

August 6, 2018

CICA STAY REQUIRED

BY ELECTRONIC DELIVERY

U.S. Government Accountability Office
Attn: Procurement Law Control Group
Office of the General Counsel
441 G Street, N.W.
Washington, D.C. 20548

Re: Pre-award Protest of Oracle America, Inc. Under RFP No. HQ0034-18-R-0077, Department of Defense Joint Enterprise Defense Infrastructure Cloud

Dear Sir or Madam:

Oracle America, Inc. ("Oracle"),¹ by its undersigned counsel, files this pre-award protest challenging (among other things) the decision of the Department of Defense ("Department" or "DoD") to make a single, potential 10-year, \$10 billion Indefinite Delivery Indefinite Quantity ("IDIQ") contract award under Solicitation No. HQ0034-18-R-0077 (the "RFP"). The RFP seeks a Joint Enterprise Defense Infrastructure ("JEDI") Cloud for use by DoD and other entities involved in DoD business. The JEDI Cloud will provide infrastructure as a service ("IaaS") and platform as a service ("PaaS") offerings, in both unclassified and classified environments, to support DoD business and mission operations in the homeland and abroad, including the full range of military operations.

DoD's single awardee IDIQ contract approach is contrary to statutory and regulatory requirements; contrary to the perspective of numerous industry experts that a multi-vendor IDIQ contract offers the most advantageous approach for DoD's near term and long term technology requirements; contrary to the market trend toward multi-cloud environments; and contrary to DoD's own stated objectives of flexibility, innovation, a broad industrial base, and keeping pace with evolving technology. DoD is a complex, heterogeneous computing environment driven by unique (in many cases, non-commercial) requirements for security, scalability, performance, and government-specific purpose built features. Standardizing on a single cloud today makes no more sense than standardizing on a single on premise computing architecture decades ago.

¹ Oracle is located at 1910 Oracle Way, Reston, Virginia, 20190, telephone number 703/478-9000. All communications concerning this protest should be directed to the attention of undersigned counsel.

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 2 of 40

Indeed, DoD previously has acknowledged that the diversity of its mission necessitates a multi-cloud environment.

DoD's JEDI single source determination effectively closes a significant market (DOD estimates up to \$10 billion) to competition in violation of statutory and regulatory mandates and assuredly (by tying DoD to a single technological cloud vendor for ten years) will frustrate (not foster) the innovation necessary for DoD to operate on technology's leading edge. DoD's mission demands the best technology for the particular task, which, given the dynamic nature of cloud computing services and the ill-defined nature of DoD's needs, cannot be determined as the RFP is structured. DoD's interests and those of the taxpayer are best achieved through the multiple award process Congress has preferred and, in these circumstances, has mandated. Significantly, the multiple award process tracks best practices of the cloud market today: namely a multi-cloud approach benefiting from differentiated products, varied expertise, and constant competition to encourage both innovation and lower prices. GAO, accordingly, should sustain this protest.

I. INTRODUCTION

The JEDI RFP emanates from a draft solicitation that already has faced substantial Congressional skepticism and industry criticism related to DoD's intention to limit award of this 10-year, \$10 billion IDIQ to a single offeror;² a decision that violates the law and clashes with the multiple-cloud demographics and best practices of leading enterprises in the commercial

² Chris Cornillie, *Pentagon Releases Second Draft RFP for JEDI Cloud Contract*, Bloomberg Government, <https://about.bgov.com/blog/pentagon-releases-second-draft-rfp-jedi-cloud-contract/> (last visited 8/6/2018) (reporting three major industry concerns including single award strategy); John K. Higgins., *DoD Launches JEDI Program Amid Cloud Provider Criticism*, E-Commerce Times, <https://www.ecommercetimes.com/story/85478.html> (last visited 8/6/2018) (reporting on concerns of industry groups for move to single award); Jared Serbu, *Deasy takes control of JEDI, but fate of DoD's cloud steering group is up in the air*, Federal News Radio, <https://federalnewsradio.com/federal-cloud-report/2018/07/deasy-takes-control-of-jedi-but-fate-of-dods-cloud-steering-group-is-up-in-the-air/> (last visited 8/6/2018) (reporting on criticism from both Congress and industry groups of DoD's single award decision); Nike Wakeman, *Spending bill questions JEDI cloud acquisition strategy*, Washington Technology, <https://washingtontechnology.com/blogs/editors-notebook/2018/03/jedi-congressional-requirements.aspx> (last visited 8/6/2018) (reporting on Congressional response to significant industry concern regarding single-award strategy).

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 3 of 40

cloud market.³ Contrary to the Memorandum from the DoD Chief Information Officer ("CIO"), the single awardee IDIQ Jedi Contract approach contravenes rather than "employs the best standards of competitive pricing, innovation, and security." (CIO Memo, Ex. K.)

Neither DoD nor commercial technological marketplace leaders can accurately predict where the still nascent cloud computing industry will be or who will lead it five years from now, much less ten. With quantum computing, blockchain, artificial intelligence and machine learning, internet of things, and other technologies actively disrupting a disruptive technology, the only constant is change.⁴ DoD knows this. Indeed, DoD routinely warns Congress and others about the rapid pace of technological change. Yet, the DoD Determination and Findings ("D&F") oddly intimates that DoD will receive proposals for firm fixed prices to meet DoD's future, unarticulated tactical cloud computing needs (classified and unclassified) *for the next ten years* and today can determine the single best value cloud computing technological leader over the next ten years when some – if not most – of the impactful technology has yet to be developed. Congress prohibits the use of single source IDIQ contracts in these circumstances. Therefore, this protest challenges the failure to use the Congressionally preferred multiple award approach to the "maximum extent practicable," the flawed D&F, and several related anti-competitive aspects of the JEDI RFP, each of which will frustrate fair and meaningful competition in this significant market.⁵

First, the United States ("U.S.") Code and Federal Acquisition Regulation ("FAR") envision two separate steps for award of IDIQ contracts over \$112 million: (i) a contracting

³ See *RightScale State of the Cloud Report*, <https://assets.rightscale.com/uploads/pdfs/RightScale-2018-State-of-the-Cloud-Report.pdf> ("81% of respondents have a multi-cloud strategy.") (last visited 8/5/2018); Kim Weins, *Cloud pricing comparison: AWS vs. Microsoft Azure vs. Google Cloud vs. IBM Cloud*, *InfoWorld* <https://www.infoworld.com/article/3237566/cloud-computing/cloud-pricing-comparison-aws-vs-azure-vs-google-vs-ibm.html?page=2> ("Developing a multi-cloud strategy is a critical component of cloud cost management efforts.") (last visited 8/4/2018).

⁴ Heraclitus of Ephesus.

⁵ Oracle raises this challenge to the single source determination out of an abundance of caution to the extent GAO finds that the publication of the D&F triggers the 10-day timeliness rule. Oracle is continuing to review the RFP; accordingly, Oracle reserves its right to assert any other challenges to the RFP prior to the deadline for receipt of proposals in accordance with 4 C.F.R. § 21.2(a)(1).

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 4 of 40

officer determination at the acquisition planning stage; and (ii) an agency head determination in connection with any single source IDIQ award. As related to the former, FAR 16.504(c)(1)(i) provides that "the contracting officer must, to the maximum extent practicable [i.e., to the greatest degree possible], give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources." (emphasis added). As related to the latter, FAR 16.504(c)(1)(ii)(D) provides: "No task or delivery order contract in an amount estimated to exceed \$112 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that . . . The contract provides only for firm fixed price (see 16.202) task or delivery orders for . . . Services for which prices are established in the contract for the specific tasks to be performed." FAR 16.504(c)(1)(ii)(D) (emphasis added); *see also* 10 U.S.C. § 2304a(d)(3) (containing similar prohibition).

The RFP lacks any indication that the Contracting Officer complied with the clear mandate to give preference to competing multiple award IDIQ contracts to the maximum extent practicable, as part of the acquisition planning process. Although the RFP attaches the later-required D&F, the Contracting Officer's acquisition planning obligations differ both in focus and expected considerations. The FAR requires a documented contracting officer's decision considering a number of specific factors that DoD appears to have missed. FAR 16.504(c)(1)(ii)(A), (B). Both the Government Accountability Office ("GAO") and the U.S. Court of Federal Claims have made clear that this is a significant requirement, particularly given the "maximum extent practicable" language that Congress employed. On what basis has the Contracting Officer selected this single source approach? Has the Contracting Officer fully and properly considered each of the FAR factors? Why not compete with the possibility of multiple contracts? Indeed, the DoD CIO states in his Memorandum for JEDI Cloud Industry Partners that "[w]ith the diversity of DoD's mission, DoD will always have a multiple cloud environment." (CIO Memo, Ex. K.) Yet, inexplicably, DoD seeks to award a potential 10-year, \$10 billion IDIQ contract to a single cloud provider. Unanswered questions abound.

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 5 of 40

Separately, the law requires an additional step for agencies to issue a single-award IDIQ contract exceeding \$112 million; specifically, an agency head determination that the award meets one of the few specific statutory exceptions that permit award to a single contractor. In an attempt to meet this requirement, the D&F announces that the solicited JEDI Cloud Contract will only permit firm fixed price task orders involving "services for which prices are established in the contract for the specific tasks to be performed." (D&F at 3, Ex. J.) Trying to fit a square peg into a round hole, the D&F declares that offerors will provide a commercial catalog at the time of award "cover[ing] the full potential 10 years" and will submit a "single, fixed unit price for delivery of that particular cloud service." (*Id.* at 2.) These statements, however, directly contradict the premise of the JEDI RFP to stay on the leading edge of technology and have no resemblance to what the JEDI RFP actually contemplates.

