated from other customer data and located in U.S. data centers. *See also* AR Tab 5, pp. 50-58 (Google's June 17, 2010 letter to DOI describing how its cloud solution satisfies DOI's requirements as outlined in DOI's May 27, 2010 letter (AR Tab 4)).

Although the Court observed that the then-existing AR was "far from complete" and identified examples of documentation that the Court believed should be in the AR, *id.* at 679-80, the refiled AR contains only a few additional documents responsive to the Court's expressed concerns. These include a generic Microsoft handout and product materials (AR Tab 87, pp. 2000-16, and Tab 100, pp. 2221-80) provided with a July 19, 2010 e-mail to DOI's Mr. Andrew Jackson, Mr. Jackson's notes (handwritten and retyped) only from meetings with Microsoft held on September 22, 2009 and August 30, 2010 (AR Tab 65, pp. 1771-77),[5] documents purporting to establish that DOI's modification to the Dell Marketing LLP schedule contract to implement the BPOS-Federal "proof of concept" project was within the scope of the original Dell contract (AR Tab 102), and other insignificant documents. Two e-mails added to the record, however, provide further confirmation of the deal that was cut between DOI and Microsoft before any thought was given to the mandates of the CICA and the FAR.

On February 17, 2010, the day before DOI officials met with Google, Mr. Jackson and Mr. Corrington exchanged e-mails regarding Mr. Jackson's conversation with Microsoft's Teresa Carlson, Vice President – Federal Government. According to Mr. Jackson, "[b]ottom line is that she [Ms. Carlson] committed that our pricing won't change and that they will back off of the hard sell." AR Tab 65, p. 1778.2. Thus, well before Mr. Corrington penned his June 29, 2010

[5] No documentation was provided in relation to numerous other meetings referenced in the AR that apparently occurred *at least* monthly between and among Mr. Jackson, Mr. Corrington and various Microsoft executives and marketing personnel. *E.g.*, AR Tab 32, pp. 1088-89 (referencing a meeting in July 2009); pp. 1083 and 1086 (referencing a meeting on October 7, 2009); p. 1077 (referencing a meeting on November 10, 2009); pp. 1071-1074 (referencing a meeting on November 17, 2009); pp. 1068-1070 (referencing a meeting around December 2, 2009); pp. 1060-1061 (referencing a meeting on December 22, 2009); pp. 1050-1051 and 1057 (referencing a meeting on January 7, 2010 at Microsoft); p. 1050 (confirming high-level executive meetings on February 4, 2010 (Defendant has asserted that no documents reflect what happened at this particular set of meetings)); p. 1044 (referencing a meeting on February 23, 2010); pp. 1041-1044 (referencing a meeting around April 1, 2010); pp. 1036 (referencing a meeting around May 7, 2010); p. 1016 (referencing a call and future meetings in late July 2010).

risk assessment (AR Tab 11), [redacted] concluded its market research (AR Tab 12), or Ms. Suh signed the standardization decisions (AR Tabs 15 and 16), the DOI and Microsoft had already agreed on the pricing for migrating DOI's e-mail systems to the BPOS-Federal cloud solution. Evidence of exactly what that pricing arrangement was (or is) has never been produced by Defendant.

In addition, on July 19, 2010, Mr. Corrington provided Mr. Jackson with "talking points" for a conversation to be held with Ms. Carlson, including DOI's commitment to and need for Microsoft to design and build a system to support 80,000 users (and not just the 6,000 users for the "proof of concept" project) "despite the lack of a signed contract." Mr. Corrington's e-mail stated that Mr. Jackson might want to reference the standardization decision – signed just four days earlier – to demonstrate "that we have made a commitment to BPOS." AR Tab 65, p. 1778.1.

