IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

ORACLE AMERICA, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

AMAZON WEB SERVICES, INC.,

Defendant-Intervenor.

REDACTED VERSION
02/12/2019

Case No. 18-1880C
Senior Judge Eric G. Bruggink

[redacted]

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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Plaintiff Oracle America, Inc. ("Oracle") seeks declaratory and injunctive relief to remedy defects related to Department of Defense ("DoD") Solicitation No. HQ0034-18-R-0077 (the "RFP"), commonly known as the Joint Enterprise Defense Infrastructure Cloud procurement ("JEDI"). The RFP solicits a single awardee to provide infrastructure as a service ("IaaS") and platform as a service ("PaaS") cloud services across DoD, under a ten-year, ten billion dollar, Indefinite Delivery Indefinite Quantity ("IDIQ") contract.

I. INTRODUCTION

By Congressional design, competition and integrity mandates undergird the entire federal procurement system. *See, e.g.,* 48 C.F.R. § 1.102(b). Oracle challenges three pre-award JEDI actions that break from specific statutory and regulatory direction to the substantial prejudice of the public and Oracle: (i) DoD's violation of a specific high-dollar value, single award IDIQ contract prohibition and disregard of a broader "maximum extent practicable" mandate for multiple awards; (ii) DoD's use of three gate criteria to limit competition in violation of statutory proscriptions on qualification requirements, unduly restrictive specifications, and DoD contracting authority; and (iii) DoD's involvement of heavily-conflicted former government officials (Deap Ubhi and Anthony DeMartino) in JEDI, and AWS' rehiring of Ubhi during JEDI.

DoD, demanding deference, asks the Court to temper its review of Oracle's protest despite that the protest principally applies statutes and regulations designed to restrict DoD. DoD, however, lacks discretion to disregard the law, whatever DoD's intent. *See Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990) ("Where Congress prescribes the form in which an agency may exercise its authority ... [courts] cannot elevate the goals of an agency's action, however reasonable, over that prescribed form."). The power to legislate (and appropriate funds) belongs to Congress. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). The Court, thus, cannot condone what Congress has restricted, no matter what DoD's motivation.

[redacted]

Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1979 (2016) ("we do not defer to [the procuring] agency when the statute is unambiguous").[1]

First, DoD has violated 10 U.S.C. § 2304a(d)(3) by soliciting this $10 billion IDIQ contract, with near constant technology refresh requirements, as a single award. In 2008, Congress, confronted with numerous examples of DoD's runaway, single source IDIQ contracts, prohibited use of such contracts absent a head-of-agency determination that one of four narrow exceptions existed. As relevant here (based on the exception DoD selected), section 2304a(d)(3) permits the award of an IDIQ contract valued over $112 million to a single source if "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); 48 C.F.R. § 16.504(c)(1)(ii)(D). DoD, by the challenged determination and finding ("D&F"), asserts that the awardee's cloud catalog proposed for JEDI and incorporated into the contract will cover all services delivered across the potential ten years of performance and include a "single, fixed unit price for delivery of that particular cloud service." (AR Tab 16 at 319.) The RFP and record demonstrate that this is not so.

DoD designed JEDI to help DoD keep pace with the rapidly evolving commercial cloud arena by having the awardee regularly add new commercial cloud services onto the JEDI contract. In this respect, JEDI is a classic IDIQ technology contract of the very type that led Congress to enact provisions favoring task order competition. The Office of Management and Budget ("OMB") has described the backdrop for the earliest single IDIQ contract restrictions:

> Use of multiple award contracts may be especially effective for maintaining better prices and quality in the IT market. Before FASA, many agencies relied on long-term ID/IQ and umbrella contracts with technology refreshment and price reduction clauses to take advantage of falling prices and new technology. Even

[1] All emphasis of quoted material in this brief is added unless otherwise noted.

[redacted]

> with these clauses, the government had to negotiate in a sole-source environment and was often unable to realize the economies and efficiencies afforded by vigorous competition among vendors in the marketplace.

(AR Tab 77 at 5310.)

New record documents not shared with the U.S. Government Accountability Office ("GAO") confirm that DoD knew the solicited "Iaas/PaaS offerings are not static and will be updated overtime [sic] both in terms of available services and applicable pricing." (AR Tab 130 at 8721.) Indeed, DoD crafted a special technology refreshment clause under which the awardee will continually add new services to the contract – the prices of which the awardee and DoD will set when incorporating the future service onto the contract. (AR Tab 35 at 740-41.) Gartner estimates that major cloud providers release 40 to 50 new cloud services in any given month.[2] Given that, Chris Cornillie, a Bloomberg technology writer, succinctly posited the question raised by Oracle's Count I: "How can the Pentagon request firm fixed prices on services that don't yet exist?"[3]

Second, the Contracting Officer ("CO") separately violated statutory and regulatory directives (applicable to all IDIQ contract competitions, regardless of size) to favor a multiple award IDIQ acquisition strategy to the "maximum extent practicable." *See* 10 U.S.C. § 2304a(d)(4); 48 C.F.R. § 16.504(c)(1)(i); *WinStar Comm'ncs, Inc. v. United States*, 41 Fed. Cl. 748, 759 (1998) (holding agency failed to comply with "maximum extent practicable" requirement). Congress' "maximum extent practicable" direction is not an empty decree. *Cf. Palantir USG, Inc. v. United States*, 904 F.3d 980, 992-93 (Fed. Cir. 2018) (affirming that Army actions undermined different "maximum extent practicable" commercial item preference).

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[2] Chris Pemberton, *Hidden Cloud Opportunities for Technology Service Providers*, Gartner (June 20, 2018), https://www.gartner.com/smarterwithgartner/7-hidden-cloud-growth-opportunities-for-technology-service-providers/ (last visited 2/4/19).

[3] Chris Cornillie, *Five Takeaways from GAO's JEDI Decision Denying Oracle*, Bloomberg (Nov. 30, 2018), https://about.bgov.com/blog/five-takeaways-jedi-decision-oracle/ (last visited 2/4/19).

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Here, affirming the CO's one-sided "maximum extent practicable" analysis requires a suspension of disbelief. With respect to the purported negatives of competition, a concoction of *ipse dixit* assertions and unsupported inputs yields implausible conclusions such as multiple awards will "result[] in 282,240 days (or 770 years worth of time collectively) of delaying warfighters from getting access to foundational cloud computing and storage resources." (AR Tab 24 at 460.) The analysis also relies on an inflated assertion that task order competition will add $505 million in administrative costs, apparently hoping that the eye-popping output will dissuade a discriminating review of the unsourced inputs. (*Id.*)

But, even with the CO's inflated numbers, the scales would have tipped in favor of competition had the CO considered the benefits of multiple awards as FAR 16.504(c) requires: "Each of these [FAR 16.504(c)(1)] criteria plainly requires consideration of the benefits of multiple awards." *WinStar*, 41 Fed. Cl. at 758 (overturning each of three invoked single award reasons). Indeed, OMB has observed that multiple award IDIQ technology contracting can both reduce costs (by 16% for one agency, $1.6 billion here) **and** improve quality. (AR Tab 77 at 5309-12.) DoD Guidelines, likewise, identify seven different benefits of competition. (*Id.* at 5361-62.) Yet, the CO here neither quantifies nor weighs any benefits of task order competition.

DoD's failure to promote IDIQ competition has not escaped notice. Recently, Congress tasked the GAO to report on DoD's use of single award IDIQ contracts for fiscal years ("FY") 2015 through 2017. GAO's May 2018 study reveals that DoD "obligated about two-thirds of its IDIQ obligations on single award contracts."[4] In FY2017 alone, DoD awarded a staggering 9331 single source IDIQ contracts and only 1423 multiple award IDIQ contracts.[5] After lamenting the

[4] *Defense Contracting: Use by the Department of Defense of Indefinite Delivery Contracts from Fiscal Years 2015 through 2017*, B-691692 (May 10, 2018) at 7, available at https://www.gao.gov/assets/700/691692.pdf (last visited 2/4/19).
[5] *Id.*

[redacted]

disconnect between DoD's practice and the relevant statutory provisions, Professor Schooner and the Nash and Cibinic Report offered: "In a compelling recent example, in one of its highest profile ongoing solicitations [JEDI], the DOD reminds us that the multiple award preference, in practice, is the exception, not the rule.... Lord's D&F appears entirely consistent with her stated emphasis on speed, rather than bureaucracy, control, or regulation."[6]

Third, unsatisfied with eliminating task order competition, DoD employed RFP gate criteria to unduly restrict competition for the base contract. DoD's acquisition planning reveals that DoD crafted the seven gate criteria to limit the number of proposals and potential protests: "The JEDI Cloud program schedule could be negatively impacted if source selection extends beyond the planned timeline due to an unexpected number of proposals or lengthy protest delays. To mitigate this risk, the solicitation will use a gated evaluation approach...." (AR Tab 21 at 422; AR Tab 25 at 504.)[7] Internal DDS communications reveal an even more problematic design:

> Let me put the metrics [we select] in this context. The agreed upon measures drive what acquisition strategy will be approved. So if multiple cloud providers can meet the metrics, then we don't get to one. The metrics solve the problem.

(AR Tab 47c at 3123.) The Competition In Contracting Act ("CICA"), specifically 10 U.S.C. § 2304(c)(1), (f), and FAR 6.302-2 set forth requirements an agency must satisfy to limit the number of sources and restrict competition. DoD did not follow CICA's process.

The gate criteria crafted by DoD had the planned and predictable effect. (*See* AR Tab 70 at 5022.) Although hundreds of competitors participated in industry day and more than sixty

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[6] Steven L. Schooner, *Indefinite-Delivery/Indefinite-Quantity Contracts: Time to Correlate Practice and Policy?*, 32 Nash & Cibinic Rep. ¶ 44 (Sept. 2018).

[7] Congress specifically rejected the concept of "effective" competition when it statutorily required "full and open" competition. *SMS Data Products Grp., Inc. v. United States*, 853 F.2d 1547, 1544 (Fed Cir. 1988) (quoting H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1422) ("The Conference agreement on CICA rejected 'effective' competition as too low a standard for government procurements..."); 10 U.S.C. § 2305(a)(1)(A)(i).

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companies submitted detailed request for information ("RFI") responses, only four companies submitted proposals, and based on public statements (and protests) of the competitors no more than two companies can satisfy the gate criteria.[8] The three gate criteria Oracle challenges violate the law, exceed DoD's needs, or both to Oracle's competitive prejudice.

Subfactor 1.2 mandates that each offeror have, at the time of proposal submission, three existing, physical data centers separated by at least 150 miles, each supporting FedRAMP Moderate Authorized offerings. DoD admits that the JEDI contract does not require FedRAMP authorization: "[W]e are not requiring, as part of the JEDI cybersecurity plan, that the winner go through the FedRAMP process before the DoD uses the final solution...." (AR Tab 78 at 5495:5-14.) The offeror need not even propose the data centers and offerings used to clear the gate. (AR Tab 40 at 853 (Q233).) Instead, DoD selected this gate to screen and severely restrict the field. Congress has strict rules limiting the use of such qualification requirements. 10 U.S.C. § 2319; *W.G. Yates & Sons Constr. Co. Inc. v. Caldera*, 192 F.3d 987 (Fed. Cir. 1999) (declaring qualification requirement invalid). DoD, however, did not even attempt to follow these basic statutory requirements. Equally problematic, DoD's demand that the offerors' meet this requirement at the time of proposal submission both exceeds DoD's needs and violates FedRAMP policy: "Federal agencies cannot require [Cloud Service Providers ("CSPs")] to be FedRAMP authorized as part of their RFP but can state that a CSP needs to be FedRAMP authorized once federal data is placed in the system."[9]

Subfactor 1.1. likewise exceeds any legitimate DoD need to Oracle's competitive prejudice. Subfactor 1.1 requires each offeror to demonstrate that the DoD-provided, significant

[8] *See* Complaint ¶ 4 (citing largest IaaS provider statements regarding JEDI requirements).
[9] *FedRAMP Tips & Cues Compilation 2015-2017* (Jan. 2018) at 7, https://www.fedramp.gov/assets/resources/documents/FedRAMP_Tips_and_Cues.pdf (last visited 2/4/19).

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cloud usage metrics are less than 50% of the offeror's Commercial Cloud Offering usage during the months of January-February 2018, i.e., nine months before the proposal deadline and sixteen months before the anticipated award date. (AR Tab 35 at 791.) The measurement period selected will lead to unreasonable results and does not serve a minimum, legitimate need. Rather, DoD has conceded that the capacity needs measured by the Subfactor 1.1 metrics will not arise until after contract award. (AR Tab 42 at 5749:5-9.)

Subfactor 1.6 is also an improper gate requirement that does not represent a legitimate minimum need. This subfactor requires each offeror to demonstrate an online marketplace of third-party platform and software offerings which JEDI Cloud users can purchase and quickly provision. But DoD lacks authority to procure such a marketplace. Congress only recently gave the General Services Administration ("GSA") permission to test such an approach and required inclusion of multiple contractors. Just months ago, this Court declared a similar Department of Veterans Affairs vendor overseen marketplace a violation of CICA. *Electra-Med Corp. v. United States*, 140 Fed. Cl. 94, 104 (2018).

Fourth, Oracle challenges the CO's inadequate investigation of two distinct conflicts created by Ubhi's JEDI involvement: the first challenges DoD's decision to involve Ubhi despite his prohibited connections to a JEDI competitor and the second challenges AWS' decision to solicit and rehire Ubhi, a JEDI procurement official. As related to the DoD-Ubhi created conflict, the FAR mandates that procuring agencies "avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships." 48 C.F.R. § 3.101-1. The record, however, evidences a systemic DoD failure. Ubhi worked at AWS before joining the Defense Digital Service ("DDS") in summer 2016, and he returned to AWS as a General Manager in November 2017. (AR Tab 77 at 5254-55; AR Tab 33 at 686.) Yet, while

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at DDS, Ubhi served as "lead [Product Manager] on the [JEDI] effort," one of four people within DDS "leading the cloud acquisition for DoD." (AR Tab 47a at 2793.) In this role, Ubhi engaged in "highly technical" discussions with potential JEDI Cloud competitors, met with DoD cloud users regarding their needs and other offerors' solutions, zealously advocated for the single award approach, attacked DoD and industry personnel favoring multiple award approaches, denigrated AWS competitors, framed the business case, and established requirements (metrics).[10]

This Court has described its task with regard to the conflict of interest challenges as answering "whether the agency reviewed the proper materials, asked the right questions, and articulated a sufficient reasoning" for its no-impact decision. (Dkt. 48 at 7.) The record demonstrates that the response to each is "no." The CO did not interview Ubhi or review his work product. (AR Tab 78 at 5603:1-12, 5646:3-11; *see also* Dkt. 40-1, Kasper Decl.) The CO's investigation of the government-side conflicts created by the Ubhi-AWS relationship spans less than one page, does not explore most of the Ubhi-AWS connections, fails to detail Ubhi's various tasks and responsibilities, never considers when the Ubhi-AWS business negotiations began, ignores the documents Ubhi accessed, created, and downloaded (Dkt. 40-1, Kasper Decl. ¶ 11), and makes no mention of Ubhi's re-employment with AWS. (*See* AR Tab 33 at 686-87.) The CO's failure to address such basic facts renders her conclusions unreasoned. Further, the no-impact determination required concurrence by a higher-level DoD-designated official. 48 C.F.R. § 3.104-7(a)(1). The CO neither sought nor obtained the required concurrence.