Instead, the JEDI RFP expects that the awardee will regularly port its new commercial offerings onto the JEDI Cloud and will work with DoD to develop new classified offerings – none of which offerors in the JEDI competition will specify or price. Tacitly acknowledging that the JEDI RFP competition will not cover the evolving services solicited, the D&F goes on to state: "Moreover, to achieve commercial parity over time, the contract contemplates adding new or improved cloud services to the contract . . . the [contract] includes mechanisms to ensure the fixed unit price for the new service cannot be higher than the price that is publicly available in the commercial marketplace in the continental United States." (*Id.* at 3 (emphasis added).) The D&F, on its face, thus evidences that the very exception identified does not apply. In this way, the D&F itself acknowledges that it is not possible today to run a competition for future technology that does not yet exist. Under the RFP, the JEDI offerors will not price, and DoD will not compete, many of the services solicited across the next ten years – many of the particular cloud services are not even known.

Gartner reports that the pace of cloud change is so rapid that major providers add 40 to 50 new offerings each month.⁶ The JEDI RFP does not price these future services. Instead, the

⁶ *Hidden Cloud Opportunities for Technology Service Providers* (June 20, 2018) at <https://www.gartner.com/doc/4144444>.

RFP attempts to peg the new offering prices to the awardee's future commercial catalogs – as if this somehow equates to the "established price" the U.S. Code and FAR require. The FAR, however, provides "[t]he fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable" – much less competitive. FAR 15.403-3(c). Moreover, technology refreshment and price reduction clauses targeted to take advantage of falling prices and new technology do not offer a valid substitute for task order competition. To the contrary, the use and reliance on such provisions is the very reason Congress passed the single source restriction in the first place: "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 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." OFPP, Best Practices for Multiple Award Task And Delivery Order Contracting, at <https://www.gsa.gov/cdnstatic/BestPracticesMultipleAward.pdf> (last visited 8/3/18). The JEDI RFP involves the precise circumstance for which Congress has directed agencies to use multiple award IDIQ contracts. The only lawful and reasonable approach is multi-vendor task order competitions over time.

Second, unless a procuring agency intends to award multiple IDIQ contracts and evaluate price as part of the task order process, the agency must perform a meaningful price evaluation for the base contract award. 10 U.S.C. § 2305(a)(3). To do so, the RFP must reflect the services that the Department expects to purchase across the entire contract. Here, the Department has elected to use a limited scenario approach under which an offeror can select from any of its many current cloud offerings to fulfill the scenario. The absence of detail as to what the offerors must provide in the scenarios most assuredly will leave the Department with no basis to meaningfully compare even the scenario proposals. Moreover, DoD intends to add the entirety of each offerors' cloud catalog to the contract. The RFP does not contemplate any comparative evaluation for most of the catalog items or the thousands of pricing permutations possible under

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 7 of 40

such a contract. (RFP at 93-95, Ex. C.) Moreover, the prices for future technology offerings will not be competitively priced. Finally, because IaaS and PaaS offerings are not a commodity like a pencil, and cloud service providers offer differing features and functions, which Cloud Service Provider will offer the most cost effective solution will vary depending on the ultimate function, work requirements, and applications. Absent a multiple award approach, this type of pricing evaluation falls far short of the statutory bar.

Third, the RFP contemplates a single best value award. But the RFP reflects substantial uncertainty as to the essential characteristics of IaaS, PaaS, Cloud Support Package, and Portability services the potential JEDI Cloud users may need. The RFP does not specify which IaaS and PaaS offerings an offeror must propose, or the specific tasks the JEDI Cloud end users – DoD agencies, the U.S. Coast Guard, the Intelligence Community, countries with which the U.S. has collective defense arrangements, and federal government contractors – will require. (Statement of Objectives ("SOO") at 2, Ex. D.) Instead, the RFP directs each offeror to provide its own Performance Work Statement that describes the services the offeror proposes to achieve the SOO Performance Requirements and any "Desired Capabilities" set forth therein. (RFP at 77, Ex. C.) A single award approach necessarily requires greater specificity regarding the services DoD solicits for the JEDI Cloud Contract over the 10-year period of performance in order to assess the best value offeror.

DoD developed the SOO "to maximize Offeror flexibility in proposing and delivering solutions to meet DoD's needs" (*id.* at 1) and intends to rely on the JEDI Cloud contract as a "pathfinder", "to learn how to most effectively use cloud at the enterprise level." (RFP Cover Letter at 2, Ex. B.) Such a "pathfinder" concept directly conflicts with a single award approach, especially one that is potentially for 10 years and \$10 billion. DoD can best achieve its "pathfinder" goal through a multiple award approach that leverages the evolving technology of multiple vendors rather than locking into one Cloud Service Provider.

In sum, the Department seeks a cloud marketplace of unspecified IaaS, PaaS, Cloud Support Package, and third party software offerings, for use all over the world, by those

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 8 of 40

performing DoD business and missions, to advance DoD's capabilities and meet current and future warfighting needs, but DoD wants to restrict that market and DoD's learning about how to most effectively use the cloud to a single company. This anti-competitive RFP violates law and regulation, and creates significant risk that DoD will award a 10-year, \$10 billion contract to a company that will not offer the best value for all the potential JEDI Cloud user's current and future cloud service needs. GAO should sustain this protest.

II. ORACLE IS AN INTERESTED PARTY, THE PROTEST IS TIMELY, AND THE COMPETITION IN CONTRACTING ACT REQUIRES A STAY OF AWARD.

As a prospective offeror under the RFP and a company with significant experience delivering cloud services to the federal government and other customers, Oracle is an interested party with economic interests directly impacted by the single source determination and other defective RFP terms. *See* 4 C.F.R. § 21.0(a)(1). GAO maintains authority to resolve this protest pursuant to 31 U.S.C. §§ 3551-56 (2018) and 4 C.F.R. Part 21 (2018).

This pre-award challenge to the Department's decision to make a substantial IDIQ contract award to a single awardee and other defective RFP terms is timely under both (i) 4 C.F.R. § 21.2(a)(1), as Oracle files this protest prior to the September 17, 2018 deadline for receipt of proposals, and (ii) 4 C.F.R. § 21.2(a)(2) as Oracle files this protest within 10 days of the Department publicizing on July 26, 2018 the D&F that provides its rationale for restricting the award of this \$10 billion IDIQ contract to a single source.

The Contracting Officer for this procurement is Chanda Brooks. (RFP at 67, Ex. C.) Oracle files this protest through GAO's Electronic Protest Docketing System. The system automatically generates an email notifying the procuring agency that an interested party has protested the procurement. Upon such notice, the Competition in Contracting Act of 1984 ("CICA") requires the Department to stay award under the RFP. *See* 31 U.S.C. § 3553(d); FAR 33.104(b).

III. BRIEF FACTUAL BACKGROUND

A. The Parties

1. Oracle is a global provider of enterprise cloud computing. <http://www.oracle.com/us/corporate/oracle-fact-sheet-079219.pdf>. More than 500 government organizations take advantage of the flexibility and cost savings provided by the Oracle Cloud to engage with constituents and modernize government services. <https://www.oracle.com/industries/public-sector/index.html>.

2. DoD's Washington Headquarter Services provides services to the Office of the Secretary of Defense ("OSD"), DoD agencies, and offices in the National Capital Region, enabling economies of scale for delivering essential administrative services to fulfill the DoD mission. <http://www.whs.mil/our-organization>. The Department Acquisition Directorate is the Single Enterprise Contracting Office, providing acquisition services to all OSD components. *Id.*

B. The Solicitation

3. The Department issued the JEDI Cloud RFP on July 26, 2018, and the FBO notice states that DoD is conducting the procurement in accordance with the streamlined procedures of FAR 12.6. (July 26, 2018 FBO Notice, Ex. A.) The Cover Letter explains that the final RFP captures the totality of the JEDI Cloud requirement, and states that the Department intends to use the JEDI Cloud Contract "to learn how to most effectively use cloud at the enterprise level." (RFP Cover Letter at 1, Ex. B.) The Department states: "The JEDI Cloud will act as a pathfinder for us to understand how we can best achieve security, governance, and architectures at the enterprise level in a modern, relevant manner." (*Id.* at 2.)

4. RFP Section B includes multiple Contract Line Items by ordering period of performance. (RFP at 2-12, Ex. C.) The RFP contemplates a potential 10-year performance period based on the following ordering periods:

Base Ordering Period (2 years)	April 17, 2019 - April 16, 2021
Option Ordering Period 1 (3 years)	April 17, 2021 - April 16, 2024
Option Ordering Period 2 (3 years)	April 17, 2024 - April 16, 2027
Option Ordering Period 3 (2 years)	April 17, 2027 - April 16, 2029

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 10 of 40

(*Id.* at 17.)

5. The RFP sets the maximum contract limit at \$10 billion and the minimum guaranteed amount at \$1 million. (RFP at 13.)

6. The RFP does not dictate what IaaS, PaaS, and Cloud Support Package services each offeror proposes. Instead, the RFP directs each offeror to provide its own Performance Work Statement describing the services the offeror proposes to achieve the SOO Performance Requirements and any "Desired Capabilities" set forth therein, and to offer catalog pricing for each proposed service. (RFP at 77.) The Department developed the SOO "to maximize Offeror flexibility in proposing and delivering solutions to meet DoD's needs." (SOO at 1, Ex. D.) The RFP advises offerors not to interpret the SOO "as limiting any functionality within the proposed solution." (*Id.* at 2.)

7. The SOO evidences a massive scope for the JEDI Cloud contract. Users will include all of DoD, and others performing "DoD business and mission operations," including the U.S. Coast Guard, the Intelligence Community, countries with which the United States has collective defense arrangements, and Federal government contractors. (SOO at 2, Ex. D.) The SOO also requires the contractor to offer JEDI Cloud Services "at all classification levels, across the homefront to the tactical edge, including disconnect and austere environments, and closed loop networks." (*Id.*) The RFP defines the tactical edge to include "[e]nvironments covering the full range of military operations...." (JEDI Cloud Definitions at 6, Ex. M.)