The plans and commitments between DOI and Microsoft referenced in these additional documents are encapsulated in numerous other documents contained in the record and referenced by the Court in *Google I*, most notably in DOI's September 28, 2009 Project Plan (AR Tab 33), its May 4, 2010 updated Project Plan (AR Tab 47), its July 13, 2010 Acquisition Plan (AR Tabs 18 and 98), and its July 15, 2010 BPOS-Federal standardization decision (AR Tab 15). *See also Google,* 95 Fed.Cl. at 664-65 (describing Microsoft/DOI communications); AR Tab 32 (e-mail correspondence between Microsoft and DOI). Taken together, these documents and other materials in the AR prove beyond cavil that the DOI's sole-source selection of the Microsoft cloud-based system was made in 2009 without the benefit of any competition or an authorized, compliant justification pursuant to FAR Subpart 6.3 to use other than full and open competition. The DOI made this monumental decision well before the BPOS-Federal solution was even

[redacted]

launched, designed or built by Microsoft, and based on the factually-incorrect premise that "the BPOS-Federal offering is the only standardized hosted e-mail service offering that meets Federal government security requirements including FISMA certification." AR Tab 47, p. 1586.

II. THE COURT HAS JURISDICTION AND PLAINTIFFS HAVE STANDING

In *Google I*, the Court determined that it has jurisdiction to adjudicate this protest action, and nothing relevant to this conclusion has changed. *Google,* 95 Fed.Cl. at 672-73. The U.S. Court of Federal Claims has jurisdiction "to render judgment on an action by an interested party objecting to ... any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (the "Tucker Act"). The U.S. Court of Appeals for the Federal Circuit has defined the phrase "procurement or proposed procurement" as including "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345–46 (Fed. Cir. 2008).[6] Here, as the Court held in *Google I,* Plaintiffs have alleged violations of statutes and regulations in connection with a proposed procurement, namely, the DOI's unwavering decision made initially in 2009 to restrict competition exclusively to a Microsoft cloud solution –

[6] Softchoice's argument that the statutory definition of "procurement" is only applicable for determining jurisdiction under the Tucker Act, but not for purposes of determining whether the same agency action (constituting a "procurement" for jurisdictional purposes) violates CICA's requirements is nonsensical. Softchoice Reply, pp. 7-10. There exists no legal or logical reason for the Court to assume jurisdiction because DOI's standardization decisions constitute a procurement as defined at 41 U.S.C. § 403(2) (recodified in CICA at 41 U.S.C. § 111), but then to decline examination of that same action's compliance with the competition requirements of CICA and the FAR because of the applicability of some different definition of procurement. Indeed, the court in *Savantage Financial Services, Inc. v. United States,* 81 Fed.Cl. 300 (2008), assumed jurisdiction of Savantage's bid protest on the basis that the challenged brand name justification constituted a procurement and, even though the justification did not result in a contract award or obligate funds to purchase goods or services (which was to be accomplished through a procurement restricted to contractors with EAGLE IDIQ contracts), the court held that the brand name justification violated CICA and FAR Subpart 6.3 requirements. *Id.* at 306-08.

subsequently identified as the BPOS-Federal system -- and the Microsoft Desktop and Service Software for messaging and collaboration solutions.

Furthermore, in order to have standing under 28 U.S.C. § 1491(b), a plaintiff must also establish that it is an "interested party." This requires a plaintiff to show that "(1) it was an actual or prospective bidder or offeror, and (2) it had a direct economic interest in the procurement or proposed procurement." *Distrib. Solutions*, 539 F.3d at 1344; *see Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed.Cir. 2006) (explaining that the definition of "interested party" under the Tucker Act is the same as its definition under CICA). "Where a claim is made that an agency violated the CICA by failing to comply with the procedures set forth, 'it is sufficient for standing purposes if the plaintiff shows that it likely would have competed for the contract had the government publicly invited bids or requested proposals.'" *Google,* 95 Fed.Cl. at 673 (quoting *CCL, Inc. v. United States*, 39 Fed.Cl. 780, 790 (1997)).

As previously noted by the Court, Google was engaged in an active campaign to have its products considered for this procurement, and would have received substantial revenue from any such procurement. *Google,* 95 Fed.Cl. at 673. Similarly, Onix, as a licensed vendor of Google's products, would have also had a direct economic interest at stake. *Id.* The DOI's improper selection of Microsoft products, however, deprived each Plaintiff of the opportunity to compete, and this is sufficient economic harm to demonstrate prejudice for purposes of standing. *Id.* at 674 (citing *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1363 (Fed.Cir. 2009) ("[W]e conclude that in a pre-award protest such as the one before us, [a] prospective bidder or offeror must establish 'a non-trivial competitive injury which can be addressed by judicial relief' to meet the standing requirement of § 1491(b)(1).")).