With respect to the AWS conflict of interest created when AWS solicited and rehired Ubhi, the CO did not investigate the matter at all. Given that DoD now has an ongoing investigation, Oracle does not object to a stay of this particular allegation pending investigation

[10] *See infra* at Section III.C.1.

[redacted]

completion. Failing that, the Court should sustain this allegation as well.

Finally, the CO's perfunctory review of DeMartino's JEDI involvement likewise warrants judgement in favor of Oracle. At relevant times, DeMartino, a high-level political appointee, served as the chief of staff for the Deputy Secretary of Defense ("DSD") – the Pentagon official who initiated and led JEDI.[11] Given that DeMartino's work prior to entering the government involved consulting for AWS, the Standards of Conduct Office ("SOCO") specifically directed DeMartino in April 2017 not to participate in any matters related to AWS without prior approval and, later in April 2018, directed DeMartino's immediate recusal from JEDI when SOCO untimely learned that DeMartino disregarded that guidance. DoD's attempt to reclassify the DSD's Chief of Staff as a mere "note taker" lacks record support; the record demonstrates that DeMartino oversaw JEDI from the policy level to specific details.

The CO again dedicated less than one page to DeMartino's involvement. (AR Tab 33 at 685.) The CO did not consider (or know about) SOCO's pre-JEDI guidance to DeMartino. (AR Tab 78 at 5669:13-5670:13.) The CO did not interview DeMartino, review his documents, or even attend many of the JEDI meetings DeMartino held. (*Id.* at 5686:11-14, 5695:2-9; AR Tab 75 at 5239 (¶ 33).) The CO also did not forward the no-impact findings for concurrence by DoD's procurement integrity designee, as required by FAR 3.104-7(a)(1).

II. QUESTIONS PRESENTED

1 Whether DoD violated the statutory prohibition on single source awards by attempting to recast the JEDI contract and its technology refresh provisions as seeking only "services for which prices are established in the contract for the specific tasks to be performed."

2 Whether DoD violated applicable law by failing to "give preference to making

[11] DoD admits that DSD Shanahan (whose authority DeMartino implemented) had "personal and substantial" involvement in the procurement. (AR Tab 64 at 4862.)

[redacted]

multiple [IDIQ] awards" to the "maximum extent practicable."

3 Whether DoD's imposition of the three challenged gate criteria (Subfactors 1.2, 1.1, and 1.6) violates statutory and regulatory proscriptions governing qualification requirements, barring unduly restrictive specifications, and limiting DoD's authority.

4 Whether the CO's determination that the participation of heavily-conflicted former government officials had no impact on the procurement's integrity and the CO's failure to investigate AWS' rehiring of Ubhi violate procurement law or otherwise lack a rational basis.

III. STATEMENT OF FACTS

Although DoD has employed FAR Subpart 12.6's streamlined procedures, the RFP demands capabilities far beyond anything in the commercial cloud computing market. The JEDI contractor will provide cloud services to DoD, related agencies, and federal contractors performing DoD missions "at all classification levels, across the homefront to the tactical edge, including disconnect and austere environments, and closed loop networks." (AR Tab 27 at 608, 610.) The RFP defines "tactical edge" to include "[e]nvironments covering the full range of military operations...." (AR Tab 29 at 651.) The RFP requires two types of tactical edge capabilities, the first of which offerors must have in production by January 11, 2019, and the second by "the first day of the post award kickoff event." (AR Tab 35 at 808.) In discussions with DoD about the final RFP, [redacted] (AR Tabs 120-123.) [redacted] (AR Tab 122 at 28:40.)

[redacted]

A. From The Outset, DoD Chose The Convenience Of A Single Award.

On September 13, 2017, the DSD issued a memorandum establishing the Cloud Executive Steering Group ("CESG") and initiating JEDI. (AR Tab 91 at 5955.) The very next day, the CESG held its first meeting, where the CESG expressed its commitment to a single award approach and an intention to withhold that decision from the public to delay scrutiny. (*See* AR Tab 86 at 5928 (CESG meeting minutes withheld from GAO showing CESG sought to "[a]void specifying that there is a single vendor," because doing so "will create perception issues with vendors already in use.").)[12] The CESG's October 5, 2017 meeting minutes reiterate the single award approach: "Single cloud solution necessary for this enterprise initiative to be successful and allow DoD to achieve its mission objectives with cloud adoption." (AR Tab 88 at 5934; *see also* AR Tab 51 at 4325 (October 27, 2017 update to DSD: "the CESG acquisition strategy is focusing on a single award.").) On November 6, 2017, DoD confirmed publicly the chosen "Acquisition Strategy" of a "Single-award [IDIQ] contract. . . . " (AR Tab 92 at 5957.) In its May 2018 report to Congress, DoD asserted that its single award approach would avoid the administrative burden of task order competition. (AR Tab 109 at 6496-97.)

On July 17, 2018, nearly ten months after the first CESG meeting choosing the single award approach, the CO signed a memorandum setting forth three purported justifications for adopting this acquisition strategy. (AR Tab 24.) The CO's one-sided analysis reflects one purpose – to support DoD's foregone single award conclusion. (*Id.*) In her memorandum, the CO does not consider the benefits of task order competition, much less give the maximum practicable preference to multiple awards. (*Id.*) Each finding is inaccurate, unsubstantiated, or both. For instance, the CO relies on a flawed calculation to conclude that a single award

[12] DoD withheld much of the record from GAO, including the documents at AR Tabs 86-186.

[redacted]

approach will save the government half a billion dollars in administrative costs and prevent "770 years worth of time … of delaying warfighters." (*Id.* at 460.) The CO testified that she derived the inputs for these calculations from her "personal experience" (AR Tab 78 at 5717:1-5), but acknowledged that she has never purchased cloud services under an IDIQ contract before, and offered no explanation for how her prior experience relates to JEDI. (*See id.* at 5707:10-17.)

Two days later, on July 19, 2018, the Under Secretary of Defense for Acquisition and Sustainment signed a D&F declaring JEDI exempt from the statutory prohibition against large, single-award IDIQ contracts. (AR Tab 16.) The D&F rests on a single conclusion, i.e., the JEDI contract will provide only for firm, fixed price ("FFP") "task orders or delivery orders for services for which prices are established in the contract for the specific tasks to be performed." (*Id.* at 318.)

B. DoD Structured The Challenged Gate Criteria To Restrict Competition.

DoD also structured the RFP to reduce the administrative burden of competing the base contract. Specifically, to avoid potential delays from receiving more proposals or protests than expected, DoD imposed several RFP gate criteria, evaluated on a "go/no-go" basis in Phase One of the RFP's two-phased evaluation process:

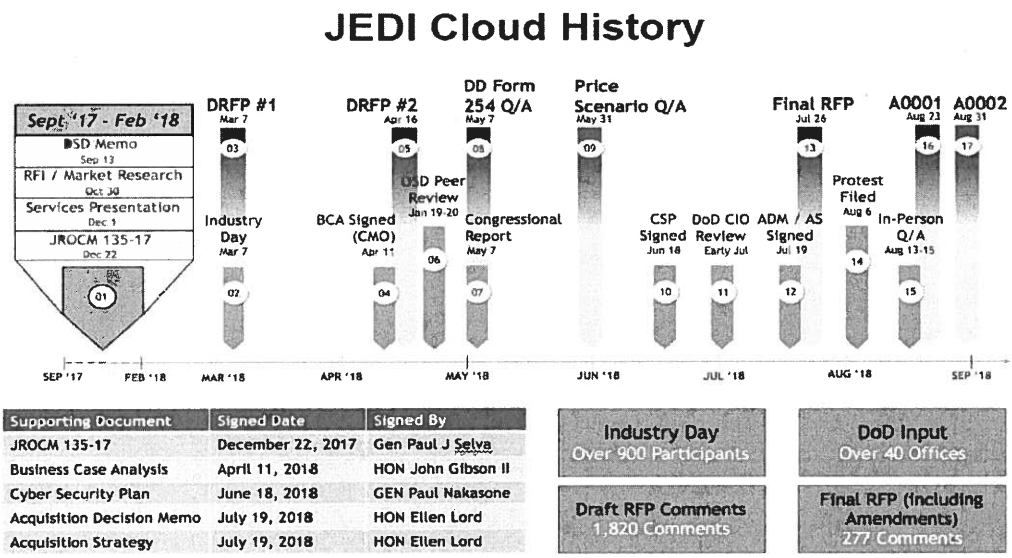
> The JEDI program schedule could be negatively impacted if source selection extends beyond the planned timeline due to an unexpected number of proposals or lengthy protest delays. To mitigate this risk, the solicitation will use a gated evaluation approach that includes "go/no go" gate criteria. Offerors must meet the established minimum criteria in order to be considered a viable competitor.

(AR Tab 21 at 422; AR Tab 25 at 504; AR Tab 78 5473:2-11; AR Tab 35 at 805.) If an offeror receives an Unacceptable rating under any gate, the RFP provides that "the remainder of the proposal will not be evaluated and will not be considered for award." (AR Tab 35 at 805.) DoD designed the metrics and capabilities required by the gate criteria to "get to one" contractor. (*See*

[redacted]

AR Tab 47c at 3123 ("So if multiple cloud providers can meet the metrics, then we won't get to one.").)

The gate criteria served their improper purpose. DoD's market research noted the existence of a robust commercial cloud services market. (AR Tab 20 at 366.) When first announced, JEDI sparked intense interest in the contracting community: hundreds of companies attended the industry day, and more than sixty companies submitted detailed RFI responses identifying extensive, sometimes unique capabilities:



(AR Tab 70 at 4986-87, 5022.) But following the issuance of the final RFP and its restrictive gate criteria, only four companies attended DoD's in-person question and answer ("Q&A") session and ultimately submitted proposals. (*See* AR Tabs 120-123.)

Three of the four offerors expressed concerns during the Q&A session regarding the restrictive nature of the gate criteria and the considerable effort and resources necessary to pass the gates and compete. (*See id.*) Two of the four offerors (Oracle and IBM) ultimately filed protests challenging the restrictive specifications,[13] and a third offeror (Microsoft) publicly

[13] Sam Gordy, *JEDI: Why We're Protesting*, IBM (Oct. 10, 2018), https://www.ibm.com/blogs/

[redacted]

criticized the restrictive gates.[14] Other major cloud service providers, e.g., Google, chose not to compete based, in part, on the RFP's restrictive terms: "We determined that there were portions of the contract that were out of scope with our current government certifications."[15]

Of the seven gates, three are relevant here. First, Subfactor 1.2 mandates that each offeror have, at the time of proposal submission, no fewer than (i) three physically existing data centers, (ii) within the customs territory of the United States, (iii) that are separated by at least 150 miles, (iv) capable of automated failover to the others, and (v) each "supporting at least one IaaS offering and at least one PaaS offering that are FedRAMP Moderate 'Authorized' by the Joint Authorization Board (JAB) or a Federal agency as demonstrated by official FedRAMP documentation." (AR Tab 35 at 792; AR Tab 32 at 661 (response to Q26 and Q27); AR Tab 42 at 946-47; AR Tab 78 at 5488:22-5489:21.) DoD first required FedRAMP authorized services in all three data centers in the July 26, 2018 final RFP. (*Compare* AR Tab 105 at 6241 (requiring "FedRAMP Moderate compliant") *with* AR Tab 35 at 792.) DoD thus gave interested providers less than two months to obtain FedRAMP authorization, a process that takes at least six months to complete.[16]

"FedRAMP Authorized" is a designation that the Cloud Service Provider's systems have

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policy/jedi-protest/ (explaining that "Certain requirements in the RFP either mirror one vendor's internal processes or unnecessarily mandate that certain capabilities be in place by the bid submission deadline versus when the work would actually begin. Such rigid requirements serve only one purpose: to arbitrarily narrow the field of bidders.") (last visited 2/4/19).

[14] Billy Mitchell, *DOD defends its decision to move to commercial cloud with a single award*, FedScoop (Mar. 8, 2018), https://www.fedscoop.com/dod-pentagon-jedi-cloud-contract-single-award/ (last visited 2/4/19).

[15] Naomi Nix, *Google Drops Out of Pentagon's $10 Billion Cloud Competition*, Bloomberg (Oct. 8, 2018), https://www.bloomberg.com/news/articles/2018-10-08/google-drops-out-of-pentagon-s-10-billion-cloud-competition (last visited 2/4/19).

[16] *Compare* AR Tab 1 at 67 (requiring proposals by September 17, 2018) *with FedRAMP Accelerated A Case Study for Change Within Government*, at https://www.fedramp.gov/assets/resources/documents/FedRAMP_Accelerated_A_Case_Study_For_Change_Within_Government.pdf (noting FedRAMP efforts to reduce authorization timeline to six months) (last visited 2/4/19).

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completed the FedRAMP authorization process.[17] Two acceptable paths of authorization exist: a JAB provisional authorization or an initial agency authorization.[18] FedRAMP prohibits federal agencies from requiring authorization as a prerequisite for bidding on a federal cloud services solicitation. (AR Tab 77 at 5292.) The security requirements in the RFP's Cyber Security Plan, i.e., the contract requirements, do not require FedRAMP authorization. (AR Tab 78 at 5495:1-8.) Instead, the JEDI contract requires the awardee, thirty days after award, to submit a Security Authorization Package demonstrating compliance with the Cyber Security Plan for DoD's review outside of the FedRAMP process. (AR Tab 5 at 159 (CDRL 11).)

Second, in order to compete for the JEDI award, Subfactor 1.1 requires the offeror to demonstrate that the estimated JEDI Cloud metrics for Network, Compute, and Storage are less than 50% of the Commercial Cloud Offerings usage during the months of January-February 2018. (AR Tab 35 at 791.) DDS claims these metrics ensure the JEDI contractor will have surge capacity for unexpected future events and continue to invest in innovation during contract performance. (AR Tab 42 at 944-46.) But Subfactor 1.1, as written, measures the offeror's capacity as of January and February 2018 – long before proposal submission and nearly sixteen months before DoD will award the contract let alone issue a task order. (AR Tab 35 at 791.)

Third, Subfactor 1.6 requires demonstration at the time of proposal submission that the offeror has an online marketplace of third-party platform and software offerings that JEDI Cloud users can use to purchase and provision software. (*Id.* at 793-94.) DoD has yet to (and cannot) identify any legal authority permitting it to set up this online marketplace.

[17] https://www.fedramp.gov/faqs/ (last visited 2/4/19).
[18] https://www.fedramp.gov/agency-authorization/ (last visited 2/4/19).

[redacted]

C. DoD Neither Implemented Procedures To Promote The Public Trust In JEDI Nor Properly Investigated And Resolved Conflicts.

DoD failed to screen the procurement officials for potential conflicts of interest prior to JEDI involvement. Consequently, DoD permitted two individuals with known AWS ties – Ubhi and DeMartino – to shape the acquisition. When the press and others questioned their participation, the CO created a brief integrity memorandum.