8. The RFP requires the Cloud Service Provider to meet the Cyber Security Plan security requirements for the unclassified services within 30 days of contract award, the Secret-level security requirements within 180 days of contract award, and the security requirements for all other classified services including Top Secret, SCI, and SAP within 270 days of contract award. (SOO at 4, Ex. D; *see also* RFP Cover Letter at 1 ("There is no requirement for offerors to have accredited classified environments at the time of proposal."), Ex. B.)

9. The RFP contains two types of Outside the Continental U.S. ("OCONUS") requirements: (1) OCONUS tactical edge requirements, including the static, modular, rapidly

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 11 of 40

deployable data centers for use on military controlled locations; and (2) point of presence requirements, i.e., interface point between communicating entities. (JEDI Cloud Q&A Matrix at No. 1360, Ex. E.) In response to questions about the OCONUS tactical edge requirements, DoD states that the "Government, not the JEDI Cloud contractor, is responsible for establishing appropriate facilities to support tactical edge capabilities." (*Id.* at No. 1371.)

10. The RFP provides no other specific location information for the services covered by the JEDI Cloud Contract. (JEDI Cloud Q&A Matrix at No. 1377 (potential offeror stating that the "Government must identify locations for service as to ensure response, availability and support," and Department responding: "Your comment has been noted.").)

11. CLIN x001 covers unspecified Unclassified IaaS and PaaS offerings, which the RFP indicates offerors will price by catalog. (RFP at 2, Ex. C.)

12. CLIN x002 covers the unspecified IaaS and PaaS offerings in a classified environment, which the RFP indicates the offerors will price by catalog. (RFP at 2.)

13. CLIN x003 covers an Unclassified Cloud Support Package, which the RFP indicates offerors will price by catalog. (RFP at 2.) The RFP does not define a specific or finite scope of work for the Cloud Support Package service, purportedly to leave flexibility for future Task Orders:

Unclassified offerings of catalog support to advise and assist with architecture, usage, provisioning, and configuration of IaaS and PaaS, to include homefront to the tactical edge. Package services may advise and assist with integration, aggregation, orchestration, and troubleshooting of cloud services. Package may include training services, materials, and documentation for available services. This is not a time-and-materials or labor-hour based CLIN.

(*Id.*; see also SOO at § 3.24, Ex. D.) The SOO advises that if the offeror proposes to constrain the Cloud Support Package by a number of hours available to users, then the offeror must also provide a mechanism (without charge) for users to inquire how many hours have been consumed. (SOO at § 3.24.1.)

14. CLIN x004 covers the Classified Cloud Support Package, which the RFP also indicates offerors will price by catalog. For CLIN x004, the RFP includes the same vague

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 12 of 40

description as CLINs x003 except the series x004 CLIN covers "classified offerings." (RFP at 3, Ex. C.)

15. CLIN x005 covers the Portability Plan for which each offeror must propose a firm fixed price. (RFP at 3.) The Portability Plan is a set of user instructions to "extract all online, nearline, and offline data, including, but not limited to, databases, object and file storage, system configurations, cloud activity logs, source code hosted in a JEDI Cloud code repository, and network configurations" to migrate from JEDI Cloud to another environment. (SOO at § 3.16.1 (emphasis added), Ex. D.) This plan must also evidence the potential offeror's ability "to demonstrate successful erasing, purging or destruction of all system components, as appropriate, and an ability to prevent re-instantiation of any removed or destroyed system, capability (software or process), data, or information instances once removed from JEDI Cloud." (*See id.*)

16. CLIN x006 covers a Portability Test demonstrating the portability of data and applications to other hosting environments, for which each offeror must propose a firm fixed price. (RFP at 4.) As with the other CLINs, the RFP does not provide a finite scope of work for the Portability Plan or the Portability Test services.

17. In the bidder questions on an RFP draft, an offeror noted that "[d]eveloping a Firm Fixed Price for a Portability Plan will require the scope of what is being ported." (JEDI Cloud Q&A Matrix at No. 1643, Ex. E.) The Department responded that the offerors shall assume that "the scope and complexity of the applications and data described in the Price Scenarios are illustrative examples" of what the Department intends to port to inform the pricing for the Portability Plan and Test CLINs. (*Id.*) The RFP cautions, however, that "the Government is not limited to those illustrative examples in post-award contract execution." (RFP at 84, Ex. C.)

18. CLIN x007 covers Cloud Computing Program Office Program Management Support, i.e., the Program Management Office (at least a Program Manager and Deputy Program Manager), process and tools necessary for the contractor to manage and oversee all contract activities, including, e.g., "facilitating the timely authentication and authorization of JEDI Cloud

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 13 of 40

infrastructure and offerings at all classification levels and coordinating successful integration of the DoD's provisioning tool," monitoring and reporting on contract status and Service Level Agreements, Quality Assurance activities, and reporting on small business participation. (RFP at 4, 14.) Each offeror must propose a monthly fixed price for the management services covered in CLIN x007. (*Id.* at 4.)

19. The RFP contemplates that the contractor will add new or improved IaaS, PaaS, or Cloud Support services to the Contract by (i) advising the Contracting Officer of new services that the vendor has made publicly available in the vendor's CONUS commercial cloud, or (ii) notifying the Contracting Officer of potential new services in advance of availability in the vendor's CONUS commercial cloud. (RFP at 23.)

20. Pursuant to RFP Section H2, the price of any new unclassified services shall not be higher than the price that is publicly available in the commercial cloud plus any applicable discounts, premiums, or fees the Cloud Services Provider proposed in RFP Attachment J-3. (RFP at 23.) If offered in advance of availability into the commercial marketplace, the Contracting Officer will make a commerciality determination about the new service and may require cost and pricing data or other than cost and pricing data as required by FAR 15.4. (*Id.*)

21. For new classified services, RFP Section H2 provides that the "price incorporated into the JEDI Cloud catalog ... may include a price premium compared to the unclassified services because of the additional security requirements." (RFP at 23.) That premium, per Section H2 will be the lesser of the premium applicable to the most comparable classified service at the time of contract award, the classified price premium offered by the Cloud Service Provider in its proposal for Section H2, or the premium proposed by the Cloud Service Provider at the time it offers the new service to the Department. (*Id.* at 24.)

22. If the Cloud Service Provider eliminates a service from its publicly-available commercial catalog, RFP Section H2 requires the contractor to offer "replacement service(s) with substantially similar functionality," to the Department at a price no higher than the eliminated service. (RFP at 24.)

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 14 of 40

23. RFP Section H3 requires the Cloud Service Provider to match any price reductions in the unclassified JEDI services catalog to those made in the commercial marketplace within 45 days, and to lower the related classified service by the proposed "percentage of the net value difference for the newly lowered rate for the unclassified service." (RFP at 24.)

24. The RFP includes six pricing scenarios (the "Price Scenarios") to guide both the technical and price evaluation. (Price Scenarios, Ex. H.) For all scenarios, the RFP directs the offerors to make certain assumptions unless stated otherwise, e.g., that the required solution is for an unclassified JEDI Cloud requirement, the service will take place in the offeror's most expensive CONUS region or zone, all services and resources are utilized continuously and all storage and data is retained for the duration of the order, and migration of any application is instantaneous on day 1 of the order. (*Id.* at 1.)

25. The RFP requires offerors to include a Priced and Unpriced Basis of Estimate ("BOE"), as well as a price build-up, for each of the Price Scenarios. (RFP at 83, Ex. C.)

26. The BOEs must document the "ground rules, assumptions, and drivers used in developing the price estimates, including applicable model inputs, rationale justification for analogies, estimating methods, supporting schedule and other details supporting the price estimates." (RFP at 83.) For each Price Scenario, the BOE must (i) describe the proposed technical solution and the quantities of the applicable IaaS, PaaS, and Cloud Support offerings, and (ii) illustrate how the offeror proposes to use the offerings together to achieve the scenario's requirements and any recurring or non-recurring offerings. (*Id.*)

27. The Price Build-up must capture the unit prices and quantities of each offering for the solution proposed, consistent with the offered catalog pricing and any proposed discounts, rebates, fees, etc. (RFP at 83-84.)

28. In addition, each offeror must submit four catalogs, one for CLIN x001 Unclassified IaaS and PaaS Offerings, one for CLIN x002 Classified IaaS and PaaS Offerings, one for CLIN x003 Unclassified Cloud Support Package, and one for CLIN x004 Classified

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 15 of 40

Cloud Support Package. (RFP at 84.) The RFP requires offerors to include a worksheet in the catalog for the base period and each option period. (*Id.*)

29. RFP Section L instructs that the offeror may not price any Cloud Support Package catalog offerings using time and material or labor hour pricing. (RFP at 84.)

30. The RFP provides for the JEDI Cloud IDIQ Contract award to a single offeror deemed the best value. (RFP at 88.) The Department intends to award two task orders concurrently with the base contract award. (*Id.* at 65.) Task Order 1 relates to CLIN 007, setting up the Cloud Computing Program Office Program Management Support. (PWS for Task Order 1, Ex. F.) Task Order 2 serves as a place holder, obligating to the contract the difference between the guaranteed minimum of \$1 million and the price of Task Order 1. (PWS for Task Order 2, Ex. G.) The awardee will not perform any cloud services under Task Order 2 or submit invoices under this Task Order. (*Id.*) Rather, upon the issuance of future orders for services, the government will administratively transfer the funds obligated under Task Order 2 to those task orders. (*Id.*)

31. The RFP requires a multiple-phased evaluation. (RFP at 88, Ex. C.)

32. In Step 1, the Department will perform a pass/fail evaluation against several "Gate Criteria." (RFP at 88.) The Gate Criteria are:

- i. Elastic Usage – the addition of JEDI Cloud unclassified usage will not represent a majority of all unclassified usage in the offeror's commercial cloud (*id.* at 74, 89);
- ii. High Availability and Failover – the Commercial Cloud Offering data centers (no fewer than three physical existing unclassified data centers within the Customs Territory of the United States) are sufficiently dispersed and can continue supporting the same level of DoD usage in the case of catastrophic data center loss (*id.* at 75, 89);
- iii. Commerciality – proposal demonstrates commerciality through revenue information for calendar year 2017 (*id.* at 75, 89);
- iv. Offering Independence – the proposed solution for storage, compute, and network IaaS does not require bundling with any particular PaaS and SaaS product (*id.* at 75, 89);

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 16 of 40

- v. Automation – the Commercial Cloud Offering can meet automation requirements for an existing Application Programming Interface as described in Section L (*id.* at 76, 90);
- vi. Commercial Cloud Offering Marketplace – the proposal shows an easy to use online marketplace (*id.* at 76); and
- vii. Data – the proposed solution meets the data requirements specified in Section L. (*Id.* at 77, 90.)