III. DEFENDANT'S ACTIONS VIOLATED STATUTORY AND REGULATORY REQUIREMENTS

A. Standard Of Review On A Motion For Judgment Upon The Administrative Record

The Tucker Act, as amended by the Administrative Dispute Resolution Act, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (Oct. 19, 1996, authorizes the U.S. Court of Federal Claims to review agency decisions under the standards of the Administrative Procedure Act, 5 U.S.C. § 706 (the "APA"). In a bid protest action, the relevant APA standard is whether the agency decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1350 (Fed.Cir. 2004) (quoting 5 U.S.C. § 706(2)(A)). As the Court previously explained:

> [T]he court's primary responsibility is to determine whether the agency violated a federal statute or regulation in the procurement process and whether any such violation is prejudicial. If no prejudicial violation of law or regulation is found, the court next is required to determine whether the agency decision evidences a rational basis. Last, the court is required to ascertain whether the agency *otherwise* acted in an arbitrary and capricious manner with respect to the procurement at issue.

Google, 95 Fed.Cl. at 675 (internal citations and quotations omitted) (emphasis in original).

When applying these standards, the Court may not substitute its judgment for that of the agency, but is required to "perform an informed review of even technical decisions in order to meaningfully exercise its jurisdiction." *Redland Genstar, Inc. v. United States,* 39 Fed.Cl. 220, 231 (1997) (citing *Prineville Sawmill Co., Inc. v. United States*, 859 F.2d 905, 910-11 (Fed.Cir. 1988). In doing so, the Court "must ensure that the agency has examined a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Redland Genstar,* 39 Fed.Cl. at 231 (citations and quotation marks omitted). And even where the agency may be entitled to some "presumption of regularity," that presumption does

not shield the agency's actions from a "thorough, probing, in-depth review." *Id.* Agency decisions will be set aside where 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 is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Ala. Aircraft Indus. Inc.-Birmingham v. United States,* 586 F.3d 1372, 1375 (Fed.Cir. 2009).

B. Defendant's Pre-Selection Of The Microsoft BPOS-Federal Solution Violated CICA And FAR Subpart 6.3, And Was Not Rationally Based

The relevant facts recited in *Google I* prompted the Court to hold that "Google has made a *prima facie* showing that Interior violated the Competition in Contracting Act and relevant FAR provisions and that such violation was prejudicial to Google's interests." *Google,* 95 Fed.Cl. at 679. The Court remanded the case to the DOI to correct its illegal and prejudicial actions. *Id.* at 680. Despite the Court's directive, and as pointed out in Plaintiffs' Response to Defendant's Motion to Dissolve, the DOI did nothing to remedy the improprieties in its procurement processes; instead, the Defendant informed the Court that the reasoning in *Google I* was flawed and produced an additional 429 pages of materials (now made part of the refiled AR) that have little or no bearing on the merits of this case. Consequently, Plaintiffs respectfully submit that the DOI's procurement processes still violate CICA and FAR Subpart 6.3 requirements, thereby warranting the issuance of a permanent injunction.

Plaintiffs acknowledge, however, that the Court's decision in *Google I* "made no judgment as to whether Interior's basis for this procurement was rational or whether the procurement was conducted in a manner that was arbitrary and capricious." *Id.* at 680. In that regard, Plaintiffs contend that the record, as described at length in Plaintiffs' December 3, 2010 Motion for Judgment on the Administrative Record, Reply to Defendant's and Defendant-

Intervenor's Oppositions to Plaintiffs' Motion for Preliminary Injunction, and Response to Defendant-Intervenor's Motion to Dismiss ("Plaintiffs' MJAR"), does in fact establish that DOI's bases for procuring the BPOS-Federal solution on a sole-source basis were irrational and that DOI's pre-selection of the Microsoft product, as well as its subsequent procurement-related actions focused on implementing that decision, were arbitrary and capricious. This Restated Motion is intended to highlight the reasons that declaratory and permanent injunctive relief in this case is both warranted and necessary to fulfill CICA's mandate.