1. Ubhi Helped Shape the Procurement.

Ubhi temporarily left AWS to serve as a "Product Director" at DDS in August 2016. (AR Tab 77 at 5254; AR Tab 33 at 686.) DDS hand-picked Ubhi to the four person team leading the acquisition without first engaging in the required conflict vetting process. (AR Tab 47a at 2813.) The record does not contain a conflict-of-interest questionnaire or any signed non-disclosure agreement for Ubhi. DoD's only purported vetting is a Slack exchange in which DoD counsel informs Ubhi that industry will "want to give 'capabilities briefings' to DDS about cloud," and asks who should serve as the point of contact. (AR Tab 47b at 3049.) Ubhi responds "make it me please," and follows-up with "unless you think my past in AWS biases me." (*Id.*) Counsel responds back – without asking any questions about whether he still has ties to or financial interests in AWS – "No. You have no conflict anymore." (*Id.*)

Ubhi managed untold amounts of nonpublic and acquisition sensitive JEDI-related information based on his access to the acquisition's Google drive. (*See* AR Tab 78 at 5532:16-18, 5533:8-16.) DoD has not attempted to determine the information that Ubhi accessed through the Google drive, much less the documentation he contributed to and revised, but has confirmed that Ubhi synced the Google drive to his laptop. (Dkt. 40-1, Kasper Decl. ¶ 11.)

Although the CO misreports otherwise, DoD has acknowledged that Ubhi participated personally and substantially in JEDI. (*Compare* AR Tab 33 at 686-87 *with* AR Tab 64 at 4860,

[redacted]

4862 (DoD identifying Ubhi as "personally and substantially" participating in JEDI).) The record confirms as much. Most notably, Ubhi drove the decision to adopt a single award approach. For example, in a September 29, 2017 message to Ubhi, DDS counsel Sharon Woods said: "I get nervous when I hear these arguments about multiple clouds. I really need to better understand from you [Ubhi] why only one provider makes sense." (AR Tab 47c at 3114.)[19] In an October 9, 2017 message among DDS team members, Woods indicated that Ubhi planned to attend the next CESG meeting to advocate for a single award approach: "Deap [Ubhi] has a specific way he wants to tackle this [one versus multiple providers] and will be attending in person for this purpose." (AR Tab 47c at 3181.) Ubhi attended the CESG meetings, and argued robustly for the single award approach. (AR Tab 78 at 5742:7-14.)

Ubhi supported other acquisition strategy aspects, including defining JEDI requirements. (AR Tab 47a at 2941 (addressing technical requirements); *id.* at 2964 (Van Name to Ubhi: "thanks for initiating and for your work on the requirements documents"); *id.* at 2963 (Slack exchange asking Ubhi "for any work that has been done so far on the acquisition strategy.").) Ubhi drafted the "Problem Statement" for DoD leadership that "explains the problem we are solving with this initiative," including "why can't we solve the problem with multiple clouds," and "why is only one cloud a truly necessary requirement." (AR Tab 47b at 2986; *id.* at 2992.) Ubhi also contributed to the Business Case Analysis, a document that "serv[ed] as a foundation" for JEDI. (AR Tab 21 at 399; AR Tab 78 at 5442:21-5443:6; *id.* at 5572:4-11.)

Ubhi led DDS' JEDI communications with other DoD entities and industry. (*See* AR Tab 34 at 708.) To help structure the requirements, Ubhi met with DoD end-users about needs, and

[19] DoD included two relevant Slack groups at Tab 47. Slack apparently gives each user a numerical code; the user keys can be found at AR Tab 47a at 2901 and 2973. Additionally, Slack uses epoch time. To convert into a date we used the conversion tool at the following site https://www.freeformatter.com/epoch-timestamp-to-date-converter.html.

[redacted]

engaged potential competitors such as Microsoft, AWS, and Google in "highly technical" capabilities discussions. (*See, e.g.*, AR Tab 78 at 5436:11-5437:3; *id.* at 5463:12-5464:11.)

2. AWS' Purchase of Ubhi's Business and Ubhi's Return to AWS.

At some point during his DDS tenure, Ubhi entered into negotiations with AWS regarding AWS' potential purchase of Ubhi's startup company, Tablehero. (AR Tab 45 at 2777-78.) Missing from the AR is any documentation of how or when AWS began making offers to Ubhi, what was discussed, how long Ubhi waited before recusing himself, etc. The CO conceded that she does not know such information. (AR Tab 78 at 5603:1-6, 5609:18-19, 5617:9-14, 5642:6-7; 5645:18-5646:11, 5657:3-4, 5657:20-5658:6; AR Tab 75 at 5239 (¶ 33).) The only record document relevant to the inquiry is Ubhi's late October 2017 recusal letter indicating he planned "further" partnership discussions with AWS. (*See id.*)

Two weeks after his recusal, Ubhi, on November 13, 2017, announced his resignation from DDS. (AR Tab 46 at 2779-82.) After leaving DDS, Ubhi rejoined AWS as its General Manager. (AR Tab 77 at 5254.) Neither Ubhi nor AWS provided DoD with notice of the employment discussions. The record lacks information regarding, and the CO does not know, when the AWS-Ubhi employment discussions began. (AR Tab 78 at 5657:20-5658:3.)

3. The CO's Perfunctory Assessment of Ubhi's Involvement in JEDI.

On July 23, 2018, nine months after Ubhi's recusal and just three days before DoD posted the final RFP, the CO issued a Memorandum noting "there were four instances where individuals with potential financial conflicts of interest under 18 U.S.C. § 208 or impartiality restrictions under 5 C.F.R. § 2635.502 were provided with access to procurement sensitive information." (AR Tab 33 at 683.) The CO observed that like Ubhi, the other three individuals "had either a financial interest in or a covered relationship with Amazon, Inc./Amazon Web Services (AWS),"

[redacted]

and concluded "that no violation had occurred because these individuals [purportedly] had not participated personally and substantially in the procurement." (*Id.*)

The CO dedicated less than one page to discussing Ubhi's conflicts. (*Id.* at 686-87.) The CO considered only whether Ubhi joined the JEDI acquisition team more than one year after leaving AWS, and based on that finding concluded that his connections to AWS did not negatively impact JEDI. (*Id.*) Despite observing that AWS sought to purchase a start-up company from Ubhi, the CO did not investigate the communications or dealings between Ubhi and AWS, at all. (*See id.*) The CO's Memorandum shows that the CO neither considered the fact that Ubhi and AWS apparently engaged in employment discussions during the procurement nor that Ubhi returned to AWS in a leadership position upon leaving DDS. (*Id.*)

Before GAO, the CO testified that she did not interview Ubhi, did not identify or review the documents to which Ubhi had access, did not investigate the business discussions between Ubhi and AWS – she does not know when and how they started, what AWS offered, etc., did not consider the employment discussions or know when and how they started, and did not assess Ubhi's re-employment by AWS. (AR Tab 78 at 5603:1-6, 5609:18-19, 5617:9-14, 5642:6-7, 5645:18-5646:11, 5657:3-4, 5656:7-5657:18, 5657:20-5658:6; AR Tab 75 at 5239 (¶ 33).)

4. DeMartino's JEDI Participation Contrary to SOCO Advice.

DeMartino served as a consultant for AWS through January 2017, when he became Deputy Chief of Staff for the Office of the Secretary of Defense. (AR Tab 75 at 5231-32 (¶ 9).) In March 2017, DeMartino transitioned to serve as the DSD's Chief of Staff. (*Id.*) DeMartino reportedly declared income from AWS through August 2017 – the same month in which Secretary Mattis visited AWS to learn about AWS' cloud service capabilities.[20]

[20] "Both Donnelly and DeMartino declared income from Amazon on ethics disclosures, and were

[redacted]

Due to his financial ties with AWS, DeMartino received an ethics letter from DoD's SOCO in April 2017 warning DeMartino not to work on matters involving AWS. (AR Tab 51 at 4345.) DeMartino ignored SOCO's written direction, electing to participate in JEDI from its inception. (AR Tab 75 at 5233 (¶ 13).) Eight months later – after DoD received press FOIA requests raising concerns about his involvement – DeMartino consulted with SOCO about the propriety of his actions. (*Id.*) SOCO instructed DeMartino to recuse himself immediately. (*Id.*)

As the Chief of Staff for the organization driving DoD's cloud strategy, DeMartino participated in JEDI from a policy level all the way down to specific details regarding the acquisition. DeMartino obtained and edited JEDI briefings on behalf of the Secretary of Defense and DSD, directed JEDI activities, and participated in JEDI strategy meetings that discussed the Acquisition Strategy, Security Strategy, Business Case, and the propriety of a single versus multiple award approach. (AR Tab 51 at 4351-53, 4366-68, 4390; AR Tab 47a at 2926; AR Tab 78 at 5676:21-5677:18; *id.* at 5541:3-20; AR Tab 47e at 3310, 3315-16.) DeMartino also directed efforts and strategized as to the most likely way to garner approval for the single source approach. (AR Tab 51 at 4366-67.) Additionally, DeMartino provided input regarding the JEDI industry day briefing and coordinated and provided input into the JEDI press strategy. (*Id.* at 4402, 4404; AR Tab 47f at 3831, 3880; AR Tab 47e at 3319.)

5. The CO's Perfunctory Review of DeMartino's JEDI Involvement.

In an analysis that spans less than one page, the CO concluded that "DeMartino's involvement did not negatively impact the integrity of the JEDI Cloud acquisition" based on the assumption that his role was "ministerial," and that "he did not participate personally and substantially in the procurement." (AR Tab 33 at 685.) No citation to or explanation of the

working for Mattis when he visited Bezos in August 2017." Pete Sweeney, *Amazon Pentagon ties may receive greater scrutiny*, Reuters (Aug. 16, 2018), https://www.breakingviews.com/considered-view/amazon-pentagon-ties-may-receive-greater-scrutiny/ (last visited 2/4/19).

[redacted]

materials supporting this conclusion appears in the record. The CO did not talk to DeMartino or review his emails or other documentation. (AR Tab 78 at 5686:11-14; AR Tab 75 at 5239 (¶ 33 ("there are relatively few documents that I considered in my investigation").) Instead, the CO "largely relied on conversations that [she] had with the DDS legal counsel who provided advice in concert with SOCO." (AR Tab 78 at 5695:2-9.) At GAO, the CO testified that she could not remember when, or exactly how, the issue of DeMartino's conflict of interest came to her attention. (*Id.* at 5668:16-5669:5.) The CO had not reviewed the prior April 2017 ethics warning that SOCO issued to DeMartino. (*Id.* at 5669:11-5670:13.) The CO did not confer with SOCO (*id.* at 5675:4-8) or even consider the materials that SOCO reviewed (if any) when SOCO directed DeMartino in April 2018 to immediately recuse himself (*id.* at 5674:1-5675:3).

IV. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review this bid protest action pursuant to 28 U.S.C. § 1491(b). *See Distributed Sols., Inc. v. United States*, 539 F.3d 1340, 1344 (Fed. Cir. 2008). To obtain declaratory relief, Oracle must show that the challenged decisions and RFP criteria violate procurement law or are arbitrary and capricious and competitively prejudice Oracle. *See* 28 U.S.C. § 1491(b)(4) (incorporating 5 U.S.C. § 706); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001). To obtain permanent injunctive relief, Oracle must show that: (i) Oracle has achieved success on the merits; (ii) Oracle will suffer irreparable injury if injunctive relief does not issue; (iii) the harm to Oracle if an injunction does not issue outweighs the harm to DOJ if an injunction issues; and (iv) the injunction serves the public interest. *See Precision Asset Mgmt. Corp. v. United States*, 135 Fed. Cl. 342, 359 (2017). Once Oracle establishes success on the merits, a rebuttable presumption arises regarding irreparable harm. *See, e.g., CW Gov't Travel, Inc. v. United States*, 61 Fed. Cl.

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559, 577 (2004).

V. THE COURT SHOULD GRANT JUDGMENT IN FAVOR OF ORACLE.

A. The Single Award D&F Violates 10 U.S.C. § 2304a(d)(3) And FAR 16.504(c)(1)(ii)(D) (Count I).

The D&F purporting to justify the $10 billion, single award JEDI contract violates the statutory prohibition on such awards by relying on an inapplicable exception. The D&F claims that the JEDI contract will involve only "[FFP] task orders or delivery orders for services for which prices are established in the contract for the specific tasks to be performed." (AR Tab 16 at 318.) This is inaccurate. Neither the prices nor the specific tasks to be performed are "fixed" or "established." Instead, the RFP includes a custom, technology refresh provision requiring the contractor to update the available services continually, as the awardee daily or weekly adds and removes cloud service offerings. The JEDI contract does not price these non-existent future services; instead it seeks to peg the not-yet-created services to future not-yet-issued catalogs.

The D&F, accordingly, invokes a statutory exception to the single-award prohibition that does not apply, rendering the single award decision unlawful and irrational. The improper D&F also works competitive prejudice against Oracle. By limiting the number of awards, DoD deprived Oracle of the opportunity to compete for one of multiple JEDI awards, and all subsequent task order competitions. *See Weeks Marine v. United States*, 575 F.3d 1352, 1361-62 (Fed. Cir. 2009); *WinStar*, 41 Fed. Cl. at 762-63 (finding protester prejudiced).

1. Congress Prohibits Large, Single Award IDIQ Contracts Except in Limited Circumstances.

For IDIQ contracts estimated to exceed $112 million, statute and regulation prohibit a single award unless the head of the contracting activity (or senior procurement executive for DoD procurements) issues a written determination that one of four stated exceptions exists. *See*

[redacted]

10 U.S.C. § 2304a(d)(3); 48 C.F.R. §§ 16.504(c)(1)(ii)(D), 216.504(c)(1)(ii)(D). As relevant here, the U.S. Code identifies the following exception to the single source prohibition:

> (3) No task or delivery order contract in an amount estimated to exceed $100,000,000 (including all options) may be awarded to a single source unless the head of the agency determines in writing that ... (B) the contract provides only for firm, fixed price task orders or delivery orders for- ... (ii) services for which prices are established in the contract for the specific tasks to be performed[.]

10 U.S.C. § 2304a(d)(3); 48 C.F.R. § 16.504(c)(1)(ii)(D)(1)(ii).[21] The prohibition reflects Congress' admonition that agencies maximize use of multiple award IDIQ contracts in order to achieve the benefits of task order competition. Legislative history explains that the prohibition serves to ensure that future, significant IDIQ contracts "provide for the competition of task and delivery orders unless there is a compelling reason not to do so." S. Rep. No. 110-77 at 368 (2007). The regulatory history to the FAR's implementing provisions describes the benefits of task order competition: "Competition of orders leads to improved contractor performance, stimulation of technological solutions, and reduction of costs over time. The tenets of this provision strike at the core of enhancing competition and ensuring competition continues to exist even after award of initial contract vehicles...." 73 Fed. Reg. 54008, 54009 (Sept. 17, 2008).

Congress logically excepted base contracts with established firm fixed prices for the specific, identified tasks from the prohibition because in that limited circumstance the pre-award competition determines the pricing of future orders, permitting the agency (and Congress) to have confidence (at the time of award) that the specific services purchased resulted from competition. The JEDI contract contemplated by the RFP does not meet the exception.

[21] In 2015, the FAR was updated pursuant to the statutory inflation adjustment requirement at 41 U.S.C. § 1908, raising the single award prohibition to $112 million. *See* Inflation Adjustment of Acquisition-Related Thresholds, 80 Fed. Reg. 38293-01, 38997 (July 2, 2015).

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2. The D&F Fails to Acknowledge that the Cloud Services and Pricing Available on the Contract Will Constantly Adjust.