33. The RFP identifies eight other factors to determine the best value of those offerors satisfying the Gate Criteria. (RFP at 88, 90-93.) The RFP lists the non-price factors in descending order of importance:

Factor 2 – Logical Isolation and Secure Data Transfer

Factor 3 – Tactical Edge

Factor 4 – Information Security and Access Controls

Factor 5 – Applications and Data Hosting and Portability

Factor 8 – Demonstration

Factor 6 – Management and TO 001

Factor 7 – Small Business Approach

(*Id.* at 78-83, 88, 90-93.) These factors, when combined, are more importance than Factor 9 – Price. (*Id.* at 88.)

34. For Price, the RFP requires the Department to evaluate each offeror's Price Volume for accuracy and completeness. (RFP at 93.) As related to Task Order 1 the RFP contemplates that the Department will evaluate the price to determine if it is "fair and reasonable, complete and accurate." (*Id.* at 94.) DoD also must calculate a Total Evaluated Price, which equals the sum of the total proposed prices for Price Scenario 1 through 6, 4 times the Proposed Unit Price for CLIN 0005, 6 times the Proposed Unit Price for CLIN 1005, 6 times the Proposed Unit Price for CLIN 2005, 4 times the Proposed Unit Price for CLIN 3005, 4 times the Proposed Unit Price for CLIN 0006, 6 times the Proposed Unit Price for CLIN 1006, 6 times the Proposed Unit Price for CLIN 2006, 4 times the Proposed Unit Price for CLIN 3006, 24 times the Proposed Unit Price for CLIN 007, 36 times the Proposed Unit Price for CLIN 1007, 36 times

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 17 of 40

the Proposed Unit Price for CLIN 2007, and 24 times the Proposed Unit Price for CLIN 3007. (*Id.* at 94-95.)

35. The RFP does not contemplate any evaluation of the four proposed price catalogs except to confirm the accuracy of any prices used in the Price Scenario build-ups. (RFP at 93-95.)

36. In Step 2, the RFP requires the Department to evaluate each offeror which passes the Gate Criteria and proposes technical solutions under Factors 2 through 6 by assigning adjectival ratings. The RFP contemplates the evaluation of Factor 9 by calculating the Total Evaluated Price and evaluating the Task Order 1 price for reasonableness and completeness. (RFP at 88.)

37. Based on the Step 2 evaluation, the Department will determine a competitive range of not more than four offerors. (RFP at 65, 88.)

38. For Step 3, each competitive range offeror will propose a Small Business Participation Approach (Factor 7) and complete the Demonstration of the technical solutions proposed for each Price Scenario (Factor 8), and engage in discussions (if the Department initiates discussions). (RFP at 88.) The Department will then evaluate the competitive range offerors against the Factor 7 and Factor 8 criteria, and eliminate from the competitive range any offerors rated marginal or lower for technical capability or high risk. (*Id.*)

39. In the final step, DoD will invite all remaining competitive range offerors to submit a final proposal revision (which will include the already conducted Factor 8 Demonstration), and evaluate the final proposals against all criteria. (RFP at 88.)

40. RFP Section B3 specifies that the contract type is a "single award ID/IQ contract" and that the Department will only issue firm-fixed price task orders. (RFP at 13.)

C. The D&F

41. DoD issued with the RFP a single source IDIQ D&F signed on July 19, 2018 by the Honorable Ellen Lord, Under Secretary of Defense for Acquisition and Sustainment. (D&F, Ex. J.) The D&F contains seven paragraphs of "findings." The first paragraph describes 10 U.S.C. § 2304(a)(d)(3)(B)(ii). (*Id.* at 1.)

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 18 of 40

42. The second paragraph describes the rationale for the JEDI Cloud Contract procurement, including the need for modern cloud computing capabilities and to leverage artificial intelligence and machine learning tools for the warfighter. (D&F at 1.)⁷

43. The third paragraph describes the potential duration and maximum value of the JEDI Cloud Contract, i.e., "10 years with a maximum dollar value of 10 billion." (D&F at 1.)

44. The fourth paragraph notes that users will place firm-fixed price ("FFP") task orders and specifies the seven CLINs for each ordering period. (D&F at 2.)

45. The fifth paragraph states: "The CLINS for cloud offerings (i.e., IaaS, PaaS, and Cloud Support Package) will be priced by catalogs resulting from full and open competition, thus enabling competitive forces to drive all aspects of the FFP pricing." (D&F at 2.)

46. The sixth paragraph describes RFP clauses H2 and H3 addressing price reduction triggers and adding new services to the JEDI Cloud Contract. (D&F at 2-3.)

47. The last finding states that the CLINs from which the Cloud Computing Program Office may order (Portability Plan, Portability Test, and CCPO Management Support) are fixed priced and result from full and open competition. (D&F at 3, Ex. J.)

48. The Determination states:

Based on the above findings, I hereby determine, pursuant to 10 U.S.C. § 2304a(d)(3)(B)(ii) that the ID/IQ contract or JEDI Cloud will provide only for FFP task orders for services which prices are established in the contract for the specific tasks to be performed.

(D&F at 3.)

⁷ Although not relevant to the determination, the D&F also asserts that artificial intelligence and machine learning require leveraging of a "common environment." (D&F at 1, Ex. J.) Given that the DoD CIO acknowledges that "DoD will always have a multiple cloud environment" (CIO Mem. at K) and that the JEDI Cloud will be a complementary offering to other existing and future cloud contracts, such as milCloud 2.0, the Defense Enterprise Office Solution (DEOS) RFP (*see* Final Cloud Combined Congressional Report at 8, Ex. I), and other pending awards by the military branches, the assertion of a need for a "common environment" is unfounded. To the extent this statement is relied upon by DoD for the D&F determination, Oracle hereby challenges the Government's assertions as irrational and not relevant to the stated exception.

IV. PROTEST GROUNDS

A. The Department's Decision To Restrict The \$10 billion, 10-Year JEDI Cloud IDIQ Contract To A Single Awardee Contravenes Statutory And Regulatory Requirements And Otherwise Lacks A Rational Basis.

Procurement law and regulation require DoD to use a multiple award contract approach for the JEDI Cloud RFP. DoD has failed to follow the statutory and regulatory requirements by designing the massive \$10 billion, 10-year JEDI Cloud procurement to provide for a single awardee IDIQ contract. Although DoD claims to employ "best standards of competitive pricing, innovation, and security," DoD also has ignored the broad consensus of industry experts that a multi-vendor approach is the most advantageous approach, and has effectively closed a critical government technology market to competition.⁸

The U.S. Code and FAR establish a preference for awarding multiple IDIQ contracts for the same or similar services to the "maximum extent practicable." 10 U.S.C. § 2304a(d)(4); FAR 16.504(c)(1)(i). In mandating this preference, Congress determined that multiple award indefinite quantity contracts better protect the government and taxpayer interests than single awardee indefinite quantity contracts:

The Committee believes that indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can effectively be addressed without significantly burdening the procurement system by awarding

⁸ *The Federal Information Technology Acquisition Reform Act (FITARA) Scorecard 6.0* (hearing May 25, 2018) (statement of DoD CIO Dana Deasy), <https://oversight.house.gov/hearing/the-federal-information-technology-acquisition-reform-act-fitara-scorecard-6-0/> (last visited 8/6/2018) (responding to "What is your opinion on a multicloud environment?" and stating: "It is my belief that in a cloud world there is no such thing as one solution is going to solve for all. You are always going to have a need when you build anything where you're going to have specific requirements that are going to be best served by unique providers. That is no different than has always been the case with technology," and providing response based on his experience in the private sector where Mr. Deasy was Global Chief Information Officer of JPMorgan Chase and CIO for BP, General Motors North America, Tyco International, and Siemens Americas); Nick Wakeman, *DHS CIO wants multi-cloud strategy*, Washington Technology, <https://washingtontechnology.com/blogs/editors-notebook/2018/05/dhs-cloud-strategy-zangardi.aspx> (last visited 8/6/2018) (reporting on DHS industry day announcement by Chief Information Officer to adopt a multi-cloud strategy because "different (DHS) components have different needs").

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 20 of 40

multiple task order contracts for the same or similar services and providing reasonable consideration to all such contractors in the award of such task orders under such contracts. The Committee intends that all federal agencies should move to the use of multiple tasks order contracts, in lieu of single task order contracts, wherever it is practical to do so.

S. Rep. 103-258 at 15 (May 11, 1994); *see also* S. Rep. 110-77 at 368 (June 5, 2007) ("The provision recommended by the committee would ensure that future contracts of this type provide for the competition of task and delivery orders unless there is a compelling reason not to do so.").

FAR 16.504(c)(1)(i) contains Congress's stated preference for agencies to make multiple award IDIQ contracts and requires contracting officers to favor multiple IDIQ contract awards under a single solicitation "to the maximum extent practicable":

(i) Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (c)(2) of this section, the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.