Competition has long been the cornerstone of federal procurement policy. CICA imposes a duty on procuring agencies to solicit proposals "in a manner designed to achieve full and open competition for the procurement." 10 U.S.C. § 2304(a)(1)(A); 41 U.S.C. § 253(a)(1)(A). Under CICA, solicitation provisions that restrict competition are authorized only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. § 2305(a)(1)(B)(ii); 41 U.S.C. § 253(a)(2)(B). Where an agency's procurement decision is challenged as being unduly restrictive of competition in violation of CICA, this Court has held that such a challenge "invokes 'highly deferential' rational basis review." *CHE Consulting, Inc. v. United States*, 552 F.3d 1351, 1354 (Fed.Cir. 2008) (citing *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed.Cir. 2000) ("This standard requires a reviewing court to sustain an agency action evincing rational reasoning and consideration of relevant factors.")). Here, DOI's *post hoc* reasoning, primarily described in its June 29, 2010 risk assessment (AR Tab 11), in formulating the restrictive requirements for its cloud computing environment lacked a rational basis and was purposefully tailored to support the conclusion that only the pre-selected Microsoft solution will satisfy those requirements.

Citing several commercial reports addressing the risks and attributes associated with generic cloud computing models, a [redacted][7], and other materials, the DOI's risk assessment compared private versus public clouds and concluded that the security risks were too great with the public cloud model. As discussed in Plaintiffs' MJAR, pp. 37-38 (addressing types of computing clouds) and pp. 39-42 (addressing DOI's risk assessment), the DOI did not assess the benefits and risks associated with a public cloud versus a community cloud, and more specifically DOI did not consider the different risks, if any, that may result from hosting its data in a community cloud consisting of only federal government customers and one consisting of federal, state and local government customers. The only rationale provided by the DOI for rejecting a community cloud, such as Google's, that includes state and local governments was that such non-federal governments "do not have the same security requirements as Federal agencies, nor would they face the same potential impacts from security issues that the DOI would face." AR Tab 21, p. 784. There was no explanation or substantiation, rational or otherwise, for this conclusory statement.

There is no question that the security of the selected cloud computing model should be critically important to DOI and any other customer of a cloud provider. And there is no question that DOI gathered many commercial reports and other materials addressing various topics related to the general concept of cloud computing. DOI also contracted with [redacted] to conduct market research and provide acquisition support services "to foster the successful competition and award of a DOI-wide hosted Microsoft Exchange infrastructure." AR Tab 36, pp. 1173 and 1176. As described in Plaintiffs' MJAR, pp. 34-35, [redacted] research

[7] The DOI relied on the [redacted] in preparing its June 29 risk assessment; however, as pointed out by the Court in *Google,* 95 Fed.Cl. at 668, fn.15, a March 17, 2010 [redacted] report (AR Tab 14EE, p. 662) questioned the usefulness of the [redacted] for such an assessment.

[redacted]

was perfunctory at best and it ruled out Google's public cloud, Google Apps, for failure to meet "the DOI's external private cloud requirement." AR Tab 12, p. 171.[8] Even though Google had previously announced on September 15, 2009 that it was creating the Google Apps for Government community cloud, [redacted] brief report did not consider, or even mention, the community cloud dedicated to government customers, presumably because [redacted] was focused solely on private cloud models. Moreover, like DOI's May 4, 2010 version of the Project Plan, [redacted] report erroneously concluded that Microsoft's BPOS-Federal cloud met all of DOI's technical and security requirements, including FISMA. AR Tab 12, p. 171.