The D&F claims that the JEDI contract purportedly will "provide[] only for [FFP] task orders or delivery orders for services for which prices are established in the contract for the specific tasks to be performed" (AR Tab 16 at 318), based on the mistaken belief that the cloud catalogs proposed for the JEDI competition and incorporated into the contract will cover all services delivered across ten years. (*Id.*) The D&F states: "The CLINS for cloud offerings (*i.e.*, IaaS, PaaS, and Cloud Support Package) will be priced by catalogs resulting from the full and open competition, thus enabling competitive forces to drive all aspects of the FFP pricing. All catalogs will be incorporated at contract award and cover the full potential 10 years." (*Id.* at 319.) DoD misreported the same to Congress: "The JEDI Cloud contract will be FFP that uses pre-negotiated catalogs resulting from the full and open competition." (AR Tab 109 at 6503.) But the RFP and its technology refresh provisions neither identify the "specific tasks to be performed" nor call for prices on products that do not yet exist.

Rather, in order to "keep[] pace with industry innovation and stay[] at the forefront of available technology" (AR Tab 25 at 472), DoD structured the JEDI contract to require the contractor to update continually the cloud services available on the contract. DoD's decision to apply this technology refresh approach prevents DoD from falling within the statutory exception that requires fixed prices for established services at the time of contract award.

As DoD's research reveals, the "cloud market is an evolving and competitive landscape" where "new cloud providers are emerging monthly, and the service offerings of the vendors are rapidly shifting." (AR Tab 137 at 9603.) To account for this dynamic nature, the RFP intentionally does not solicit fixed service catalogs or pricing. Instead, DoD incorporated a special clause at RFP Section H2, which provides that the awardee will constantly add "new

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services" to the contract, with pricing to be determined later. (AR Tab 35 at 740-41.)

In documents withheld from GAO, the record reveals that DoD issued an internal Justification and Approval ("J&A") for Section H2. (AR Tab 112 at 6673-74.) The J&A explains that DoD designed this "New Services" clause to ensure that the offerings made available on the JEDI contract "keep pace with advancements in industry," by requiring the contractor to update the catalogs consistently so that "as new commercial cloud services are available, the Contractor will provide these new services and apply and incorporate those services into the contract catalog." (*Id.* at 6674.) When the Defense Procurement and Acquisition Policy office questioned the H clauses, the JEDI team explained that "the Iaas/PaaS offerings are not static and will be updated overtime [sic] both in terms of available services and applicable pricing." (AR Tab 130 at 8721.) Industry advised DoD that the H2 clause would result in "daily or weekly" updates to the service offerings and pricing, even during the competition. (*See* AR Tab 32 at 660 (Q17); *id.* at 668 (Q86-87).)

DoD cannot and has not solicited firm fixed prices for the future, undefined and unknown cloud services that the awardee will deploy on the contract. Clause H2 merely attempts to peg the DoD's prices to future negotiation or to the awardee's future commercial market prices – an approach that the FAR does not countenance and that Congress sought to block by the statutory single award prohibition. 48 C.F.R. § 15.403-3(c) ("[t]he fact that a price is included in a catalog does not … make it fair and reasonable," much less competitive). Thus, the catalogs incorporated into the contract at the time of award will not have established prices for all services to be performed over the ten-year period, rendering the cited exception inapplicable. The D&F's conclusion that 10 U.S.C. § 2304a(d) supports a single award IDIQ violates the statute.

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3. The Statute Forecloses DoD's Position.

Before GAO, DoD argued that to sustain Oracle's protest would infringe DoD's perceived ability to modify contracts during performance and award single award IDIQ contracts using flexible Statements of Objectives ("SOOs") rather than proscriptive Performance Work Statements. (AR Tab 71 at 5041.) Four fatal errors infect the DoD position.

First, DoD's selected exception requires the contract to contain "fixed prices" for the "specific tasks to be performed." The suggestion that enforcing Congress' exception as written forecloses certain types of contracts is a strawman. Three other exceptions exist, including a "public interest" exception. This protest asks the straightforward question, "does the exception DoD selected cover the JEDI contract," and the record answers in the negative.

Second, Congress' prohibition against large, single award IDIQ contracts is unambiguous. The statute controls, not DoD's purported concerns regarding impact to certain contracting techniques. "If the statutory language is unambiguous and the statutory scheme is coherent and consistent – as is the case here – the inquiry ceases." *Kingdomware*, 136 S. Ct. at 1976 (internal quotation omitted); *see also Palantir*, 904 F.3d at 995 (affirming permanent injunction). No ambiguity exists with respect to statute or its purpose. Legislative and regulatory history reveals that Congress enacted the provision to protect against the exact same risk raised by DoD's single award decision here. *See* S. Rep. No. 110-77 at 368 (2007) (highlighting lack of task order competition as a major concern on large IDIQ military contracts); 73 Fed. Reg. 54008, 54009 (Sept. 17, 2008) ("The tenets of this provision strike at the core of enhancing competition and ensuring competition continues to exist even after award of initial contract vehicles....").

Third, the DoD and GAO positions suggest that applying the plain language of the statute would either conflict with or dilute DoD's discretion under IDIQ contracts. Ultimately, these

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concerns carry no weight in the face of an unambiguous statutory mandate. But the concerns are also misplaced. To be sure, FAR Part 16 provides agencies latitude in stating requirements but that is precisely why Congress favors multiple award IDIQ contracts. That Congress placed restrictions on this flexibility given DoD's documented disregard of Congress' multiple award preference is neither surprising nor a reason to ignore the restrictions. As related to the use of a SOO, the statutory single award prohibition does not limit an agency's ability to use this flexibility unless the agency: (1) anticipates that the IDIQ contract will exceed $112 million, (2) insists on making a single award, (3) cannot identify the specific services by contract, and (4) cannot invoke one of the other three exceptions. Enforcing the plain language of the selected exception does not prohibit DoD from using a SOO or utilizing FAR Part 16. But, because DoD here both (1) intends to award a $10 billion, ten year single award contract, *and* (2) seeks persistent incorporation of future, unknown, and unpriced "new services" – Section 2304a(d)(3) requires DoD either to utilize a multiple award IDIQ or identify an applicable exception.

Fourth, the notion that interpreting the statutory prohibition to prevent a single award in this procurement would somehow interfere with widespread procurement practice – such as issuing change orders – is a red herring. If constantly adding "new services" to the JEDI contract to maintain commercial parity were a simple in-scope change, then DoD could have relied on a standard changes clause instead of drafting and justifying a bespoke "New Services" clause. Enforcing the single award prohibition here does not prevent DoD from using the changes clause in future contract administration; it prevents DoD from treating an IDIQ contract with persistent technology refresh provisions (the very type of contract that led to the "maximum extent practicable" provisions) as if it contains fixed prices for "specific tasks to be performed."

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B. The CO's Single Award Approach Violates Law And Lacks A Rational Basis (Count II).

A separate statutory provision, applicable to all IDIQ RFPs, requires contracting officers to favor a multiple award approach to the maximum extent practicable. The CO's July 17, 2018 Memorandum (prepared months after DoD chose the administrative convenience of a single award) prejudicially violates the law. The CO did not meaningfully consider the benefits of competition, arbitrarily inflated the cost of competition, and undermined Congressional policy.

FAR 16.504(c)(1)(i) implementing 10 U.S.C § 2304a(d)(4) requires the contracting officer to (i) "give preference to making multiple [IDIQ contract] awards" under a single solicitation for the same or similar services to the "maximum extent practicable," and (ii) document the decision in the acquisition plan or acquisition file. 48 C.F.R. § 16.504(c)(1)(ii)(C). This requirement differs from the separate prohibition on single award IDIQ contracts over $112 million and, consequently, an agency must satisfy both requirements where a single award IDIQ exceeds $112 million. 75 Fed. Reg. 13416, 13420 (Mar. 19, 2010).

The statutory and regulatory requirement favoring multiple award IDIQ contracts "to the maximum extent practicable" materially limits contracting officer discretion. *See, e.g.*, *SMS Data Products Grp., Inc.*, 853 F.2d at 1553-54 (interpreting "shall," "to the maximum extent practicable" to mean that "the contracting officer did not have unbridled discretion ..., but was required to conduct the reprocurement in the most competitive manner feasible."); *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 269 (2016) ("Given the congressional choice of the word 'maximum,' even when coupled with words like 'practicable' and 'appropriate,' agencies cannot ignore or superficially comply with the requirement...."), *aff'd*, 904 F.3d 980 (Fed. Cir. 2018).

The CO's justification for a single award approach must find support in the record and demonstrate that the CO rationally balanced Congress' strong preference for multiple awards to

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the maximum extent practicable by objectively assessing the benefits and risks of both the multiple award and single award approach. *WinStar*, 41 Fed. Cl. at 764 (declaring single award approach and GSA award decision contrary to law and without a reasonable basis). By improperly limiting the number of awards available, an agency prejudicially deprives contractors of the opportunity to compete for one of multiple contract awards, and all subsequent task order competitions. *See Weeks Marine*, 575 F.3d at 1361-62; *WinStar*, 41 Fed. Cl. at 762-63.

1. The CO Did Not Meaningfully Consider the Benefits of Competition in Violation of FAR 16.504(c).

The CO cites three grounds for concluding that DoD must use a single award approach for JEDI: (i) based on the CO's knowledge of the market, more favorable terms and conditions, including pricing will result from a single award competition; (ii) the expected cost of administering multiple contracts outweighs the benefits of multiple awards; and (iii) multiple awards are not in the government's best interest. (AR Tab 24 at 457-64.) The CO, however, never meaningfully considers the benefits of competition. The CO's failure to consider objectively the benefits of competition undermines each finding and prejudices Oracle.

In *WinStar*, the Court confronted a circumstance in which the contracting officer made a single award IDIQ determination based on the same three maximum practical exceptions utilized here. The *WinStar* contracting officer, as here, principally focused on multiple award contracting difficulties, which caused the Court to hold that the contracting officer violated procurement law by failing to give meaningful consideration to multiple award contracting benefits:

> Each of these criteria plainly requires consideration of the benefits of multiple awards. Obviously, it is impossible to conclude that a single award will provide more favorable terms and conditions, including pricing (16.504(c)(1)(ii)), without first considering the terms and conditions which would result from multiple awards. Likewise, the conclusion that the costs of administering multiple contracts may outweigh the potential benefits (16.504(c)(1)(iii)) plainly cannot be made without considering the potential benefits. Finally, the CO cannot rationally

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> conclude that a single award is more beneficial to the government than multiple awards (16.504(c)(1)(vi)) without considering the benefits of multiple awards. This is especially true since the CO is obligated to give preference to multiple awards to the "maximum extent practicable." 48 C.F.R. § 16.504(c)(1)....

41 Fed. Cl. at 758.

Undoubtedly, significant benefits accrue to the government when it uses multiple award IDIQ contracts for technology. Indeed, Congress implemented the multiple award, maximum practicable preference to address just such contracts: "Use of multiple award contracts may be especially effective for maintaining better prices and quality in the IT market." (AR Tab 77 at 5310.) OMB has documented the competitive benefits achieved by numerous federal agencies through technology task order competition, noting that surveys revealed the costs after competition "averaged 16.7 percent less than the government's projected estimated costs." (*Id.* at 5310-11.) DoD Guidelines also recognize the many benefits of task order competition, including lower prices, innovation, better quality and performance, curbing fraud, and maintaining a strong defense industrial base – none of which the CO considers. (*Id.* at 5361-62.)

Moreover, in September 2018, Congress (aware of DoD's intended single award approach) mandated that DoD maintain cloud service provider competition under JEDI:

> None of the funds appropriated or otherwise made available ... may be obligated or expended by the Department of Defense to migrate data and applications to the proposed Joint Enterprise Defense Infrastructure ... until a period of 90 days has elapsed following the date on which the Secretary of Defense submits to the congressional defense committees—
>
> .....
>
> (2) a detailed description of the Department's strategy to implement enterprise-wide cloud computing, including the goals and acquisition strategies for all proposed enterprise-wide cloud computing service procurements; the strategy to sustain competition and innovation throughout the period of performance of each contract, including defining opportunities for multiple cloud service providers and insertion of new technologies....

Pub. L. 115-245, § 8137 at 50-51. Still DoD argues that the Court should accept a CO

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justification that presumes JEDI competition has no value.

The CO's first justification is that "more favorable terms and conditions, including pricing, will be provided if a single award is made." (AR Tab 24 at 457.) The CO explains that, in a multiple-award environment, each contractor may receive only a subset of JEDI task orders, and therefore might charge higher prices in order to recoup the large infrastructure investments necessary to meet certain RFP classified and tactical edge requirements. (*Id.* at 457-59.) The CO's unsupported surmise that competition will increase prices speaks volumes about the analysis. Regardless, as in *WinStar*, the CO entirely ignored all of the seven DoD identified benefits of competition.[22]

The same failure to consider the benefits of competition infects the CO's second single award justification, that "the expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards." (*Id.* at 459.) Here, the CO's single source predisposition comes into stark relief; the CO takes great pains to calculate the purported $515 million in additional costs from conducting multiple award competitions. Leaving aside the wildly errant assumptions and administrative cost calculations, the CO, after quantifying a $515 million cost, makes no effort to quantify any benefits of competition: "Since the CO did not consider those benefits or explain why they would not ensue ... the analysis is one-sided and incomplete." *WinStar*, 41 Fed. Cl. at 762. Indeed, applying OMB's 16.7% cost reduction figure to JEDI would have yielded $1.67 billion in savings from competition, with added quality, more choices, and less fraud risk as additional, unconsidered benefits.

[22] The CO also ignores a serious cloud computing problem associated with a single cloud approach, commonly referred to as "lock-in." Market research prepared for DoD repeatedly emphasizes the "lock-in" and "exit strategy" risk associated with a single cloud approach. (*See* AR Tab 178 at 23151, 23160, 23162 (Gartner report for CESG); AR Tab 166 at 22919 (Navy's cloud acquisition goals are to utilize "multi-cloud solutions" to "avoid vendor lock-in."); AR Tab 173 at 23003 (noting goal to foster DoD's ability to innovate freely and to avoid lock-in.).)

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Likewise, the CO's third justification "best interests of the government" ignores the benefits of competition and relies instead on purported added costs to manage connections and train staff. Leaving aside the flaws in the CO's best interest assertions, "one cannot reasonably conclude that a single award is in the government's best interests based on the inherent costs of multiple awards unless the costs are weighed against the presumed benefits, underlying the preference." *WinStar*, 41 Fed. Cl. at 762.

2. The CO's Purported Justifications Contradict Law and Policy.

The CO's analysis contains other prejudicial, fatal flaws as well.

a. The CO Errantly Found that a Single Award Approach Will Result in More Favorable Contract Terms and Conditions.

In the first purported justification, the CO determined that a single award approach would result in more favorable terms based on two faulty assumptions: (i) a multiple award approach would cause offerors to charge higher prices to offset classified and tactical edge offerings, and (ii) "fierce competition is expected under a single award scenario." (AR Tab 24 at 457-58.)

Turning to the latter assumption first, the CO's focus on base contract competition is misplaced. If base contract competition sufficed to overcome Congress' maximum practicable preference for multiple awards, the preference would be rendered meaningless. *WinStar*, 41 Fed. Cl. at 760 (finding unreasonable government's assumption that RFP could achieve "the same type of competitive benefits as multiple contract awards," and noting "this argument is not reasonably equivalent to multiple vendors competing head-to-head for each task order").