FAR 16.504(c)(1)(i) (emphasis added). The FAR identifies several factors a contracting officer must consider when determining the number of IDIQ contracts to award and also specifies several instances where it is not practicable for a contracting officer to use a multiple award approach. FAR 16.504(c)(1)(ii)(A) and (B). The FAR requires the contracting officer to document the basis for the decision whether or not to use multiple awards. FAR 16.504(c)(1)(ii)(C). GAO reviews such decisions. *See Info. Ventures, Inc.*, B-403321, Sept. 27, 2010, 2010 CPD ¶ 233 (sustaining protest where agency failed to provide maximum practicable preference).

In addition to requiring agencies to award at least two IDIQ contracts to the "maximum extent practicable," the U.S. Code and FAR impose an additional proscription for large IDIQ procurements. For IDIQ contracts estimated to exceed \$112 million, the applicable statute and regulation prohibit a single award unless the head of contracting activity (or senior procurement executive for DoD procurements) also determines in a written D&F that complies with FAR Part

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 21 of 40

1.7 that one of four stated exceptions exist. 10 U.S.C. § 2304a(d)(3); FAR 16.504(c)(1)(ii)(D); DFARS 216.504(c)(1)(ii)(D). Specifically, FAR 16.504(c)(1)(ii)(D) provides:

No task or delivery order contract in an amount estimated to exceed \$112 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that—

- (i) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;
- (ii) The contract provides only for firm fixed price (see 16.202) task or delivery orders for— (A) Products for which unit prices are established in the contract; or (B) Services for which prices are established in the contract for the specific tasks to be performed;
- (iii) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or
- (iv) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

FAR 16.504(c)(1)(ii)(D) (emphasis added); *see also* 10 U.S.C. § 2304a(d)(3) (containing similar prohibition).

Regulatory history confirms that that this requirement for the head of contracting activity to make an independent written determination regarding the award of an IDIQ contract worth more than \$112 million to a single contractor is in addition to the contracting officer's obligation to maximize the use of multiple-award IDIQs. When the FAR council proposed the initial version of FAR 16.504(c)(1)(ii)(D) to implement Congress's additional restrictions on use of single award IDIQs, several public comments raised concerns regarding an alleged redundancy in the requirement for a contracting officer's determination regarding whether to use a multiple-award IDIQ and the head of contracting authority's determination required to award a single-awardee IDIQ contract above the \$112 million threshold. *See e.g.*, Fed. Reg. Vol. 75, No. 52, 13416, 13419 (Mar. 19, 2010) (comment 10).

The FAR Council rejected the comments, noting the statutory requirement for the head of an agency to make a written determination for any single award above the threshold "did not

change the contracting officer's determination during acquisition planning as to whether multiple awards are appropriate." *Id.* (emphasis added). The FAR Council explained:

The contracting officer determination, at the acquisition planning stage, on whether multiple awards are appropriate is required by statute. This determination is separate from the determination by the agency head to award a task- or delivery-order single contract over \$100 million, which is required by a different statute. Each agency is responsible for ensuring it meets the requirements of both determinations when applicable. As such, questions regarding agency implementation of section 843 should be directed to that agency.

Id. at 13420 (indicating that Section 843 of the National Defense Authorization Act for FY 2008 added this second requirement) (emphasis added).

Two primary problems exist with the Department's approach here. First, the D&F relies on an inapplicable FAR exception and cannot support a single award of the JEDI Cloud IDIQ Contract. Second, the RFP contains no evidence that the Contracting Officer applied the required preference for multiple awards and considered the factors specified in FAR 16.504(c)(1)(ii). GAO, accordingly, should find that DoD's decision to limit the JEDI Cloud procurement to the award of a single IDIQ contract with a potential 10-year period of performance and \$10 billion value violates applicable law and lacks reason.

1. The D&F Fails to Meet the Criteria for the Asserted Exception to The Prohibition Against Large Single Award IDIQ Contracts.

The JEDI Cloud single source D&F is brief, consisting of seven numbered "findings" and a "determination" that "pursuant to 10 U.S.C. § 2304(a)(d)(3)(B)(ii), ... the IDIQ contract for JEDI will provide only for FFP task orders for services for which prices are established in the contract for the specific tasks to be performed." (D&F, Ex. J (emphasis added).) The cited exception to the prohibition against awarding a single IDIQ contract valued at greater than \$112 million requires that the contract (i) permit only firm, fixed price delivery orders; (ii) establish the prices for all items; and (iii) identify the specific tasks contemplated. This exception permitting a single award focuses on an objective analysis of the order type, pricing, and contract

structure. The IDIQ Cloud contract contemplated by the JEDI Cloud RFP does not meet the stated exception.

Although the D&F correctly observes that JEDI Cloud IDIQ Contract only permits firm fixed price task orders (part 1), the RFP does not contemplate a contract with "established" prices for all services solicited across the 10-year term (part 2), and the JEDI RFP does not identify the "specific tasks" DoD will require (part 3). Significantly, the law requires the D&F to "clearly and convincingly" demonstrate each of these points. FAR 1.704 (requiring "[e]ach D&F shall set forth enough facts and circumstances to clearly and convincingly justify the specific determination made" and to "detail the particular circumstances, facts, or reasoning essential to support the determination."). The JEDI D&F fails to meet these rigorous standards for exempting the JEDI Cloud Contract from the statutory requirements mandating multiple award IDIQ contracts and competitive task orders.

a. The RFP Does Not Contemplate A Contract With Established Prices for All Services Solicited Across the 10-Year Term.

As an initial matter, the RFP does not contemplate that the offerors will provide prices for all services to be delivered under the contract. The exception requires the contract to have established prices for all the services solicited. 10 U.S.C. § 2304a(d)(3)(B)(ii). The JEDI Cloud Contract will not establish the prices for the 10 years of evolving cloud computing services solicited or even the prices in the near term. The Department has an expansive potential scope of services and has little idea what type of cloud services will exist in 2025 and the contract will not include established prices of such future services. The only thing certain is that if DoD wants to maintain its military advantage and utilize modern cloud computing capabilities, the myriad JEDI Cloud users will not be able to order cloud services from an offeror's 2018 catalog for the next 10 years. To the contrary, DoD expects that the successful offeror will constantly add new services to the cloud – keeping the cloud current.

In this regard, the RFP "Section H2: New Services" provides:

When new (including improved) IaaS, PaaS, or Cloud Support Package services are made publicly available to the commercial marketplace in the continental United States (CONUS) and those services are not already listed in the JEDI

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 24 of 40

Cloud catalogs in Attachment J-1: Price Catalogs, the Contractor must immediately (no later than 5 calendar days) notify the JEDI Cloud Contracting Officer for incorporation of the new services into the contract in accordance with the Performance Work Statement. At its discretion, the Contractor may also seek to incorporate new services into the contract in advance of availability to the commercial marketplace. The JEDI Cloud Contracting Officer must approve incorporation of any new services into the contract.

(RFP at 23, Ex. C.)

The D&F states in paragraph five that "CLINS for cloud offerings (i.e., IaaS, PaaS, and Cloud Support Package) will be provided by catalogs resulting from the full and open competition, thus enabling competitive forces to drive all aspects of the FFP prices." (D&F at 5, Ex. J.)⁹ The catalog will not result from full and open competition because the offerors' catalogs are not even being evaluated. (RFP at 93-95, Ex. C.) There is no mechanism for evaluating which catalog will produce the optimal solution or the lowest price unless there is task order competition. The RFP does not contemplate a stagnant cloud catalog. Instead, as indicated, the RFP contemplates that the awardee will constantly refresh its offerings.

In this regard, available cloud services evolve at a staggering pace.¹⁰ Gartner notes that major cloud providers may release 40 to 50 new features in any given month, with total cloud

⁹ The first three D&F "findings" provide background citing the statute triggering the need for the D&F, DoD's need for the JEDI procurement, and the period of performance and maximum potential value of the solicited IDIQ contract. (D&F at 1-2, Ex. J.) The fourth states that the users may only issue firm fixed price task orders under the JEDI Cloud Contract and specifies the CLINs. (*Id.* at 2.) Effectively, the relevant findings for this \$10 billion IDIQ contract award span two short conclusory paragraphs.

¹⁰ See e.g., *The Changing Faces of the Cloud*, <http://www.bain.com/publications/articles/the-changing-faces-of-the-cloud.aspx> (last visited 8/3/2018); *10 Ways Cloud Computing Will Evolve in 2018*, CMS Wire at <https://www.cmswire.com/information-management/10-ways-cloud-computing-will-evolve-in-2018/> (last visited 8/3/2018).

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 25 of 40

feature sets in the thousands.¹¹ The pricing is complicated, sometimes opaque, and highly variable across regions, competitors, and time.¹²

The CLIN prices in the contract thus are not established at all, but will consistently evolve throughout the period of performance. Future new and different services will not be priced at the time of award. To the extent that DoD seeks some solace in the presence of commercial price parity, the FAR provides "[t]he fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable." FAR 15.403-3(c). In addition, the JEDI Cloud IDIQ contract will permit the contractor to add new features to the JEDI Cloud in advance of their introduction into the commercial marketplace. (RFP at 23, Ex. C.) Neither the price reduction clause nor the new service clause provide established prices for specific tasks or substitute for competition. To the contrary, the Department's reliance in paragraph six of the D&F on the new services and price changes provisions in RFP Section H2 and H3 ignores the history of the very restriction on single source IDIQ contracts that DoD seeks to circumvent. Rather than support the determination that the JEDI Cloud RFP falls within the exception for "services for which prices are established in the contract," the D&F and the cited RFP provisions prove that the exception does not apply.

In July 1997, the Office of Federal Procurement Policy ("OFPP") noted that such "technology refreshment and price reduction clauses to take advantage of falling prices and new technology" are not valid substitutes for task order competition:

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 with these clauses, the government had to negotiate in a sole-source environment

¹¹ *Hidden Cloud Opportunities for Technology Service Providers* (June 20, 2018) at <https://www.gartner.com/smarterwithgartner/7-hidden-cloud-growth-opportunities-for-technology-service-providers/> (last visited 8/4/2018).