None of the reports and other materials upon which DOI purportedly relied, however, substantiates DOI's conclusion that (a) only a private cloud would meet DOI's enhanced security requirements or subsequently (b) a federal-government-only community cloud, and not a community cloud dedicated to federal, state and local governments, could satisfy DOI's minimum security needs. On the contrary, as detailed in Plaintiffs' MJAR at pp. 46-49, the security of a cloud model is not defined solely by its classification as a private, community, hybrid or public cloud. In other words, a private cloud is not *per se* more secure than a community or public cloud. As the U.S. Government Accountability Office's May 2010 report entitled "Information Security: Federal Guidance Needed to Address Control Issues with Implementing Cloud Computing," states: "Private clouds may have a lower threat exposure than public clouds, but evaluating this risk requires an examination of the specific security controls in place for the cloud's implementation." AR Tab 14KK, p. 696 (emphasis added). As noted by

[8] Of course, by the time [redacted] report was issued (on the same day as the DOI's risk assessment), DOI's requirement was no longer limited to a private external cloud, as evidenced by the risk assessment and the BPOS-Federal standardization decision. The August 30 RFQ, however, continued to erroneously state that DOI was procuring "an external private cloud deployment model," while at the same time stating that an infrastructure dedicated to "DOI and other Federal government customers only" would meet DOI's requirements. AR Tab 24, pp. 800 and 803. Again, confusion abounds.

[redacted]

the Court, other materials in the AR caution against investing in a private cloud without a complete and thorough investigation of the alternatives. *Google,* 95 Fed.Cl. at 668, fn.16. Despite Google's several offers to provide its FISMA C&A package to DOI for review, DOI never examined the specific security controls in place for the Google Apps Premier cloud system, or the enhanced security controls being added for the Google Apps for Government version. Instead, DOI concluded that Google's system will not satisfy DOI's security needs because it is not a private cloud or federal-government-only cloud and its data storage and computing infrastructure will not physically – in addition to logically -- separate DOI's data from other customer data.

DOI's conclusion was arbitrary and capricious, and irrational, not only for the reasons noted above, but also because DOI gave little or no credence to GSA's July 22, 2010 FISMA security authorization for the "Google Apps Premier Edition (Google Apps Cloud) information system and its constituent components." AR Tab 92, pp. 2041-59. As alluded to earlier, Defendant has made this FISMA certification a bone of contention in this case, and the Court determined in its April 15, 2011 Order, at p. 4, that "whether or not Google Apps Premier and/or Google Apps for Government are FISMA certified is central to resolve the issues presented in this case." At the Court's direction, GSA's David McClure submitted a declaration to the Court on April 22, 2011 addressing this issue. As explained by Mr. McClure, GSA is serving as the lead agency for the Federal Cloud Computing Initiative, and GSA's Office of the Chief Information Officer ("OCIO") provides determinations of FISMA compliance for particular technology products or services that may be relied upon by (but are not binding on) other federal agencies. AR Tab 103, pp. 2309-10. There is no question that the Google Apps Premier cloud is FISMA-certified and other agencies wishing to use the Google Apps cloud may rely on GSA's

certification and authorization, and it is important to understand that Google Apps for Government is not a separate information system from Google Apps Premier Edition. As verified by Mr. McClure, the GSA's OCIO has been reviewing Google's updated C&A package to include enhancements and additional security controls to the Google Apps for Government "subset" of Google Apps Premier. The GSA's public statement has characterized the change (*i.e.,* additional enhancements and security controls that re-brand the Google Apps Premier system as the Google Apps for Government system using the same infrastructure) as "noteworthy enough to be reviewed, but is not significant enough to require a new FISMA certification." *Id.* at 2314. While GSA's "review focuses on the change itself and (if applicable) how the change interacts with the package as a whole," the original certification remains valid. *Id.* It is Google's understanding that the GSA's review has been completed and the updated certification letter for the Google Apps system, which addresses the enhancements that constitute Google Apps for Government, has been signed and recommends that the Authorizing Official, Ms. Casey Coleman, sign the updated security authorization letter.[9] Google has not yet been provided with either letter by GSA officials.