The CO's first assumption is similarly unsound. The record lacks any support for the conjecture that a single award contract will result in lower pricing. *WinStar*, 41 Fed. Cl. at 761-62 (rejecting similar unsupported claim). Moreover, the underpinnings of the CO's assumption are wrong. For instance, the CO wrongly believed that DoD cannot require awardees to compete

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for particular task orders. (*Id.* at 457.) But, as DoD conceded to GAO, the FAR does not prohibit agencies from requiring each awardee to compete for all task orders. (AR Tab 71 at 5067-68 (citing FAR 16.505(b)).) The CO also wrongly assumed that a single award approach would guarantee the awardee the ability to recover its classified and tactical edge investments. But the RFP only guarantees the awardee $1 million of work – 1/100 of one percent of the JEDI value. (AR Tab 35 at 730; AR Tab 70 at 4985 (¶ 3).) As the CO testified: "The guarantee for the JEDI Cloud requirement is a million dollars.... [Q: But there is no guarantee for tactical edge?] A: No. No separate guarantee for tactical edge...." (AR Tab 78 at 5592:16-5593:5.)

Although the JEDI contract does not guarantee what services the users will purchase or how many task orders the awardee will receive, the RFP requires each contractor to invest in the classified environment and tactical edge capabilities to compete. (*See, e.g.*, AR Tab 35 at 807-08 (requiring Category One tactical edge device in production by January 11, 2019 and the Category Two tactical edge device in production by day one of post-award kickoff).) The absence of any guarantee for classified or tactical edge services in the base competition evidences a fatal flaw in the CO's logic that a single award will result in better pricing.[23]

b. The CO's One-Sided Determination that the Expected Costs of Multiple Awards is Prohibitive Lacks Record Support.

In the second purported justification, the CO concludes that the "expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards." (AR Tab 24 at 459.) As noted above, the CO never tallies the benefits, but that is not the only error. The cost assertions also lack record support.

The CO relies on severely flawed administrative costs calculations, with inputs that

[23] If DoD needed a work guarantee to obtain best pricing of classified services and tactical edge offerings, DoD could have provided a guarantee in the contract. DoD did not.

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overstate multiple award competition costs and understate single award contract costs:

	Multiple Award IDIQ	Single Award IDIQ	Cost Savings for Single Award IDIQ
Cost Per Order	$127,851.84	$2,595.71	$125,256.13
Number of Orders	4,032	4,032	-
TOTAL	**$515,498,618.88**	**$10,465,884.98**	**$505,032,733.90**

(*Id.* at 460.) By this unsupported calculation, the CO reaches the dubious conclusion that a multiple award approach will result in over $505 million more in administrative costs and cause "770 years" of delay across a ten-year contract. (*Id.*) These assertions strain credulity.

The CO reaches the baseless $505 million differential by claiming that DoD will expend 1688 hours awarding each multiple award task order but only 32 hours for a single award task order. The CO testified that she derived these hours from "personal experience," but conceded that she has never purchased cloud services on an IDIQ contract. (AR Tab 78 at 5707:10-17, 5717:1-5.) A GSA-sponsored 2013 study reveals that agencies average 119 to 168 hours to award a task order depending on complexity, not 1688 hours, and the CO could not explain this 1318% hour escalation. (*Compare* AR Tab 77 at 5337 *with* AR Tab 24 at 466.)

The CO's claim that task order competition will cause "770 years worth of time ... of delaying warfighters" over the ten-year contract fares no better. (AR Tab 24 at 560.) The CO used a series of unsubstantiated inputs – 4,032 task orders * 70 days (difference between 100 days the CO assumes for a multiple award order versus 30 days the CO assumes for a single award order) to arrive at 282,240 days. (*Id.*) The record fails to corroborate any of the inputs, e.g., 4,032 task orders over the ten-year period. (*Id.* at 456.) Instead, the Acquisition Plan funding profile casts serious doubt on the task order estimates. (AR Tab 23 at 443.) The record also disproves the CO's assumption that each task order competition will have the same duration and cost. As the CO conceded: "You cannot predict across the board, how long that is going to

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take per task order." (AR Tab 78 at 5723:9-11.) Aside from the suspect inputs, the calculation presumes that DoD will work one task order at a time, and not start any task order performance until DoD awards all 4,032 task orders, an unlikely (and unsupported) result.

c. The CO's Best Interests Determination Ignores Record Evidence and Congressional Statements to the Contrary.

In a final catch-all, the CO concludes that a single award JEDI contract serves the government's best interest. (AR Tab 24 at 461-64.) The CO's underlying suggestion that a multiple award approach would result in a prohibitive security risk or contravene DoD's interest by preventing data pooling or introducing complexity in administration fail for several reasons.

First, record documents contradict the CO's suggestion that DoD needs a single cloud approach because the security of multiple clouds will be too costly to manage. Several DoD entities and other federal agencies have awarded (or plan to award) contracts for multi-cloud offerings during the JEDI competition, undermining this purported security risk. DoD's own market research shows that the Defense Information Systems Agency ("DISA") MilCloud 2.0 leverages a multi-cloud approach. (*See* AR Tab 44 at 1009-11 (indicating that MilCloud 2.0 utilizes multiple commercial cloud service providers).) DoD research also shows the Navy uses a multi-cloud approach. (*See* AR Tab 166 at 22919; *see also* AR Tab 161 at 22853 (indicating that NSA still has at least three smaller-scale private cloud deployments as well as its own large–scale SCI private cloud environment).)

Notably, the DoD CIO's Memorandum, issued with the RFP, reports that "DoD will always have a multiple cloud environment" (AR Tab 115 at 6788), and the Acquisition Strategy states that DoD "will continue to use disparate clouds." (AR Tab 25 at 505.) Indeed, in its Report to Congress about JEDI, DoD stated that it "is best served by a robust, competitive and innovative technology industrial base." (AR Tab 109 at 6497.) DoD's multi-cloud environment

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contradicts the purported cost-prohibitive security risks.

Moreover, late last year, OMB published its government-wide Cloud Smart strategy recognizing that multi-cloud environments are "effective and efficient": "Industries that are leading in technology innovation have also demonstrated that hybrid and multi-cloud environments can be effective and efficient."[24] And, as noted, Congress has directed that DoD adopt a multi-cloud provider acquisition strategy for JEDI. Pub. L. No. 115-245, § 8137 at 50-51. It is impossible to reconcile the CO's assertions with the actions of DoD's largest and most secretive entities (awarding multi-cloud contracts during JEDI),[25] the DoD CIO's statements that DoD will always be multi-cloud, OMB's directive favoring multi-cloud, and Congress' JEDI multiple-provider direction.

Second, the DDS Deputy Director testified at GAO that the security risk arose not from the multi-cloud approach but instead from DoD's purported inability to manage that approach. (AR Tab 78 at 5452:15-54:4.) Given that DoD runs more than 500 different cloud efforts today, the suggestion that DoD cannot handle two or three JEDI contractors strains credulity and hardly provides a basis for limiting competition as DoD can contract that effort if need be. A contractor administers the DISA's MilCloud today. (AR Tab 44 at 1009-11; AR Tab 25 at 471.) Notably, the CO's finding was that management of the multi-cloud approach would "increase costs" to DoD. (AR Tab 24 at 462.) But the CO neither quantifies nor explains how those costs exceed the benefits of competition.

Third, the record also belies the CO's suggestion that a single JEDI Cloud remains necessary to foster DoD's attempts to pool data. In lessons learned from 2011-2017 related to the

[24] OMB Cloud Smart Strategy, https://cloud.cio.gov/strategy/ (last visited 2/4/19).
[25] DoD entities such as DISA and the Navy do not have to use JEDI and the fact that these entities do not agree that a single cloud is more secure or better is telling.

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CIA Commercial Cloud Service procurement and implementation (another document withheld from GAO), the Intelligence Community ("IC") reported that after five years the CIA has still not been able to implement a "data lake" due to slow migration of data to the cloud (IC analysts continue to use databases external to the cloud) and the fact that data maintained in different instances of the cloud, using different programs, is not pooled. (AR Tab 161 at 22856-57.)

Given that the CO's reasoning for the single IDIQ contract approach rests on assertions contradicted by the record, unsubstantiated, or in violation of the law, this flawed decision competitively prejudices Oracle. The Court should grant judgment for Oracle on Count II. *See WinStar*, 41 Fed. Cl. at 762-63 (protester prejudiced by unlawful single award IDIQ approach).

C. Subfactors 1.2, 1.1, And 1.6 Exceed DoD's Authority Or Legitimate Needs And Unduly Restrict Competition (Counts III-V).

The Court should grant judgment in Oracle's favor on Counts III through V because Subfactors 1.2, 1.1, and 1.6 exceed DoD's authority or legitimate needs and unduly restrict competition for the JEDI contract to Oracle's competitive prejudice.

Agencies must solicit proposals "in a manner designed to achieve full and open competition." 10 U.S.C. § 2304(a); *id.* § 2304(c) (applying section 2304's competitive procedure requirements to task order contracts). If an agency believes that needed "property or services ... are available from only one responsible source or only from a limited number of responsible sources," the agency head must issue a J&A prior to restricting competition. *Id.* § 2304(c)(1).

In furtherance of CICA's mandate, agencies may include restrictive requirements in a solicitation "only to the extent they are necessary to satisfy the agency's legitimate needs." *Am. Safety Council, Inc. v. United States*, 122 Fed. Cl. 426, 435 (2015) (finding solicitation clauses unduly restrictive); *Charles H. Tompkins Co. v. United States*, 43 Fed. Cl. 716, 723 (1999) (same). To that end, an agency cannot require an offeror to demonstrate the ability to meet a

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requirement at a point in time prior to when such requirement becomes relevant to the agency. *See, e.g.*, *USA Jet Airlines, Inc., Active Aero Grp., Inc.*, B-404666, Apr. 1, 2011, 2011 CPD ¶ 91.

Agencies that seek to impose qualifications requirements when soliciting proposals must follow additional procedures set forth in 10 U.S.C. § 2319. 10 U.S.C. §§ 2319(b), (c). The Federal Circuit has observed that "Congress realized that while qualification requirements can ensure product quality by necessitating completion of activities before the award of the contract, they also can inappropriately inhibit competition." *W.G. Yates & Sons Constr.*, 192 F.3d at 992. Consequently, the procedural safeguards serve to "ensure that qualification requirements are used only when and to the extent necessary to ensure product quality, reliability, and maintainability rather than to inappropriately restrict competition." *Id.*

DoD's imposition of the three challenged gate criteria fail against these legal standards. DoD did not develop the criteria to meet legitimate needs or safeguard competition. Instead, DoD developed these criteria to narrow the field of offerors based on concerns that too many proposals or protests might affect the acquisition schedule. (AR Tab 21 at 422; AR Tab 78 at 5473:2-11.) DoD did not issue a J&A to support limiting the competition in this way.

1. Subfactor 1.2 Violates 10 U.S.C. § 2319 and Exceeds DoD's Needs.

DoD's decision to require offerors to meet all aspects of Subfactor 1.2 by the time of proposal submission violates 10 U.S.C. § 2319. In addition, the record establishes that DoD lacks a legitimate need to depart from FedRAMP guidance and DoD's own standard practice by requiring three data centers with these capabilities by proposal submission.

DoD's stated rationale for Subfactor 1.2 is to "validate that JEDI Cloud can provide continuity of services for DoD's users around the world." (AR Tab 42 at 947.) DoD explained that Subfactor 1.2 requires "sufficiently dispersed" data centers "so that any disaster is unlikely

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to affect the services," and noted that DoD chose three data centers as the minimum gate "to provide reliability and resiliency of services even in the unlikely circumstance that two datacenters are simultaneously affected." (*Id.*; AR Tab 78 at 5486:22-5487:9.) DoD also explained that to prevent introducing security risk in the event of a failover of services, Subfactor 1.2 requires all three data centers each support at least one IaaS and one PaaS offering that are "FedRAMP Moderate Authorized." (AR Tab 42 at 947; AR Tab 43 at 955.) DoD observed that Subfactor 1.2's FedRAMP authorization requirement is a "mechanism to validate that the core architecture is extensible and likely to be able to meet the JEDI Cloud requirements across all service offerings." (AR Tab 43 at 955.) Significantly, DoD will not require FedRAMP authorization as part of performance; this is merely a qualification test. (AR Tab 78 at 5495:5-14 ("[W]e are not requiring, as part of the JEDI cybersecurity plan, that the winner go through the FedRAMP process before DoD uses the final solution"); *id.* at 5496:3-6 ("Q: So if I understand correctly, your cybersecurity plan does not require FedRAMP authorization. A: Correct.").)

As written and applied, Subfactor 1.2's "mechanism to validate" that the proposed architecture is capable of satisfying the contract's requirements is a "qualification requirement." 10 U.S.C. § 2319(a). The Federal Circuit has explained that "qualification requirements" cover "activities which establish the experience and abilities of the bidder to assure the government that the bidder has the ability to carry out and complete the contract." *W.G. Yates & Sons Constr.*, 192 F.3d at 994. But DoD did not follow the statutory and regulatory requirements to impose Subfactor 1.2 as a qualification requirement. For instance, the head of the agency did not issue a written justification stating the necessity for establishing the qualification requirement and the rationale for why the offeror must demonstrate that it meets the qualification prior to proposal submission. 10 U.S.C. § 2319(b)(1). Nor has DoD provided each potential offeror the

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opportunity to show that the offeror could satisfy the qualification requirement before the intended award date. *Id.* § 2319(c)(3). Instead, in order to compete for the contract, the RFP requires that offerors meet the Subfactor 1.2 requirements ***by the date of the proposal submission***. (AR Tab 35 at 792.) Accordingly, Subfactor 1.2 is invalid and unenforceable as a matter of law. *W.G. Yates & Sons Constr.*, 192 F.3d at 992-93 ("any attempt by an agency to impose qualification requirements without following the procedures set out by Congress is a violation of § 2319, and such a qualification requirement must be struck down.").

In addition, and as a separate basis for finding Subfactor 1.2 unlawful, DoD has not and cannot establish a legitimate need for "FedRAMP Moderate Authorized" cloud service offerings in three data centers at the time of proposal submission. To the contrary, FedRAMP, the government-wide program providing the standardized approach for security assessments, authorizations, and monitoring of cloud products, prohibits the exact requirement DoD seeks to apply here – requiring FedRAMP authorization as a precondition to bid.[26] FedRAMP has established this prequalification prohibition because procuring agencies lack a legitimate need for FedRAMP authorized offerings until after contract award ***when the systems will hold federal data***: "Federal Agencies cannot require CSPs to be FedRAMP authorized as part of their RFP but can state that a CSP needs to be FedRAMP authorized once federal data is placed in the system." *FedRAMP Tips & Cues Compilation 2015-2017* (Jan. 2018) at 7, https://www.fedramp.gov/assets/resources/documents/FedRAMP_Tips_and_Cues.pdf; *see also id.* at 13 ("Agencies can request a CSP to have a timeline for obtaining an ATO but should not limit the request to CSPs with ATOs."). The myriad of "Other Solicitation, Contract, and Requirements" documents in

[26] Despite extensive argument in Oracle's submissions, GAO's decision does not mention the statutory process for imposing qualification requirements or FedRAMP's prohibition, electing instead to treat this matter as one of national security to which DoD purportedly has deference. (AR Tab 83.) But Section 2319 does not exempt procurements involving services or goods to the warfighter; it is a DoD procurement statute.