¹² *Cloud Pricing Comparison: AWS vs. Microsoft Azure vs. Google Cloud vs. IBM Cloud*, <https://www.infoworld.com/article/3237566/cloud-computing/cloud-pricing-comparison-aws-vs-azure-vs-google-vs-ibm.html> (last visited 8/3/2018).

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 26 of 40

and was often unable to realize the economies and efficiencies afforded by vigorous competition among vendors in the marketplace.

By offering market competition on price and technology for each order, multiple award contracting provides COs with the flexibility needed to better match the dynamics of the IT market. Pre-FASA experimentation with various forms of continuing competition among multiple awardees on IT contracts demonstrates the potential of this approach.

OFPP, Best Practices for Multiple Award Task And Delivery Order Contracting, at <https://www.gsa.gov/cdnstatic/BestPracticesMultipleAward.pdf> (last visited 8/3/18) (emphasis added).

Equally troubling is the SOO requirement that each offeror propose the "ability to rapidly and securely deploy CSP [Cloud Service Provider] and third-party platform and software service offerings from an online marketplace" (SOO at 10, Ex. D.) The SOO states that "software or platform offerings that cannot be deployed on JEDI Cloud infrastructure are outside the scope of this contract." (*Id.*) In response to offeror questions about the unidentified third-party platform and software service, DoD stated:

A cloud marketplace is an online storefront, operated by the cloud provider, to which customers may subscribe to PaaS and SaaS offerings that run on the cloud provider's infrastructure. The specific third party PaaS and SaaS marketplace offering are dependent upon the particular cloud provider. SaaS and PaaS offerings that cannot be deployed on the JEDI Cloud are outside the scope of this acquisition.

(JEDI Cloud Q&A Matrix at No. 1345, Ex. E.) The RFP does not solicit any pricing for the online marketplace or include any evaluation of each offeror's marketplace offerings or the prices. Through this marketplace requirement, DoD will establish one Cloud Service Provider as the entry point for third-party software providers to DoD's IT market. Absent from the JEDI Cloud contract are limitations or guidelines regarding this marketplace. No restrictions exist on what the JEDI Cloud provider can charge the third-party software providers to access the JEDI Cloud users. No restrictions exist on what the Cloud Service Provider can charge the JEDI Cloud users for access to the third-party software. There are no established prices for the marketplace in the JEDI Cloud Contract at all and no competitive process for establishing prices.

Moreover, there does not appear to be any statutory authority for DOD to establish such a marketplace. *See* Pub. L. 115-91, § 846(a), Dec. 12, 2017, 131 Stat. 1483 (providing for the Administrator of the General Services Agency to "establish a program to procure commercial products through commercial e-commerce portals" and to "carry out the program in accordance with this section, through multiple contracts with multiple commercial e-commerce portal providers....") (emphasis added). Even if DOD has such authority, it is clear that the Department will not evaluate the specific third-party marketplace offerings in the JEDI Cloud procurement and the JEDI Cloud Contract will not contain established prices for these third-party offerings.

Because the JEDI RFP does not price many of the services it seeks to buy across the next ten years, it does not satisfy the "established price" requirement the D&F invokes.

b. The JEDI RFP Does Not Identify the "Specific Tasks To Be Performed."

Moreover, the RFP also does not purport to identify the "specific tasks to be performed" in contract year one, much less over the 10-year period of performance. 10 U.S.C. § 2304a(d)(3)(B)(ii). Instead, the RFP directs each offeror to provide its own Performance Work Statement that describes the services the offerors proposes to offer to achieve the Statement of Objective ("SOO") Performance Requirements and any "Desired Capabilities" set forth therein. (RFP at 77, Ex. C.) The Department developed the SOO "to maximize Offeror flexibility in proposing and delivering solutions to meet DoD's needs" (SOO at 1, Ex. D) and intends to rely on the JEDI Cloud contract "to learn how to most effectively use cloud at the enterprise level." (RFP Cover Letter at 2, Ex. B.)

Notably, the Department has not set up the JEDI Cloud RFP as a head-to-head competition of the many services each offeror proposes to put on the JEDI Cloud Contract. To the contrary, the RFP limits the competition for the IaaS, PaaS, and Cloud Support Package prices to the technical solutions the offerors price in response to the six Price Scenarios. (RFP at 94-95 (Technical Evaluation Price calculation), Ex. C; Price Scenarios, Ex. H.) The six Price Scenarios are illustrative examples only; the scope and complexity of undefined future "specific

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 28 of 40

tasks to be performed" will vary. (*Id.* at 94 ("the scope and complexity of the applications and data described in the Price Scenarios are illustrative examples that should inform the pricing of those CLINs, but the Government is not limited to those illustrative examples in post-award contract execution."))

The offerors (or cloud users) can configure the IaaS, PaaS, and Cloud Support Package offerings in hundreds to thousands of different ways depending on the user's computing needs, each resulting in different prices.¹³ The optimal solution for the future need of any JEDI Cloud user will depend on a variety of factors including the services offered, the location of the data center, the operating systems and applications involved, the level of support or storage needed, and whether any discount is available.¹⁴

As an example, the Cloud Support Package CLIN by its own terms is not an established price "in the contract for the specific tasks to be performed." It does not have a finite scope; instead, the Department elected to leave flexibility for future Task Orders. (RFP at 2, 3, Ex. C; SOO at § 3.24, Ex. D.) The Cloud Support Package may include advising and assisting with integration, aggregation, orchestration, and troubleshooting. (RFP at 2, 3, Ex. C; SOO at § 3.24, Ex. D.) It may also include training services and materials. (RFP at 2, 3, Ex. C; SOO at § 3.24, Ex. D.) The "specific tasks to be performed" in connection with the Cloud Support Package pricing will depend on the future Task Order requirements. The SOO even recognizes that, depending on how the offeror develops its pricing, the scope of support provided by the CLIN price may be limited to a certain number of support hours available to the user and thus the

¹³ See e.g., *Cloud Pricing Comparison: AWS vs. Microsoft Azure vs. Google Cloud vs. IBM Cloud*, <https://www.infoworld.com/article/3237566/cloud-computing/cloud-pricing-comparison-aws-vs-azure-vs-google-vs-ibm.html> (last visited 8/3/2018) (advocating using more than one cloud provider to manage cloud costs: "Developing a multi-cloud strategy is a critical component of cloud cost management efforts" and demonstrating how different CSPs offer the lowest price depending on the specific requirements of each scenario); *Cloud Price Comparison: AWS vs. Azure vs. Google*, <https://www.datamation.com/cloud-computing/cloud-price-comparison-aws-vs-azure-vs-google.html> (last visited 8/3/2018).

¹⁴ *Cloud Price Comparison: AWS vs. Azure vs. Google*, <https://www.datamation.com/cloud-computing/cloud-price-comparison-aws-vs-azure-vs-google.html> (last visited 8/3/2018).

support provided by that offeror will depend on how long it may take that offeror to perform the unknown and undefined tasks sought in a future task order. (SOO at § 3.24.1, Ex. D.)

CLINs x005 and x006 fail no better against the "prices are established in the contract for specific task to be performed" test. CLIN x005 requires a set of user instructions to "extract all online, nearline, and offline data, including, but not limited to, databases, object and file storage, system configurations, cloud activity logs, source code hosted in a JEDI Cloud code repository, and network configurations" to migrate from the JEDI Cloud to another environment. (SOO at § 3.16.1, Ex. D.) And, CLIN x006 covers a Portability Test demonstrating the portability of data and applications to other hosting environments. (RFP at 4, Ex. C.) Neither the SOO nor the RFP specify the data and applications to port or the other environment. For pricing purposes, the Department instructs all offerors to assume the scope and complexity of the applications and data to port are comparable to those in the Price Scenarios, but advises that future work calling for these services may be different. (*Id.* at 84.)

In sum, the RFP neither establishes the prices that DoD will use across the contract term nor identifies the specific tasks to be performed. Both the pricing and the cloud service offerings are dynamic. The same is true of the commercial marketplace of third party software DoD seeks to access. The IaaS, PaaS, Cloud Service Package, and Portability services offered and DoD's related needs will evolve over the period of performance. This is the precise circumstance that led to Congress largely prohibiting single-awardee IDIQ contracts valued at more than \$112 million. Indeed, the very savings provisions on which DoD seeks to rely are the precise types of provisions that failed so notably and caused Congress to act in the first instance. Multiple awards and task order competitions are not only prudent in these circumstances, they are statutorily required and, as determined by Congress, in the best interest of the Government and the taxpayer.

2. The Contracting Officer Failed to Give the Required Preference for Multiple Awards.

Even if the exception exists, which it does not, the Department's intended single-award IDIQ contract violates the law, because the Department failed to give the required maximum

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 30 of 40

preference for a multiple award contract.

As noted, 10 U.S.C. § 2304a and FAR 16.504(c) require the use of a multiple awardee IDIQ contracting approach and task order competition "to the maximum extent practicable". Specifically, FAR 16.504(c)(1)(i) states that the contracting officer must (i) "give preference to making multiple awards" of an IDIQ contract under a single solicitation for the same or similar services to two or more sources to the "maximum extent practicable," and (ii) document the decision in the acquisition plan or acquisition file. *See also* FAR 16.504(c)(1)(ii)(C). The statutory and regulatory requirement that the contracting officer "must" favor multiple award IDIQ contracts "to the maximum extent practicable" is in itself a material limit on contracting officer discretion. *See e.g., SMS Data Products Grp., Inc. v. United States*, 853 F.2d 1547, 1553-54 (Fed. Cir. 1988) (interpreting FAR command that contracting officer "shall," "to the maximum extent practicable" obtain competition when reprocurring following a termination for default to mean that "the contracting officer did not have unbridled discretion in conducting the reprourement, but was required to conduct the reprourement in the most competitive manner feasible.") (emphasis added); *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 269 (2016) ("The word 'maximum' in the phrase 'to the maximum extent practicable,' therefore, should not be ignored and read out of the statute. 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 . . .").