While Plaintiffs contend that GSA's FISMA certification of the Google Apps cloud system is significant, and clearly relevant to assessing the rationality of DOI's restrictive requirements as set forth in the risk assessment and BPOS-Federal standardization decision, it is not entirely clear that such certification(s) are "central" to the resolution of this case. While the RFQ does state that "at all times" the contractor and Microsoft shall comply with FISMA by

[9] *See* AR Tab 92, pp. 2041-59 evidencing the differences between the GSA certification letter and the authorization letter. Because of continuous changes and improvements that are made by any provider to its information technology systems, updating security certifications and authorizations for such services and systems is not only a common practice, but is also an expected process under FISMA, the purpose of which is to certify information systems and not software products.

completing and maintaining a C&A for the BPOS-Federal service[10], as noted in the Court's April 5, 2011 Order, other provisions in the RFQ state that the successful contractor, together with Microsoft and with the support of DOI, will be responsible for the C&A application and process provided for in FISMA and "shall ensure that Microsoft shall complete the C&A process on or before providing Service Ready Notice." AR Tab 24, Sections 10.5.1 through 10.5.4, pp. 816-18. If the Court should interpret the RFQ as requiring that any cloud-based messaging system be FISMA-certified as a prerequisite to DOI's award of a contract pursuant to the RFQ, then permanent injunctive relief is clearly warranted since Microsoft's BPOS-Federal --even as of today -- has not received FISMA authorization from either DOI or GSA.[11]

As the foregoing and Plaintiffs' MJAR establish, the record does not support DOI's restrictive requirements for a DOI private cloud or a federal-government-only community cloud. DOI's sole-source selection of Microsoft's BPOS-Federal cloud solution, as reflected in the risk assessment and BPOS-Federal standardization decision, therefore was not rationally based. Moreover, DOI's conduct of this procurement based on its sole-source selection of the Microsoft product was arbitrary and capricious. First, the standardization decisions violated CICA's mandate for full and open competition and the FAR Subpart 6.3 provisions for justifying a non-

[10] Although it is Google's understanding that Microsoft's C&A package for its BPOS-Standard and/or BPOS-Dedicated cloud system was submitted to GSA in 2010, the GSA has yet to issue a FISMA authorization letter to Microsoft. The fact that the U.S. Department of Agriculture recently issued a FISMA authorization to Microsoft, as mentioned by Softchoice's counsel during the May 4, 2011 conference call among the Court and the parties, does not affect the issues in this case. As admitted by Softchoice's counsel, such authorization is non-transferable and, unlike a GSA FISMA authorization, DOI may not rely on the USDA authorization for purposes of using BPOS-Federal. May 4, 2011 Hearing Transcript at p. 20.

[11] In addition, as pointed out at pp. 49-53 in Plaintiffs' MJAR, DOI's selection of the BPOS-Federal private or community cloud – and it remains unclear to this day what Microsoft has been building for DOI – was irrational because components of the BPOS-Federal solution do not satisfy DOI's requirements as set forth in its risk assessment. *See also* AR Tab 65, p. 1778 (explaining that the BPOS-Federal C&A package was delayed because there was confusion on Microsoft's part whether it was building a BPOS-Federal community cloud "for all customers" or a private cloud for DOI ("whether DOI gets their own implementation")).

competitive procurement. *Savantage Financial Services,* 81 Fed.Cl. at 308-09. Second, the evidence establishes that Google provides a competing community cloud that satisfies all of DOI's legitimate needs, complies with FISMA requirements, and meets the security concerns of numerous government and commercial customers. Even if DOI may perceive the BPOS-Federal system, which according to Defendant has yet to be built (Defendant's Cross-Motion for Judgment on the Administrative Record, p. 39), to be more secure and therefore technically superior to Google's cloud solution, that unsubstantiated determination is not acceptable as a justification for a sole-source procurement. *Id.* at 308 (citing *Aero Corp. v. Dept. of the Navy,* 540 F.Supp. 180, 208-09 (D.D.C. 1982) (holding that "the technical and administrative superiority of a given firm over all other possible sources has never been accepted as a justification for sole-source procurement from that firm[;]" rather, "[t]he place where . . . differences (in technical merit) appropriately should be considered is in evaluating proposals in connection with a negotiated procurement.")).[12] Finally, and most significantly, DOI's selection of the Microsoft solution was arbitrary and capricious because the record establishes that long before DOI developed its restrictive requirements it had already chosen the "Microsoft Dedicated Hosted Exchange service" based on nothing more than conversations with [redacted] representatives in early 2009, the fact that DOI had "previously established Microsoft Exchange as the agency standard," and "[redacted]." Plaintiffs' MJAR, pp. 3-4 (citing AR Tabs 14 and 33). All subsequent actions by DOI focused on making that 2009 decision a reality,