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AR Tab 180 that DoD presumably reviewed during JEDI acquisition planning demonstrate DoD and other agencies comply with FedRAMP's restriction:

- Air Force, DLA and U.S. Army Corp of Engineers BPA for email as a service. The RFP provides for the FedRAMP security authorization process ***to begin*** "within 180 days of either [the FedRAMP] achieving Initial Operating Capability or BPA award, whichever comes later." (AR Tab 180 at 23506.)

- SPAWAR RFP for commercial cloud services. The RFP required only that offerors "***demonstrate experience*** for achieving an authorization to operate (ATO) of a major automated system (MAIS) on a DoD network (may include military services) within five (5) years prior to RFP release." (*Id.* at 23613.)

- GSA RFQ to develop and integrate an open systems architecture. FedRAMP not required until ***six months after award***. (*Id.* at 23432.)

DoD thus had a multitude of less restrictive options available to ensure the offerors can meet the continuity and security requirements needed during contract performance.

The record offers no valid rationale for violating the FedRAMP guidance and deviating from standard DoD practice by requiring three existing data centers, each supporting FedRAMP authorized offerings, by the proposal due date for JEDI. Instead, DoD has acknowledged that it has ***no need*** for failover capabilities ***unless and until*** DoD data is placed in the Cloud. (AR Tab 78 at 5487:10-15.) Similarly, DoD confirmed in response to offeror solicitation questions that DoD has ***no need*** for three operational unclassified data centers until ***after*** contract award: "The requirement is that the three unclassified data centers must be online and available thirty days after the conclusion of the post award kick-off event." (AR Tab 32 at 675 (answer to Q157).) In short, DoD cannot articulate any legitimate, pre-proposal need for FedRAMP Moderate Authorized offerings in three data centers. *See USA Jet Airlines, Inc., Active Aero Grp., Inc.*, B-404666, Apr. 1, 2011, 2011 CPD ¶ 91 (sustaining protest challenging requirement where agency failed to show why offerors needed certifications prior to performance); *LBM, Inc.*, B-286271, Dec. 1, 2000, 2000 CPD ¶ 194 (describing exclusionary effect of requiring offerors to have ISO-

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9000 by proposal deadline where agency lacked need until contract performance).

DoD's suggestion that the Cyber Security Plan's requirements justify Subfactor 1.2 likewise fails. As noted, the Cyber Security Plan does not require authorization through the FedRAMP process. (AR Tab 78 at 5495:5-14 ("[W]e are not requiring, as part of the JEDI cybersecurity plan, that the winner go through the FedRAMP process before DoD uses the final solution"); *id.* at 5496:3-6.) Instead, the RFP and contract contemplate that DoD will work with the awardee post-award to ensure the proposed offerings and data centers comply with the Cyber Security Plan, outside of the FedRAMP process. (*Id.* at 5496:7-5498:15; *see also* AR Tab 5 at 159.) Further, DoD's timing justifications are disproved by the JEDI contract, which gives the awardee "30 days after contract award" to submit its Security Authorization Package to DoD until "and does not commit to any time frame for DoD's approval. (AR Tab 5 at 159.)[27]

DoD's response to RFP question 233 also establishes that Subfactor 1.2 does not reasonably relate to the contract requirements. DoD advised offerors that they did not even have to propose the data centers and offerings used for the gate: "the RFP does not restrict an Offeror from proposing its latest technologies, even if not FedRAMP authorized at the time of proposal. The RFP does not prescribe which specific IaaS offering and which specific PaaS offering is used to satisfy the Sub-Factor 1.2 Gate Criterion." (AR Tab 40 at 853 (Q233).)

Accordingly, given that Subfactor 1.2 bears no rational relationship to DoD's actual and legitimate needs or the JEDI contract terms, and DoD offers no rational reason for deviating from the FedRAMP requirements and standard DoD practice, the Court should grant judgment on Count III in favor of Oracle. *Redland Genstar, Inc. v. United States,* 39 Fed. Cl. 220, 235

[27] Moreover, as noted in Section V.B., Congress has prevented DoD from migrating any data onto the JEDI Cloud until 90 days after Congress receives a report detailing a JEDI acquisition strategy that provides "sustain[ed] competition and innovation throughout the period of performance …, including defining opportunities for multiple cloud services provides and insertion of new technologies."

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(1997) (declaring restrictive requirement null and void where agency failed to articulate rational basis for departing from previous practice, especially where departure unduly restricted competition).

Subfactor 1.2 causes Oracle significant competitive prejudice. [redacted] causing Oracle "a non-trivial competitive injury which can be redressed" by judicial relief. *Weeks Marine*, 575 F.3d at 1362 (citation omitted).

2. Subfactor 1.1 Exceeds DoD's Legitimate Needs and Unduly Restricts Competition.

Subfactor 1.1 requires each offeror to demonstrate that the RFP-provided JEDI Cloud unclassified usage metrics for Network, Compute, and Storage are less than 50% of the Commercial Cloud Offering usage during the months of January-February 2018. (AR Tab 35 at 791.) Although DoD designed the substantial Network, Compute, and Storage metrics to close this competition to all but a few of the very largest providers (AR Tab 21 at 422; AR Tab 47c at 3123), Oracle narrowly challenges the timing of the application of these metrics – January-February 2018 – nine months before proposal submission and sixteen months before the anticipated award. The period selected is arbitrary, serves no legitimate need, violates U.S. Code and FAR provisions governing solicitation requirements, and competitively prejudices Oracle.

Nothing in the record demonstrates a legitimate DoD need for storage of the size required

[redacted]

by Subfactor 1.1 on contract day one, much less sixteen months earlier.[28] DoD has explained that these metrics ensure that: 1) the Cloud is capable of providing the full scope of services even under surge capacity during major conflict or natural disaster event;[29] and 2) the Cloud experiences ongoing innovation and development and capability advancements throughout performance. (AR Tab 42 at 944-46; AR Tab 78 at 5475:1-14, 5483:19-5484:1.) But DoD's need for these Cloud capacities does not arise until after contract award, when DoD data is placed in the cloud. (AR Tab 78 at 5476:5-9.) As long as the offeror at the time of award has the excess capacity to meet the surge needs at an unpredictable future performance time, DoD's surge capacity need will be met. (*Id.* at 5477:2-12.) Given DoD's stated rationale, what matters is relative capacity of the Cloud at the time of performance. But Subfactor 1.1 does not measure which offerors can meet DoD's needs during performance. It measures historic usage at a point at least sixteen months before DoD will even issue its first task order and well before even proposal submission, and will lead to unreasonable results.

Specifically, Subfactor 1.1 will exclude offerors that can satisfy DoD's actual minimum performance needs, while passing offerors that may not meet DoD's needs. *See Am. Safety Council, Inc.*, 122 Fed. Cl. at 435. As written, an offeror that had customer usage in January and February 2018 slightly below the Subfactor 1.1 metrics, but whose commercial customers' usage grows month over month such that the offeror would meet or exceed the metrics at the time of proposal submission or award, would fail the gate. Conversely, an offeror with customer usage in January-February 2018 slightly above the metrics, but which has a diminishing client base at the time of award and could not meet DoD's future surge needs, would pass the gate. (AR Tab

[28] DoD estimates an FY2019 JEDI contract spend of only [redacted] (AR Tab 25 at 491.)
[29] "[S]urge capacity is the ability to meet sudden unexpected demands in usage," and these metrics seek to assess whether the offeror's Cloud can handle a certain number of users and data in a future, worst-case disaster scenario. (AR Tab 78 at 5475:15-5476:9.)

[redacted]

78 at 5478:7-18; *id.* at 5480:18-5481:6.) Thus, Subfactor 1.1's early 2018 snapshot has no bearing on the offeror's capacity and capability to meet DoD's actual Compute, Network, and Storage needs in mid-2019 (when award is anticipated) and beyond.

DoD suggests that the January-February 2018 snapshot will "facilitate fair competition" by preventing offerors from "gaming" their usage numbers to compete. (AR Tab 42 at 945; AR Tab 78 at 5422:4-10; *see also id.* at 5423:8-14.) DoD offers no evidence for its dubious suggestion that offerors would give services away for the chance to compete considering the competition requires significant investment already in DoD-unique capabilities, i.e., the production of tactical edge devices and the development of classified cloud services. Such an irrational, unwarranted concern does not provide a valid basis to narrow the competitive field. And, DoD had other less restrictive means of preventing gamesmanship in any event. For instance, DoD could resolve its data manipulation concern by seeking usage from January-February 2018 and a more recent period, and asking offerors to explain any difference.

Subfactor 1.1's arbitrary timeframe competitively prejudices Oracle. [redacted] (AR Tab 73 at 5180.) [redacted] (*See id.*) DoD's arbitrary and unlawful decision to test capacity based on usage in January-February 2018 competitively prejudices Oracle, and should be enjoined. *See Weeks Marine*, 575 F.3d at 1362.

[redacted]

3. DoD Lacks Authority to Solicit an Online Marketplace.

Subfactor 1.6 requires demonstration, at the time of proposal submission, that the offeror has an online marketplace of third-party platform and software offerings that JEDI Cloud users can use to purchase and provision software. (AR Tab 35 at 793-94.) Other RFP provisions, including the SOO and contract clause H10, specify this marketplace requirement. (AR Tab 27 at 616; AR Tab 35 at 748-49.) DoD's stated reasoning for this requirement is to evaluate "the range of offerings in such a marketplace," and confirm that "the user can easily go from the entry point (post log in) to deployment of the offering in a reasonable timeframe." (AR Tab 42 at 950-51.)

DoD cannot establish a legitimate need for the required online marketplace because DoD lacks authority to procure such a market. By outsourcing the selection of third-party software applications available for purchase by JEDI Cloud users to the Cloud provider, DoD has abdicated its responsibility to procure supplies and the many legal and regulatory requirements that govern such a procurement. *See* 48 C.F.R. § 7.503(a) ("[c]ontracts shall not be used for the performance of inherently governmental functions."). The RFP also lacks any provisions or controls to address the manifest organizational conflicts of interest that will arise from DoD delegating the control of DoD's software marketplace to a contractor.

In Section 846 of the FY2018 NDAA, Congress authorized the GSA Administrator, not DoD, to "establish a program to procure commercial products through commercial e-commerce portals," directed GSA to implement the program through a phased approach, and required GSA to "carry out the program … through multiple contracts with multiple commercial e-commerce portal providers…." Pub. L. 115-91, § 846(a), Dec. 12, 2017, 131 Stat. 1483. Section 846 defines a "commercial e-commerce portal" as "a commercial solution providing for the purchase

[redacted]

of commercial products aggregated, distributed, sold, or manufactured via an online portal." *Id.* § 846(k)(3). Per the RFP, the JEDI Cloud offering will include the commercial vendor's online commercial marketplace from which JEDI Cloud users can "purchase [] software, and then provision" it onto their systems. (AR Tab 78 at 5504:11-22.) The RFP's online marketplace thus falls within Section 846's definition of an "e-commerce portal."

This Court recently declared another federal agency's attempt to set up a vendor-overseen marketplace violated CICA. *Electra-Med Corp.*, 140 Fed. Cl. at 104 ("By outsourcing the selection of suppliers to the PVs [Prime Vendors] entirely, the government has avoided the multitude of legal and regulatory requirements appurtenant to a federal procurement...."). The Court should similarly find that the solicited marketplace contravenes the law.

DoD has not identified any authority permitting it to set up an online marketplace or how such a vendor-run marketplace complies with CICA. (*See, e.g.*, AR Tab 42 at 950-51 (Gate Memo failing to address how online marketplace complies with CICA or otherwise identify any other authority for this requirement).) Instead, DoD contends (and GAO found) that Oracle (which has a marketplace for its commercial customers) suffers no harm from DoD exercising authority it does not have. That commercial cloud providers (including Oracle) may offer an online software marketplace, and that DoD may want one, does not justify DoD including such requirements in an RFP when DoD lacks authority to procure one. DoD's decision to require something that DoD has no authority to procure causes Oracle prejudice.[30]

The Federal Circuit has made clear that injury stemming from an illegal solicitation term

[30]Other RFP provisions, including the SOO, relate to the offeror's online marketplace. (*See* AR Tab 35 at 748-49 (Clause H10), AR Tab 27 at 616 (§ 3.18.2).) Section M requires DoD to "evaluate the degree to which" the offeror's proposed solution reflects an understanding of the government's SOO requirements, when assessing each offeror an adjectival rating under Factors 2 through 7. (*Id.* at 807.) The marketplace requirements thus also may impact Oracle's competitive standing relative to other major cloud providers.

[redacted]

establishes prejudice in a pre-award protest because contractors have a "definite economic stake in the solicitation being carried out in accordance with applicable laws and regulations." *Weeks Marine, Inc.,* 575 F.3d at 1362-63. Here, Oracle, a JEDI offeror and provider of software to DoD, has an "economic stake" in DoD carrying out the RFP in accordance with applicable law. The Court, accordingly, should strike Subfactor 1.6-related RFP provisions concerning the third party software marketplace.

D. The CO Did Not Reasonably Investigate And Address The Ubhi Conflicts Of Interest Tainting JEDI (Count VI).

Oracle asserts that (i) DoD and Ubhi violated numerous legal proscriptions by permitting Ubhi's participation, creating an appearance of impropriety, and biasing JEDI; and (ii) AWS created a further conflict of interest by re-hiring Ubhi during JEDI, given Ubhi's extensive access to competitively useful DoD and JEDI competitor information. As related to the government-side conflict of interest, DoD acknowledges the conflict of interest, but claims – based on a belated, perfunctory assessment – that "no impact" resulted. The CO's assessment, however, lacks material facts, fails to address relevant law, and breaks from required procedure. As related to the AWS-created conflict, DoD has commenced an investigation. Oracle, accordingly, does not object to the Court staying review of the AWS-created conflict pending investigation receipt.

1. The Law Compelling Exclusion of Conflicted Government Officials from Procurements Exists to Protect Competitors and the Public.

Corrupt procurement systems rank among the highest risks to a free, democratic society. Consequently, to maintain the integrity of the procurement system, FAR 3.101-1 requires the government to conduct its business "in a manner above reproach ... with complete impartiality and with preferential treatment for none," demands an "impeccable standard of conduct," and

[redacted]

prohibits even the appearance of conflicts of interest in government-contractor relationships. 48 C.F.R. § 3.101-1. Recognizing that "many Federal laws and regulations place restrictions on the actions of government officials, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions." *Id.*; *id.* § 1.102-2(c)(1) (highlighting the criticality of "maintaining the public trust"). Similarly, the FAR prohibits any government employee from soliciting or accepting anything of value from someone seeking to do business with the employee's agency. *Id.* § 3.101-2.

Several statutory and regulatory systems underpin the FAR's broad mandate to avoid even the appearance of government conflicts of interest (*see* FAR Subpart 3.1, incorporating 18 U.S.C. § 208 and 5 CFR Part 2635). These laws, which serve to "insure honesty in the Government's business dealings," set an objective standard of conduct, and "whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 548-49, 562 (1961).