The FAR identifies several factors for the contracting officer to consider when deciding the number of IDIQ contracts to pursue, including the scope and complexity of the procurement, the expected duration and frequency of task orders, and the ability to maintain competition among the awardees throughout the contract period of performance. FAR 16.504(c)(1)(ii)(A). Nowhere in the D&F is there any indication that the Under Secretary or the Contracting Officer considered the benefits of multiple awards and the other factors specified in FAR 16.504(c)(1)(ii) for determining the number of JEDI Cloud Contract awards to make. The D&F does not include any findings about multiple awards versus a single award. (D&F, Ex. J.) The Under Secretary's

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 31 of 40

substantive focus is only on the inapplicable exception against the prohibition for a single award. (*Id.* at 3.) Absent from the D&F are findings describing considerations by the Contracting Officer about the number of awards, the benefits of task order competition, and the rationale for proceeding with a procurement for a single-award IDIQ contract.

None of the other documents provided with the RFP demonstrate any consideration by the Contracting Officer of the benefits resulting from a multiple award approach here. "[T]he preference for multiple award is based on the finding that when multiple ID/IQ contracts are awarded under a single solicitation, the contractors compete head-to-head for task orders, producing significant price and technological benefits which generally do not ensue under a single award." *WinStar Commc'ns, Inc. v. United States*, 41 Fed. Cl. 748, 762 (1998) (emphasis added) (sustaining protest against use of single source IDIQ contract).

In any event, it is highly unlikely that legitimate reasons (unconsidered by Congress in passing these restrictions) exist here. As the *WinStar* Court noted, Congress has analyzed the effort associated with multiple award contracts and determined that maintaining competition through multiple award, indefinite quantity contracts favors the United States:

Again, no analysis was conducted to estimate how much administrative costs would increase if multiple contracts were awarded....

These "common sense" concerns do not provide a reasonable basis for overriding the Congressional preference for multiple awards. The preference would be rendered meaningless if it could be overcome simply by pointing to such general concerns which apply to every procurement. Implicit in Congress' decision to establish a preference for multiple awards is the conclusion that the benefits generally outweigh the "common sense" costs.

WinStar Commc'ns, 41 Fed. Cl. at 762; *One Source Mech. Servs., Inc.; Kane Constr.*, B-293802, B-293862, June 1, 2004, 2004 CPD ¶ 112 (sustaining protest where agency failed to adequately justify use of single source indefinite quantity contract).¹⁵

¹⁵ To the extent DoD seeks to rely on the Final Cloud Combined Congressional Report, the Contracting Officer did not sign the report and the report itself fails against the FAR standards. (Final Cloud Combined Congressional Report at 3-4, Ex. I.) In fact, the Report in several respects evidences the impropriety of the single awardee approach by relying on the very items Congress rejected in adopting the preference, e.g., the cost of competition – unspecified, the

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 32 of 40

Had DoD applied the required preference, considered the benefits of multiple awards, and reflected on the FAR factors for making the determination, the conclusion would have been clear: task order competition for the future needs of the JEDI Cloud users is not only practical but required to further the interests of the Department and the taxpayer. The Department intends to use the JEDI Cloud Contract "to learn how to most effectively use cloud at the enterprise level." (RFP Cover Letter at 1, Ex. B.) The Department states: "The JEDI Cloud will act as a pathfinder for us to understand how we can best achieve security, governance, and architectures at the enterprise level in a modern, relevant manner." (*Id.* at 2.) In addition, the DoD CIO echoed the same "pathfinder" concept as well as highlighted DoD's need for "flexibility to be innovative and keep pace with evolving technology"; the "diversity of DoD's mission"; and the corresponding need for DoD to have a "multiple cloud environment." (CIO Memo at 1, Ex. K.) These concepts directly contradict the single award approach. Flexibility, innovation and evolving technology all are best achieved through a competitive, multi-vendor IDIQ contract. *See e.g.*, Harvard Business Review, *How to Plan for a Multi-Cloud World* at 2 (observing that leading enterprise organizations see multi-cloud environments as the fastest way to serve customers, provide price flexibility, and ensure redundancy), Ex. L.)

In sum, DoD, contrary to the statutory and regulatory requirements governing the acquisition of IDIQ contracts, has failed to apply the preference for multiple awards, and has not considered the benefits of that Congressionally-mandated preference. Equally problematic, the Department's stated intention to award a 10-year, \$10 billion IDIQ contract to a single vendor will violate the prohibition against such awards given that none of the exceptions to that prohibition apply to the facts at issue here.

impact of multiple vendors – uncalculated, etc. The Report also contains numerous contradictions. For instance, DoD has acknowledged to Congress in the context of this very procurement: "DoD is best served by a robust, competitive and innovative technology industrial base." (*Id.* at 4.) But a single awardee approach will provide for a base of one – foregoing the "robust, competitive, and innovative" marketplace. Moreover, as noted above, the DoD CIO acknowledges the importance of a multiple vendor cloud environment for DoD. (CIO Memo, Ex. K.)

The Department's failure to follow the statutory and regulatory requirements before adopting a single award IDIQ selection process competitively prejudices Oracle by limiting Oracle's chances to compete for such work today and for the next 10 years. *Info. Ventures, Inc.*, B-403321, Sept. 27, 2010, B-403321, Sept. 27, 2010, 2010 CPD ¶ 223 (sustaining protest against use of single source award approach); *see also WinStar Commc'ns*, 41 Fed. Cl. at 762 (finding prejudice and noting "as a result of the single award decision, WinStar has lost the opportunity to compete for multiple contracts and its chances of receiving a contract under the New York RFP have been reduced. These injuries are not insignificant.").

B. The RFP Does Not Provide A Reasonable Basis To Assess the Relative Price To DoD Of Making A Single Award.

Procurement law requires that the Department reasonably consider the price to the government of selecting a particular proposal. The RFP provides no valid means for the Department to do so. Given the dynamic nature of the services sought and the massive scope of the intended JEDI Cloud Contract, the RFP's price evaluation cannot reasonably assess the relative price to DoD of selecting a particular Cloud Service Provider. This further underscores why a multiple award IDIQ contract procurement is the only lawful result.

Unless a procuring agency intends to award multiple IDIQ contracts and evaluate price or cost as part of the task order process, the agency must include price or cost as an evaluation factor and the agency must meaningfully consider price or cost in evaluating each competitive proposal. 10 U.S.C. § 2305(a)(3). "[T]he central objective of evaluating the relative total cost or price of competing proposals [is] to provide the agency's source selection authority a meaningful understanding of the cost or price implications of making award to one or another concern." *CACI, Inc.-Fed.*; *Booz Allen Hamilton, Inc.*, B-413028, B-413028.2, B-413028.3, Aug. 3, 2016, 2016 CPD ¶ 238. Even though "[i]n the context of awarding an IDIQ contract, the evaluation of cost or price often is difficult because of uncertainty regarding what ultimately will be procured," GAO will sustain a protest when a solicitation lacks any means for the agency to evaluate the realistic costs to execute the IDIQ. *Id.* (sustaining protest against IDIQ solicitation that did not include evaluation of CLINs, even when those CLINs would be evaluated in later task order

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 34 of 40

procurements); *CW Gov't Travel, Inc.*, B-295530.2 *et al.*, July 25, 2005, 2005 CPD ¶ 139 (sustaining pre-award challenge to IDIQ solicitation, the terms of which precluded agency from meaningfully evaluating proposals' cost to government).

GAO likewise should sustain this protest because the RFP provides no meaningful basis to consider the actual price implications of selecting one Cloud Service Provider over another for the potential 10-year JEDI Cloud Contract. The RFP calls for the Department to evaluate two aspects of the offerors' proposed prices. First, the RFP requires the Department to assess the fairness and reasonableness of each offeror's Task Order 1 price. (RFP at 94, Ex. C.) But Task Order 1 is of limited scope, covering only Cloud Computing Program Office Program Management Support, i.e., the Program Management Office (at least a Program Manager and Deputy Program Manager), and other resources needed to manage and oversee all contract activities for a 12-month base period and one 12-month option. (RFP Att. L-3, PWS for Task Order 1, Ex. F.)

Second, the RFP requires the Department to calculate a Total Evaluated Price by adding up each offeror's proposed prices for each scenario, and various quantities of the Portability Plan, Portability Test, and Program Management CLIN prices across the various option periods. (RFP at 94-95, Ex C.) In other words, only those IaaS, PaaS, and Cloud Support Package services priced by the offeror for each of the six scenarios are included in the Total Evaluate Price. The Department will not evaluate any other catalog offerings under the RFP evaluation scheme. But the Cloud Service Providers competing for the JEDI Cloud offer hundreds to thousands of different services that can be configured in any myriad of ways, each with different pricing. The six sample tasks are neither representative of the service portfolio that the Department intends to put on contract, nor of the new services that the Cloud Service Provider will offer throughout performance.¹⁶ At best, the price evaluation and related competition is limited to a fraction of

¹⁶ *Hidden Cloud Opportunities for Technology Service Providers* (June 20, 2018) at <https://www.gartner.com/smarterwithgartner/7-hidden-cloud-growth-opportunities-for-technology-service-providers/> (last visited 8/4/2018) (stating that "major public cloud providers such as Amazon Web Services and Microsoft Azure release 40 to 50 features in any given month, with total cloud feature sets totalling in the thousands.").

the services currently available from each Cloud Service Provider and does not include any of the future services that DoD will add to the contract. Further, the RFP's price evaluation does not consider the important ways in which the future needs of the JEDI Cloud users will differ from the six hypothetical scenarios.