[12] Indeed, in its June 17, 2010 letter to DOI, Google recommended that DOI conduct a competitive procurement similar to that then being conducted by GSA in which the solicitation's Statement of Objectives required the contractor to "provide security controls that are confirmed to meet the security standards for Moderate Impact systems as described in NIST SP 800-53 with an accepted Certification and Accreditation (C&A)." AR Tab 5, p. 51. Google's and Microsoft's cloud solutions were among the offered cloud services in response to GSA's solicitation, and Google's system was ultimately selected by GSA. Plaintiffs' MJAR, p. 12 n.4. [redacted]

while DOI officials simultaneously either rebuffed Google's "active campaign to be afforded the opportunity to have the Google Apps Service considered for the procurement, if and when Interior issued a RFP," *Google,* 95 Fed.Cl. at 673, or misled Google officials into believing there would be a competitive procurement for the selection of a cloud-based messaging solution.

For these reasons and as demonstrated by the record and Plaintiffs' previous filings, Plaintiffs contend that Defendant's basis for this procurement lacked a rational basis and the procurement was conducted in a manner that was arbitrary and capricious.

IV. THE COURT SHOULD PERMANENTLY ENJOIN THE DOI FROM PROCEEDING WITH ITS PROCUREMENT OF BPOS-FEDERAL

The Tucker Act authorizes the U.S. Court of Federal Claims to award "any relief that the court considers proper, including declaratory and injunctive relief." 28 U.S.C. 1491(b)(2). In deciding whether a permanent injunction is warranted, the court considers: "(1) whether...the plaintiff has succeeded on the merits of the case; (2) whether the plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) whether the balance of hardships to the respective parties favors the grant of injunctive relief; and (4) whether it is in the public interest to grant injunctive relief." *PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed.Cir. 2004) (citing *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n. 12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.")). The Defendant's procurement actions have violated statutory and regulatory requirements, and as described below, the factors for permanent injunctive relief are satisfied in this case.

A. Plaintiffs Will Suffer Irreparable Harm If Injunctive Relief Is Not Granted

When assessing irreparable harm, "the relevant inquiry is whether the plaintiff has an adequate remedy in the absence of an injunction." *OTI Am., Inc. v. United States*, 68 Fed.Cl. 646, 659 (2005) (quoting *PGBA, LLC v. United States*, 60 Fed.Cl. 196, 221, *aff'd*, 389 F.3d 1219 (2004). In the context of a bid protest action, the U.S. Court of Federal Claims has consistently held that a protester suffers irreparable harm if it is deprived of the opportunity to compete fairly for a contract. *See, e.g., Information Sciences Corp. v. United States*, 80 Fed.Cl. 759, 798 (2008); *Cardinal Maint. Serv., Inc. v. United States*, 63 Fed.Cl. 98, 110 (2004) ("It is well-settled that a party suffers irreparable injury when it loses the opportunity to compete on a level playing field with other bidders... Irreparable injury includes, but is not limited to, lost profits which would flow from the contract."). The RFQ here contemplates an award with a five-year term, worth as much as $59.3 million. AR Tab 24, p. 811. If the Court does not grant injunctive relief, the Defendant will proceed with the implementation of this RFQ, despite the unlawful procedures and restrictions upon which it was based, and Plaintiffs will lose the opportunity to compete on a fair and lawful basis, as well as the revenues and profits that might follow. *See Google,* 95 Fed.Cl. at 679.