By design, Congress has not limited the proscriptions to final decisionmakers:

> To limit the application of the statute to government agents who participate only in the final formation of a contract would permit those who have a conflict of interest to engage in the preliminary, but often crucial stages of the transaction, and then to insulate themselves from prosecution under Section 434 by withdrawing from the negotiations at the final, and often perfunctory stage of the proceedings. Congress could not possibly have intended such an obvious evasion of the statute.

Id. at 554-55. Instead, anytime a government employee "personally and significantly" participates in a particular matter, the prohibitions apply. *See, e.g.*, 5 C.F.R. § 2635; 48 C.F.R. § 3.104-1 (FAR noting that restrictions cover actions "not determinative of outcome" and even participation in a single procurement critical step may be substantial).

[redacted]

The Court of Claims has identified three relevant questions – (1) did the government employ the individual; (2) did the individual participate "personally and substantially" in the contract letting, performance, or administration; and (3) did the individual have a prohibited conflict. *K & R Eng'g Co., Inc. v. United States*, 616 F.2d 469, 472 (Ct. Cl. 1980). "No more [is] required to establish a violation...." *Id.* Rather, the Court recognized that the conflicted individual's participation in government business establishes the harm:

> As *Mississippi Valley* makes clear, it is the potential for injuring the public interest created by a conflict of interest that requires invalidation of the tainted contract. It therefore is immaterial whether the particular taint has or has not in fact caused the government any financial loss or damages. What the statute condemns is the inevitable taint of the contract itself that results when it is the product of a conflict of interest.

Id. at 475.

These principles apply with equal vigor when raised by a competing bidder:

> Quite simply, the policy considerations upon which *Mississippi Valley* is grounded are all present herein. To find that the interest of the public, the rights of the competing bidders, and the integrity of the federal procurement process can be ignored simply because DOE chooses, in this instance, to do so would be senseless and self-defeating.

TRW Envtl. Safety Sys., Inc. v. United States, 18 Cl. Ct. 33, 67 (1989) (sustaining bid protest); *Express One Int'l, Inc. v. United States Postal Service*, 814 F. Supp. 93, 98 (D.D.C. 1992) (sustaining protest: "The temptation to assist the source of future employment … is exactly the type of conflict of interest that statutes and ethical principles are designed to prevent."); *cf. Quinn v. Gulf and Western Corp.*, 644 F.2d 89, 94 (2d Cir. 1981) (ignoring a prohibited conflict would "equally require the court to sanction an 'infected bargain' and deny the public the protection from corruption among public officials granted by Congress").

[redacted]

2. The CO's Analysis of the Ubhi (Government-Side) Conflict and No-Impact Determination Misapplies the Law and Lacks Critical Facts.

The CO's July 23, 2018 Memorandum, purporting to address the serious issues arising from DoD involving Ubhi in JEDI, fails to consider applicable legal provisions and lacks basic facts necessary to make informed conclusions regarding the Ubhi-AWS connections and JEDI impact. (AR Tab 33.) The Court should sustain this aspect of Oracle's protest and remand the matter for a proper investigation.

As an initial matter and despite the Defendants' demands, this Court should not defer to the CO's purported application of conflict-of-interest regulations:

> The court finds that special deference to the Postal Service's determination on the issues [government conflict of interest issues] reached by the court is inappropriate. . . . The primary issue is whether Mr. Maytan rationally applied the simple ethical principles proscribed by the Postal Service (through the persons of Mr. Vandamm and Mr. Maytan himself); interpretations of technical regulations and complicated evaluation procedures are not implicated.

Express One, 814 F. Supp. at 97. This is especially so given the CO does not consider numerous legal proscriptions implicated by Ubhi's actions. *OMV Med., Inc. v. United States*, 219 F.3d 1337, 1344 (Fed. Cir. 2000) (reversing protest denial and noting courts cannot supply reasoned basis for agency action). Equally significant, the CO did not follow applicable regulatory procedures, which require concurrence of a higher-level DoD official. 48 C.F.R. § 3.104-7(a)(1) (requiring referral of no-impact finding). The CO thus is not the final decisionmaker here.

At least seven independently prejudicial flaws exist with the CO's perfunctory review of the Ubhi conflicts. First, the CO declares "no violation had occurred because these individuals had not participated personally and substantially in the procurement." (AR Tab 33 at 1.) But this statement is false as to Ubhi. DoD identifies Ubhi as an individual who participated "personally and substantially" in JEDI. (AR Tab 64 at 4860, 4862 (listing on August 27, 2018

[redacted]

Ubhi as an individual "personally and substantially" involved in JEDI).) The record contradiction should end the matter, but the contemporaneous record confirms that Ubhi participated personally and substantially. (*See, e.g.*, Section III.C.1.)

Second, the CO did not undertake even the most basic steps necessary to conduct such an investigation. A FAR 3.104-7 investigation such as the CO purports to have conducted requires consideration of "all information available." 48 C.F.R. § 3.104-7(b). The CO, nevertheless, did not interview Ubhi, review his communications, or review the documents he accessed or created. (*See* Section III.C.3.) The record, accordingly, lacks material facts as demonstrated below.

Third, the CO limited review of conflicts arising from the prior Ubhi-AWS employment relationship to whether one year had elapsed between that employment and his JEDI involvement: "Because greater than one year had elapsed between when his AWS employment ended and when his participation in JEDI Cloud started, no restrictions attached to prohibit Mr. Ubhi from participating in the procurement." (AR Tab 33 at 686). The CO's myopic focus on the one-year ban ignored numerous applicable regulations potentially preventing Ubhi's involvement and led to the flawed conclusion that: "Mr. Ubhi's regulatory impartiality restriction had expired long before the JEDI Cloud procurement was initiated." (AR Tab 33 at 687.)[31]

In addition to the rule cited by the CO, the applicable regulations also prohibit federal employees from participating in matters involving companies in which they hold any financial interest (e.g., stock), 5 C.F.R. § 2635.403, and place a two-year ban on participating in matters in which a former employer is a party if the official received an extraordinary payment post-employment from the former employer. 5 C.F.R. § 2635.503. A federal employee must also

[31] Even as to the one-year rule, the CO calculated the period from the date Ubhi left AWS employment, ignoring that the legal period may extend if Ubhi received any bonus or post-employment profit sharing. *See, e.g.*, 5 C.F.R. § 2635.502.

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recuse himself from particular matters having a direct and predictable effect on the financial interests of a prospective employer with whom the employee seeks employment. *Id.* § 2635.604. And, a federal employee, who has an agreement to return to a private sector employer at a future date, may not work on matters involving that entity. *See id.* §§ 2635.403, 606.

Here, DoD deviated from its procurement policy and did not require Ubhi (or apparently anyone else) to complete a conflict-of-interest form. DoD Source Selection Procedures at 11, 36 (effective May 1, 2016) (citing FAR 3.104 and 5 C.F.R. § 2635) ("To confirm statutory and regulatory compliance, ensure all persons receiving source selection information sign a Non-Disclosure Agreement and a Conflict of Interest statement. Ensure Conflict of Interest Statements … are appropriately reviewed and actual or potential conflicts of interest are resolved prior to granting access to any source selection information.").[32] Even after learning about Ubhi's relationships, the CO failed to pursue the facts needed to apply the legal proscriptions.

For instance, despite that AWS makes substantial stock payments to its employees,[33] and has a significant employee bonus program,[34] the CO neither investigated nor considered whether Ubhi held Amazon stock or received a post-employment payment from AWS. Further, DDS rotates industry people (like Ubhi) through on limited-term engagements. To borrow from the CO, "they come from industry on a term position, and their intent is to return back to that position." (AR Tab 78 at 5654:9-11.) Yet, the CO did not investigate whether Ubhi had an

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[32] https://www.dau.mil/guidebooks/Shared%20Documents/Source%20Selection%20Guide.pdf. DoD has cited a short Slack exchange for the proposition that DOD properly vetted Ubhi. (Dkt. 40 at 30.) But that exchange is not a screening at all and fails to explore numerous topics the law requires of a proper screening. 5 C.F.R. §§ 2635.402, 403, 502, 503, 604, 606.

[33] "As a proportion of total pay, Amazon relies on stock more than any other large tech company.... The more senior the employee the more their pay package skews towards stock." https://www.realfinanceguy.com/home/2018/9/1/amazon-stock-compensation (noting that even mid-level technical employees receive as much as 30 percent of their compensation in stock) (last visited 2/4/19).

[34] *See* https://www.payscale.com/research/US/Employer=Amazon.com_Inc/Bonus (last visited 2/4/19).

[redacted]

expectation of returning to AWS despite knowing Ubhi had returned to AWS.

Fourth, the CO finds, without substantiation, that Ubhi "promptly recused himself from participating in JEDI once AWS expressed doing business with him." (AR Tab 33 at 687.) But even Ubhi's October 31, 2017 recusal note indicates otherwise: "Particularly, Tablehero, a company I founded, may soon engage in further partnership discussions with Amazon...." (AR Tab 45 at 2777.) Despite the reference to further partnership discussions, the CO admits that she did not investigate these business exchanges. (*See* Section III.C.3.) Consequently, the record lacks material facts – e.g., when and how the communications started, what AWS offered Ubhi, etc. – information critical for the CO to review Ubhi's conduct against the statutory and regulatory standards. (AR Tab 33 at 686; AR Tab 78 at 5656:21-5657:4; *id.* at 5645:18-251:2.)

Fifth, the CO's investigation lacks any consideration of Ubhi's re-employment discussions with AWS. The CO has declared: "In my July 23 determination, I did not consider whether AWS had an organizational conflict of interest based upon AWS' employment of Mr. Ubhi or any other individual ... I am currently considering whether AWS' employment of Mr. Ubhi (and potentially others) creates an OCI that cannot be avoided or mitigated." (Dkt. 40-1, Brooks Decl. at 1-2.) Although Oracle appreciates the CO investigating the AWS conflict, the CO also cannot determine that Ubhi promptly recused himself and faced no "regulatory impartiality restriction" without basic facts about the Ubhi-AWS re-employment discussions. (AR Tab 33 at 686-87.) The regulations require notice to DoD and immediate recusal. *See, e.g.*, 48 C.F.R. § 3.104-3(c). Ubhi advised DoD of his DDS departure on November 13, 2017. (AR Tab 46 at 2782.) Ubhi only recused himself from JEDI thirteen days earlier. (AR Tab 45.) Rather than investigating, the CO unreasonably presumed that AWS' employment overture and all negotiations occurred after Ubhi's October 31, 2017 recusal and before his November 13, 2017 resignation.

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Sixth, the CO investigation asserts that Ubhi's "access to any JEDI Cloud materials was immediately revoked." (AR Tab 33 at 686.) But the CO admits that she did not investigate his information access (AR Tab 78 at 5533:17-5534:14), and DoD now acknowledges that Ubhi "synced" the Google drive to his laptop. (Dkt. 40-1, Kasper Decl. ¶ 11.) The CO's Memorandum does not mention this fact, much less assess what Ubhi did with the materials on his laptop.

Seventh, the CO asserts that DoD "limited [Ubhi] to market research activities." (AR Tab 33 at 687.) The CO made the claim without interviewing Ubhi, reviewing his communications, or analyzing his work product. (*See* Section III.C.3.) The record disproves the finding. For instance, DoD's own documents identify Ubhi as its "lead PM" (AR Tab 47a at 2811) and member of the four-person DDS team "leading the cloud acquisition." (*Id.* at 2793). Among other things, Ubhi played a leading role with respect to the single source decision. (AR Tab 47c at 3114 (contacting Ubhi "to better understand … why only one provider makes sense.").) DDS messages in early October 2017 indicate that Ubhi planned to attend a CESG meeting in person during the week of October 16, 2017 to advocate for a single award approach. (*Id.* at 3181.) The record also confirms that Ubhi advocated robustly for the single award approach at CESG meetings (AR Tab 78 at 5742:7-14), and by November 6, 2017, just days after Ubhi's recusal, DoD confirmed publicly that its chosen "Acquisition Strategy" was a single award IDIQ contract. (AR Tab 92.)

Ubhi also participated in developing other critical, foundational aspects of the acquisition strategy and in defining JEDI requirements. (AR Tab 47a at 2941 (addressing technical requirements); *id.* at 2964 (thanking Ubhi for "work on the requirements documents"); *id.* at 2963 (Slack conversation with Ubhi about work on "the acquisition strategy.").) In the month

[redacted]

prior to Ubhi resigning and rejoining AWS, Ubhi met with numerous DoD entities about their specific JEDI desires and needs. (*See, e.g.*, AR Tab 47c at 3168-69; AR Tab 47a at 2941 (Ubhi offering to "huddle" on technical requirements); *id.* at 2802 (Ubhi arranging a meeting with Air Force personnel); AR Tab 47b at 3065-75 (referencing Navy meeting); AR Tab 47c at 3172-73 ("[SPAWAR's representative is] schooling us on tactical edge").)

Ubhi also drafted the "Problem Statement" for DoD leadership that "explains the problem we are solving with this initiative," including "why can't we solve the problem with multiple clouds," and "why is only one cloud a truly necessary requirement." (AR Tab 47b at 2986; *id.* at 2992.) Ubhi contributed to the Business Case Analysis. (AR Tab 21 at 399; AR Tab 78 at 5442:21-5443:6; *id.* at 5572:4-11.) Ubhi managed untold amounts of nonpublic and acquisition sensitive JEDI-related information based on his unlimited access to the acquisition's Google drive. (*See* AR Tab 78 at 5532:16-18, 5533:8-16.) Ubhi held highly technical meetings with potential JEDI competitors about their cloud computing capabilities. (*See* AR Tab 47a at 2787 (Microsoft); *id.* at 2900 (Google); AR Tab 47c at 3102 ("All industry contacts that have been funneled to me have received a response."); AR Tab 78 at 5463:12-5464:11.)

Finally, the CO asserts that she conducted the review "[i]n accordance with 48 C.F.R. § 3.104-7(a)," but even this is wrong. (AR Tab 33 at 687.) FAR 3.104-7(a)(1) required the CO to forward any "no impact" determination and all relevant documentation for a higher level review. And only if the DoD designated procurement integrity official concurred could the CO proceed with the procurement. 48 C.F.R. § 3.104-7(a)(1)(i). No such concurrence is in the AR.

DoD never should have involved Ubhi in JEDI. Having involved him (despite plain conflicts), the law required a meaningful investigation. *See Jacobs Tech., Inc. v. United States*, 100 Fed. Cl. 198, 212 (2011) (sustaining protest when "a reasonable person with responsibility

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for the integrity of the procurement … would have conducted further evaluation and analysis to determine if any potential OCIs existed"). Until DoD performs a proper analysis of the relevant facts against the governing regulations, neither Oracle nor the public can have confidence that JEDI represents a fair competition. *Impresa Construzioni Geom. Domenico Garufi*, 238 F.3d at 1333 (requiring remand to agency).

3. AWS' Re-hiring of the DoD JEDI Lead PM During JEDI Requires AWS' Exclusion (Contractor-Side Conflict).

Several months into JEDI, and with knowledge of Ubhi's position and broad access to JEDI government and competitor information, AWS rehired Ubhi. DoD concedes that AWS' rehiring of Ubhi during JEDI warrants a conflict of interest investigation. In a recent filing to this Court, DoD advised that the CO is "currently considering whether AWS's employment of Mr. Ubhi (and potentially others) creates an OCI that cannot be avoided, mitigated, or neutralized," and "anticipate[s] completing the OCI investigation prior to the establishment of a competitive range." (Dkt. 40-1, Brooks Decl. ¶¶ 7-8.) Based on the CO's representations, the Court's January 23, 2019 Order described these allegations as "not ripe." (Dkt. 48 at 8.) Given the Court's statement, Oracle requests that the Court stay the contractor-side conflict of interest challenge until DoD completes its investigation.[35] Alternatively, the Court should grant judgment in Oracle's favor because the CO did not timely investigate the patent conflict that arose from AWS re-hiring Ubhi during JEDI.