The problems with the price evaluation do not end there. The Price Scenarios also lack sufficient specifications to prevent the offerors from basing their proposals on different assumptions. Although the Department provides certain foundational assumptions, e.g., assume unclassified requirements, continuous use, and pricing the most expensive CONUS region, many necessary details are lacking. For instance, in Scenario 2, the Department directs offerors to assume CONUS ERP system deployment, 4 garrison OCONUS ERP system deployments, and 30 field system deployments in "ruggedized equipment," but offers no other location details for the OCONUS requirements. (Price Scenarios at 6-8, Ex. H.) Nevertheless, the Department seeks price information for the modular data centers and portable edge devices "required to meet the tactical edge and compute requirements for the specified OCONUS and field ERP system deployments." (*Id.* at 8.) Likewise, in Scenario 5, the Department directs offerors to provide and price 10 Forward Operating Base data centers. (*Id.* at 16.) Again, however, DoD has not provided the various locations of the Forward Operating Bases.

Location can be important to determining, for example, the appropriate environmental concerns. All datacenters are custom built, meaning that the equipment and technology must be integrated. Certain decisions must be made that respond to both the desired function and the environmental factors, such as appropriate heating and cooling. Without knowledge of the environment, offerors will each make their own assumptions that will impact the overall competitiveness of the solution. The pricing scenarios are also devoid of performance metrics in several places. For example, Price Scenario 2 does not state the exact ERP system that will be used – making it difficult to define performance criteria in terms of availability at the tactical edge. (*Id.* at 6-8.) They also lack a clear understanding of the recovery time objective or the

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 36 of 40

recovery point objective in the event of failure. Again offerors will each be making their own varied assumptions that preclude any reasonable price comparison.

And, even where DoD provides foundational assumptions for the scenarios, those details do not reflect what the JEDI Cloud users will buy. Consider that for the CONUS scenarios, DoD directs the offerors to assume delivery of services in the offeror's highest cost region. (*Id.* at 1.) DoD thus will have offerors submitting prices for different regions, none of which may actually be the region of the JEDI Cloud users' predominant usage. Under such an assumption, an offeror with overall significantly lower pricing (across regions) may appear more expensive because the evaluation focused on a lesser used region that has a higher price.

Given the lack of necessary detail in the scenarios, the Department has created an inherent "apples to oranges" comparison on price, contrary to established precedent. *See Lockheed Aeronautical Sys. Co.*, B-252235, Aug. 4, 1993, 1993 WL 306522 (sustaining protest where "offerors' dramatically different unexplained, unevaluated assumptions resulted in cost figures that could neither be meaningfully compared nor assessed for purposes of determining the likely ultimate cost to the government"); *see also MVM, Inc. v. United States*, 46 Fed. Cl. 126, 133-34 (2000) (citations omitted) (observing that "Implicit in the law's requirement that competition for government contracts be 'free and fair' is a further requirement that bidders are bidding on the same job.").

The SOO evidences a massive scope for the JEDI Cloud contract. Users will include all of DoD, and others performing "DoD business and mission operations," including the U.S. Coast Guard, the Intelligence Community, countries with which the United States has collective defense arrangements, and Federal government contractors. (SOO at 2, Ex. D.) The SOO also requires the contractor to offer JEDI Cloud Services "at all classification levels, across the homefront to the tactical edge, including disconnect and austere environments, and closed loop networks." (*Id.*) The RFP defines the tactical edge to include "[e]nvironments covering the full range of military operations...." (JEDI Cloud Definitions at 6, Ex. M.) These users will not only have available to them all proposed catalog services, but any new services added. The RFP price

evaluation however covers only a fraction of the services available now and nothing that may be available in the future. The RFP, accordingly, does not provide a rational basis for DoD to evaluate the relative cost to DoD of the competing proposals, rendering the price evaluation unsuitable for justifying a single award IDIQ under established precedent.

C. The Procurement Will Not Produce A Best Value Awardee.

The RFP provides for a single award to the compliant proposal that offers the best value to the government. (RFP at 88, Ex. C.) The procurement's structure, however, all but guarantees that it will be impossible to determine which offeror can truly provide the "best value" approach to fulfilling the vast requirements of the many potential users of the JEDI Cloud.

In a typical IDIQ arrangement, an agency can determine "best value" even when there is uncertainty regarding future procurements, because that uncertainty relates only to how much of a finite service or product the agency will require or when the agency will need those products or services. In this instance, rather than mere uncertainty as to quantity and timing, the uncertainty also relates to essential characteristics of IaaS, PaaS, Cloud Support Package, and Portability services the potential JEDI Cloud users may need and the Cloud Service Provider will offer. Although the configuration of services proposed may be ideal for the six hypothetical Price Scenarios used for the evaluation, there is no way to know whether the same configuration approach will also be optimal for the future specific needs of the many potential JEDI Cloud users, or whether some other approach is more optimal, what the cost of the configuration will be, and what the "best value" would be, in terms of technical considerations relative to price, for the undefined future tasks. Multiple awards represent one means to address this issue. Indeed, Congress recognized that the task order competition would suffice in such a circumstance. 10 U.S.C. § 2305(a)(3)(C).

Given the dynamic nature of the services and prices covered by the solicited IDIQ contract (and that most services and prices will remain uncompleted under the JEDI RFP evaluation scheme), GAO should likewise sustain this protest because the RFP provides no meaningful basis to consider which offeror has provided the best value JEDI Cloud approach to DoD.

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 38 of 40

V. ORACLE HAS SUFFERED PREJUDICE

Prejudice is an essential element of every protest. *Kardex Remstar, LLC*, B-409030, Jan. 17, 2014, 2014 CPD ¶ 1; *Humana Military Healthcare Servs.*, B-401652.2, B-401652.4, B-401652.6, Oct. 28, 2009, 2009 CPD ¶ 219. GAO will sustain a protest where a reasonable possibility of prejudice is shown or is otherwise evident from the record. *Sayres & Assocs. Corp.*, B-408253, B-408253.2, Aug. 1, 2013, 2013 CPD ¶ 206 (a reasonable possibility of prejudice is a sufficient basis for sustaining a protest); *Piquette & Howard Electric Serv., Inc.*, B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8 (where the protester has shown a reasonable possibility that it was prejudiced by the agency's action, we will sustain its protest). If an agency clearly violates procurement requirements, GAO resolves doubts concerning prejudice in favor of the protester. *Savvee Consulting, Inc.*, B-408416, B-408416.2, Sept. 18, 2013, 2013 CPD ¶ 231 (GAO resolves any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest); *see also Dismas Charities, Inc.*, B-292091, June 25, 2003, 2003 CPD ¶ 125 (rejecting agency's argument that protester was not prejudiced in light of the multiple procurement errors).

In this case, as described above, the Department's unreasonable decision to limit the potential 10-year, \$10 billion IDIQ contract to a single awardee violates the law and prejudices Oracle's ability to compete. Equally problematic, the evaluation scheme prevents the Department from evaluating the relative price of the competing offerors and determining the best value, further harming Oracle's ability to compete.

VI. DOCUMENTS REQUESTED

Oracle requests that, in addition to the relevant documents required by 4 C.F.R. § 21.3, GAO direct the Department to produce the following:

1. All documents related to the Department's decision to structure the JEDI Cloud Procurement to provide for a single award of the IDIQ contract;
2. All documents related to the Under Secretary's July 19, 2018 D&F;
3. All documents provided to the Under Secretary to make the July 19, 2018 D&F;

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 39 of 40

4. All documents related to the Department's consideration of the number of awards to make under the JEDI Cloud RFP;
5. Any documents that relate to the JEDI Cloud procurement and FAR 16.504(c)(1)(i);
6. Any documents that relate to the JEDI Cloud procurement and FAR 16.504(c)(1)(ii)(A);
7. Any documents that relate to the JEDI Cloud procurement and FAR 16.504(c)(1)(ii)(B);
8. Any documents that relate to the JEDI Cloud procurement and FAR 16.504(c)(1)(ii)(C);
9. Any documents that relate to the JEDI Cloud procurement and FAR 16.504(c)(1)(ii)(D);
10. Any documents that relate to the potential JEDI Cloud user's requirements;
11. Any documents that relate to the six Price Scenarios;
12. Any market research performed by the Department in connection with the JEDI Cloud procurement;
13. All DoD communications with Congress related to the single source approach;
14. All DoD communications with any potential competitor regarding the single source approach;
15. All DoD communications with any other agency regarding the single source approach; and
16. Any documents that relate to price evaluation factor in the JEDI RFP.

GAO's rules require that the Department produce each of the foregoing categories of documents even without request. *See* 4 C.F.R. § 21.3(d). Oracle, nevertheless and pursuant to 4 C.F.R. § 21.1(d)(2), further asserts that the foregoing documents are relevant to, and necessary for, full adjudication of Oracle's protest grounds described above. Oracle believes that the requested documents will confirm Oracle's protest challenges as set forth herein.

Arnold & Porter

U.S. Government Accountability Office
Procurement Law Control Group
August 6, 2018
Page 40 of 40

VII. HEARING

Oracle requests that GAO conduct a fact finding hearing in this matter, pursuant to 4 C.F.R. § 21.1(d)(3).

VIII. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Oracle requests that GAO sustain this Protest and:

1. Recommend that the Department amend the RFP to provide for multiple awards of the JEDI Cloud IDIQ Contract and a procedure for each awardee to receive a fair opportunity to be considered for each task order;
2. Award Oracle its reasonable attorneys' fees and costs incurred pursuing this protest; and
3. Order such other relief as GAO deems just and appropriate.

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP



Craig A. Holman
Kara L. Daniels
Nathan Castellano

Counsel to Oracle America, Inc.

cc: Chanda Brooks, JEDI Cloud Contracting Officer (chanda.r.brooks.civ@mail.mil)