B. The Balancing Of Harm Favors Injunctive Relief

The next factor considers the relative harm to the Government and to the intervening defendant should the Court enter an injunction. *PGBA*, 60 Fed.Cl. at 221-222. Here, the alleged harms to the DOI and Softchoice amount to nothing more than *de minimus* inconvenience. Injunctive relief may indeed delay the DOI's procurement while it retraces its steps and coordinates a transparent competition in accordance with the law. But these delays are the consequence of DOI's own actions, and the resulting harm is outweighed by the harm to the Plaintiffs and the public. *See Google,* 95 Fed.Cl. at 679-680. Similarly, even though Softchoice

and Microsoft may have to rewrite their messaging proposals and compete against Plaintiffs and others in response to a competitive procurement, this does not compare to the above-referenced harm to Plaintiffs. *See Hunt Building Co., Ltd. v. United States*, 61 Fed.Cl. 243, 280 (2004) (The awardee "will still be able to compete, this time on equal footing ... whereas absent injunctive relief, [the protester] will have been unfairly denied a meaningful opportunity to compete. On balance, injunctive relief is warranted to remedy the unfair process here.").

Defendant has previously argued that the balance of harms weighs against Plaintiffs because, notwithstanding the issuance of an injunction against the procurement at issue, Plaintiffs still will have no chance of competing on any subsequent procurement since DOI's requirements will not be relaxed. Def. MJAR, p. 47. But Plaintiffs have specifically challenged the rationality of DOI's alleged minimum need for a cloud hosted on a physically isolated server dedicated to DOI alone or to federal government customers only, and the procedures and circumstances underlying the selection of that alleged minimum need. If the Court upholds any of Plaintiffs' challenges, then DOI's restrictive requirements must be removed, or at least rationally reconsidered, and the subsequent procurement should be open to competition from Google, its resellers and other Microsoft competitors.

C. The Public Interest Favors Issuance Of An Injunction

The public interest lies in preserving the integrity of the competitive process. *See Hunt Building*, 61 Fed.Cl. at 280 ("the public interest is served by ensuring that the Government procurement process is fair"). A permanent injunction will serve that interest by ensuring that the DOI's acquisition of a secure cloud-based messaging system is conducted through a fair and transparent procurement process. On the other hand, allowing the DOI to proceed with its unlawful RFQ would undermine the integrity of the competitive process and encourage other

agencies to also circumvent the restraints that are imposed by the CICA and the FAR by, as here, labeling a sole-source selection of a product or service as a "standardization decision." The Court must not validate such a message. Accordingly, it is in the public interest to grant permanent injunctive relief in this case. *See Mission Critical Solutions v. United States*, 91 Fed.Cl. 389, 410-412 (2010) ("There exists strong public interest in ensuring that government procurement contracts are awarded in accordance with law.").

V. CONCLUSION

All Google has ever sought was an opportunity to compete for the DOI's unified, cloud-based messaging requirements, as it has been able to do successfully in response to several other government agency procurements. The record in this case, however, establishes that the DOI identified Microsoft as its preferred and sole cloud provider in 2009 and crafted an acquisition strategy to achieve that result. Without any regard to the applicable procurement laws and regulations, the DOI charged full speed ahead, and collaborated with Microsoft on a pilot project to begin implementation of its "first in federal" messaging system. When Google again reached out to the DOI in May 2010 after numerous attempts to remind the DOI of Google's keen interest in a competitive procurement and the DOI's obligations under the CICA and the FAR, the DOI prepared a risk assessment and standardization decision designed to back up the sole-source procurement that DOI initiated a year earlier. Even those *post hoc* documents fail to include any meaningful comparison of Google's community cloud to Microsoft's community cloud, and the logical gaps and inconsistencies in those documents further demonstrate the irrationality of DOI's conclusion that Microsoft's BPOS-Federal is the sole messaging solution that can satisfy DOI's alleged minimum needs.

This Court has the authority to afford Plaintiffs and others a fair opportunity to compete for this significant procurement. Indeed, the competitive mandate of CICA and the facts in this

case strongly favor, and Plaintiffs believe dictate, such a result. Accordingly, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for declaratory and permanent injunctive relief.

Respectfully submitted,

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Dated: May 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2011, a copy of the foregoing "Plaintiffs' Restated Motion for Judgment on the Refiled and Updated Administrative Record" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Timothy Sullivan