"[W]here a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm can be disqualified from a competition based upon the appearance of impropriety which is created by this situation, even if no actual impropriety can be

[35] If DoD does not exclude AWS, Oracle believes that DoD must supplement the record with its investigation. Oracle, accordingly, reserves the right to amend and update its challenge.

[redacted]

shown...." *Int'l Res. Grp.,* B-409346.2 *et al.*, Dec. 11, 2014, 2014 CPD ¶ 369 (sustaining protest involving "former [agency] director); *see also NFK Eng'g, Inc. v. United States*, 805 F.2d 372, 377 (Fed. Cir. 1986) (commending agency for disqualifying a bidder that hired a former government employee). Indeed, the law provides that such conflicts entitle the other offerors to a presumption that the hiring entity has misused the information known to the former procurement official. *See, e.g., NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 528 (2011); *Int'l Res. Grp.,* B-409346.2 *et al.*, Dec. 11, 2014, 2014 CPD ¶ 369.[36]

FAR 9.504 directs contracting officers to: "Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible." 48 C.F.R. § 9.504(a)(1) (emphasis added). Accordingly, this Court has recognized that contracting officers must "figure out potential organizational conflicts of interest before a solicitation is issued and either mitigate potential conflicts before award, include restrictions in the solicitation to avoid the conflict of interest, or disqualify an offeror from a competition." *NetStar-1*, 101 Fed. Cl. at 521 (quotation omitted).

The CO had all the relevant facts necessary to perform the investigation when DoD first learned that Ubhi rejoined AWS. The record makes clear that Ubhi was a member of the four-person team leading the JEDI acquisition during fall 2017; AWS and Ubhi engaged in employment discussions during fall 2017; AWS knew Ubhi's role on JEDI; and that AWS rehired Ubhi as its General Manager in fall 2017. (AR Tab 47a at 2784; AR Tab 33 at 686; AR Tab 77 at 5254; AR Tab 78 at 5648:4-5469:18.) [redacted]

[36] GAO has asserted that FAR Subpart 3.1 operates in conjunction with the Organizational Conflict of Interest provisions of FAR Subpart 9.5 when assessing the resulting contractor conflict. *See Northrop Grumman Sys. Corp.*, B-412278.8, Oct. 14, 2017, 2017 CPD ¶ 312; *Health Net Fed. Servs., LLC*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220.

[redacted]

[redacted] (*See* Section III.C.) The record also confirms that DoD knew AWS intended to compete: AWS personnel communicated with the JEDI team as early as September 2017 (AR Tab 34 at 701); AWS responded to the DoD RFI in November 2017 (AR Tab 44 at 1107-1215); and AWS was one of four offerors that participated in one-on-one discussions with DoD about the final RFP. (AR Tabs 120-123.)

The CO's failure to timely investigate and mitigate this AWS conflict lacked a rational basis and violated the FAR. *Jacobs Tech. Inc.*, 100 Fed. Cl. at 212. The Court either should stay this aspect of Count VI until receipt of DoD's investigation or grant judgment in Oracle's favor.

E. The CO Also Did Not Reasonably Investigate And Address The DeMartino Conflicts Of Interest (Count VII).

DeMartino's JEDI participation violated the U.S. Code, the applicable regulations, and specific DoD SOCO guidance. No dispute exists that DeMartino, a former DSD Chief of Staff, served as a senior executive branch official, and was prohibited from participating personally and substantially on JEDI based on his prior consulting relationship with AWS. *K & R Eng'g Co.*, 616 F.2d at 472. The only dispute involves whether the CO's FAR 3.104-7 assessment correctly declared DeMartino's involvement "ministerial and perfunctory in nature" such that it did "not "negatively impact the integrity" of JEDI. (AR Tab 33 at 685.) As with Ubhi, this CO assessment lacks material facts, ignores contrary law, and breaks from regulatory processes.

Most relevant here, a federal official may not participate in a matter involving "a person with whom he has a covered relationship" when "the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter," absent appropriate authorization. 5 C.F.R. § 2635.502(a); 48 C.F.R. § 3.104-2. Although the standard rule prohibits such involvement where a covered relationship exists for at least one year, 5

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C.F.R. § 2635.502, Executive Order 13770 extends this restriction to two years where the individual (like DeMartino) serves as a political appointee. 82 Fed. Reg. 9333 (Jan. 28, 2017). These rules apply equally to former consultants. *See* 5 C.F.R. § 2635.502(b)(1)(iv).[37]

DeMartino consulted for AWS through January 2017. (AR Tab 33 at 685.) In early 2017, President Trump appointed DeMartino as Deputy Chief of Staff for the Office of the Secretary of Defense. (*Id.*; *see also* AR Tab 75 at 5231-32 (¶ 9).) DeMartino transitioned to serve in another political appointment as DSD's Chief of Staff in March 2017. (*Id.*) Thus, applicable regulations and Executive Order 13770 prohibited DeMartino's personal and substantial participation in matters involving AWS before January 2019 at the earliest.

Indeed, due to financial ties with AWS, DoD's SOCO sent DeMartino an ethics letter in April 2017, warning him not to work on matters involving AWS without approval:

> This email is to alert you to and assist you in avoiding potential conflicts of interest between your duties as a Government official and your actual or imputed financial interests and affiliations… In this instance, you may have a regulatory prohibition under 5 C.F.R. §2635.502.... In particular, Amazon, Palantir and Bloomberg do business with DoD, and therefore, you should be vigilant and consult with our office before participating in any matters involving these entities until the one year period has expired.

(AR Tab 51 at 4345.) Yet, DeMartino ignored SOCO's written direction and participated in JEDI from its inception without seeking SOCO's consent. (*See generally* AR Tab 51.) More than eight months elapsed before DeMartino asked for SOCO guidance related to JEDI, apparently as a result of press FOIA requests questioning DeMartino's involvement. (AR Tab 75

[37] Office of Government Ethics ("OGE"), *Conflicts of Interest Considerations: Law Firm or Consulting Employment* (last updated June 22, 2018), https://www.oge.gov/web/OGE.nsf/0/53BE4061E9EFDEB4852582B400626DAA/$FILE/Law%20Firm%20or%20Consulting%20Employment.pdf (providing that former consultants may not participate in matters involving their former clients absent advance approval) (last visited 2/4/19).

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at 5233 (¶ 13).)[38] In April 2018, when DeMartino finally did ask SOCO about his JEDI involvement, SOCO instructed DeMartino to recuse himself immediately. (*Id.*)

The CO did not conduct the purported FAR 3.104-7 assessment until July 2018. (AR 33 at 685.) The CO's assessment has numerous independent and prejudicial flaws. First, the CO did not undertake the necessary steps for such an assessment. The analysis spans less than one page. (AR Tab 33 at 685.) The CO did not interview DeMartino, review his emails, or assess his work product. (AR Tab 78 at 5686:11-14; *id.* at 5695:2-9 ("I didn't investigate ... all of the emails and everything that he sent.... I wasn't aware of this ... article from anyone at Amazon.... I largely relied on conversations that I had with the DDS legal counsel who provided advice in concert with SOCO."); AR Tab 75 at 5239 (¶ 33 ("there are relatively few documents that I considered in my investigation").) In testimony to GAO, the CO did not remember when, or exactly how, the issue of DeMartino's conflict of interest came to her attention. (AR Tab 78 at 5668:16-5669:5.) The CO had not even seen the prior ethics warning that SOCO issued to DeMartino prior to completing her investigation. (*Id.* at 5669:12-5670:13.) Yet, DeMartino's disregard of SOCO's instruction itself was improper. 5 C.F.R. § 2635.502(a). The CO did not confer with SOCO (*id.* at 5675:4-8) or consider the materials that SOCO reviewed (if any) when SOCO directed DeMartino in April 2018 not to participate further in JEDI. (AR Tab 78 at 5674:1-5675:3). The CO conducted a perfunctory, "check-the-box" exercise insufficient to illuminate any conflict. *NetStar-1*, 101 Fed. Cl. at 521.

Second, the CO baselessly asserts that "Mr. DeMartino worked with the SOCO throughout his DoD employment to ensure compliance with all applicable rules." (AR Tab 33 at

[38] The documents released pursuant to this FOIA request reveal that DeMartino also engaged in questionable communications with AWS throughout his time at DoD and specifically regarding JEDI. *JEDI: Emails Between AWS and DoD Officials Reveal Questionable Judgment, Ethics Experts Say*, Capital Forum Vol. 6 dated August 17, 2018; *see also* AR Tab 51 at 4429.

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685.) But the record confirms that DeMartino did not follow SOCO's April 2017 direction, he ignored it until FOIA requests arrived. (AR Tab 51 at 4345; AR Tab 75 at 5233 (¶ 13).)

Third, even with the few DeMartino documents available, the record makes clear that DeMartino did not perform "ministerial and perfunctory" activities.[39] The record (largely unreviewed by the CO) evidences that DeMartino participated personally and substantially in (and impacted) JEDI. DoD concedes that the DSD, on whose behalf DeMartino oversaw JEDI, participated "personally and substantially." (AR Tab 64 at 4862.) As the Chief of Staff for the organization driving DoD's cloud strategy, DeMartino shaped JEDI from a policy level all the way down to specific details regarding the acquisition. DeMartino obtained and edited JEDI briefings on behalf of the Secretary of Defense and DSD, directed JEDI activities, and participated in JEDI strategy meetings that discussed the Acquisition Strategy, Security Strategy, Business Case, and the single award approach. (*See* Section III.C.4.) DeMartino also directed efforts and strategized as to the most likely way to garner approval for the single source approach. (AR Tab 51 at 4366-67 ("I would nuance this with the language about single 2 year award and that there are going to [sic] OPPORTUNITIES for other companies to compete for other awards later in the lifecycle.").) DeMartino coordinated with DoD's Cost Assessment and Program Evaluation office to obtain information to support projected savings from the single source acquisition approach, among other data. (*Id.*) DeMartino commented on the JEDI industry day briefing and coordinated and shaped the press strategy for JEDI. (*Id.* at 4402, 4404; AR Tab 47f at 3831; *id.* at 3880; AR Tab 47e at 3319.) DeMartino received and commented on JEDI acquisition sensitive information. (*See* AR Tab 47e at 3310, 3315-16.) DeMartino also almost certainly met and substantively discussed JEDI with the DSD routinely. But since the CO

[39] DoD has not produced and the CO never reviewed the purported notes taken by DeMartino.

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neither interviewed DeMartino nor anyone else, the scope of such communications is unknown.

Fourth, the limited analysis does not indicate that the CO assessed DeMartino's participation against the relevant legal benchmarks. The FAR makes clear that "[p]articipation may be substantial even though it is not determinative of the outcome of a particular matter," and that "the single act of approving or participating in a critical step may be substantial." 48 C.F.R. § 3.104-1. OGE opinions also are instructive in showing DeMartino participated "personally and substantially" in JEDI, and indicate that a wide variety of activities qualify, including advocating for the acceptance of a program plan,[40] and reviewing recommendations and issuing communications,[41] all of which DeMartino did.

Finally, the FAR required the CO to forward the no-impact conclusion and any supporting documents to DoD's designated integrity official, for concurrence or disapproval. 48 C.F.R. § 3.104-7(a). The record contains no referral or concurrence.

Had the CO reasonably investigated DeMartino's conflicts and JEDI involvement, the CO would have found that DeMartino personally and substantially participated in the acquisition in violation of FAR 3.101-1, the ethics rules, and SOCO's express direction. The CO's incomplete and flawed investigation prejudices Oracle and requires judgment in Oracle's favor on Count VII. *See Jacobs Tech. Inc.*, 100 Fed. Cl. at 213; *NetStar-1*, 101 Fed. Cl. at 519.

VI. ORACLE SATISFIES THE REMAINING PERMANENT INJUNCTIVE RELIEF REQUIREMENTS

As demonstrated in Section V, the decision to structure this procurement to award a single $10 billion IDIQ contract violates the law, three of the RFP gate criteria exceed DoD's

[40] OGE Opinion 96 x 21, Nov. 5, 1996, at https://www.oge.gov/Web/OGE.nsf/All+Advisories/0DBDD3F25EB8971885257E96005FBE98/$FILE/b491b2086be74d4791507906d501ef3c3.pdf?open (last visited 2/4/19).

[41] OGE Opinion 83 x 12, Aug. 3, 1983, at https://www.oge.gov/web/oge.nsf/Legal%20Advisories/486F71347E36660185257E96005FBBE0/$FILE/8a664c07fd4040008b68a00b4a4f30795.pdf?open (last visited 2/4/19).

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authority or needs, and the CO failed to prevent and mitigate serious conflicts of interest – all errors causing Oracle significant competitive prejudice. Having demonstrated that it is entitled to succeed on the merits and receive declaratory relief, Oracle's evidentiary obligations on the three remaining permanent injunctive elements are necessarily low. *See, e.g.*, *CW Gov't Travel*, 61 Fed. Cl. at 577. Oracle readily satisfies each prong.

First, absent an objection, Oracle will suffer the irreparable harm of being deprived the opportunity to compete fairly for the contract. *See, e.g., Palantir*, 129 Fed. Cl. at 291 ("The Court of Federal Claims has repeatedly held that a protester suffers irreparable harm if it is deprived of the opportunity to compete fairly for a contract." (quotation omitted)); *ViroMed Labs., Inc. v. United States*, 87 Fed. Cl. 493, 503 (2009). Further, Oracle will suffer irreparable harm by losing access to a substantial portion of the DoD cloud market for the duration of the ten-year contract. *See Palantir*, 129 Fed. Cl. at 291.

Second, the public interest in the integrity of the federal procurement process also substantially favors injunctive relief. *See, e.g.*, *id.* at 294-95 (citing *BINL, Inc. v. United States*, 106 Fed. Cl. 26, 49 (2012) ("With regard to the public interest, it is well-settled that there is a public interest in remedying violations of law.")); *see also, e.g.*, *Ian, Evan & Alexander Corp. v. United States*, 136 Fed. Cl. 390, 430 (2018).

Finally, the irreparable harm to Oracle and the public interest outweigh any harm DoD may claim as a result of correcting the errors and proceeding with a fair and lawful competition of the solicited $10 billion contract. Any DoD-alleged delay is a self-inflicted injury based on its refusal to ensure that DoD conducted this significant procurement in accordance with the law and in a manner above approach. *See, e.g.*, *Univ. Research Co., LLC v. United States*, 65 Fed. Cl. 500, 515 (2005) (recognizing "the public's interest in the integrity of the procurement process

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outweighs the public's interest in the timely completion of the government procurement....").

VII. CONCLUSION

For each of the foregoing reasons, Oracle respectfully requests that the Court grant judgment in favor of Oracle and (i) issue the declaratory and injunctive relief set forth in Oracle's Complaint and herein, and (ii) provide such other and further relief as the Court deems just and proper.

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Respectfully Submitted,

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