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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 8, 2021

VIA ELECTRONIC TRANSMISSION

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301

Dear Secretary Austin:

On April 28th of this year I sent you a letter seeking information I originally requested from the Department of Defense (Department) in January regarding the Joint Enterprise Defense Infrastructure program (JEDI).¹ I have not received a response. However, the day my letter was transmitted, the Court of Federal Claims rendered another decision in the series of cases regarding JEDI.² Although that litigation continues, the Department had previously informed Congress that if the government's motion to dismiss in part failed, the repercussions, particularly with regard to discovery, would be enormously burdensome.³ Subsequent news articles suggest that the Department is considering redrafting and resoliciting the JEDI contract, pointing to the court's decision as one of many factors.⁴ As you weigh the pros and cons of this decision, I wanted to highlight some of my continuing concerns regarding the JEDI program.

¹ Letter from Charles E. Grassley, Chairman, S. Comm. on Fin., to Lloyd J. Austin III, Sec'y of Def., Dep't of Def. (Apr. 28, 2021), https://www.grassley.senate.gov/imo/media/doc/grassley_to_defense_dept_jedifollowup.pdf; see also Letter from Charles E. Grassley, Chairman, S. Comm. on Fin. & David Perdue, U.S. Sen., Armed Servs. Comm., to Christopher C. Miller, Acting Sec'y of Def., Dep't of Def. (Jan. 1, 2021); Letter from Charles E. Grassley, Chairman, S. Comm. on Fin., to Mark Esper, Sec'y of Def., Dep't of Def. (Oct. 5, 2020), [https://www.grassley.senate.gov/imo/media/doc/2020-10-05%20CEG%20to%20DOD%20\(JEDI%20II\).pdf](https://www.grassley.senate.gov/imo/media/doc/2020-10-05%20CEG%20to%20DOD%20(JEDI%20II).pdf); Letter from Charles E. Grassley, Chairman, S. Comm. on Fin., to Patrick M. Shanahan, Acting Sec'y of Def., Dep't of Def. (Apr. 9, 2019), [https://www.finance.senate.gov/imo/media/doc/2019-04-09%20CEG%20to%20DOD%20\(JEDI\).pdf](https://www.finance.senate.gov/imo/media/doc/2019-04-09%20CEG%20to%20DOD%20(JEDI).pdf).

² *Amazon Web Services v. United States*, No. 19-1796C (Fed. Cl. Apr. 28, 2021); see also Jared Serbu, *Court Keeps Amazon's JEDI Challenge Intact, Dealing Blow to DoD, Microsoft*, FEDERAL NEWS NETWORK (Apr. 28, 2021), <https://federalnewsnetwork.com/defense-main/2021/04/court-keeps-amazons-jedi-challenge-fully-intact-dealing-blow-to-dod-microsoft/>.

³ Aaron Gregg, *Court Rejects Motion to Dismiss JEDI Allegations, Allowing Amazon to Argue for Depositions*, THE WASH. POST (Apr. 28, 2021), <https://www.washingtonpost.com/business/2021/04/28/pentagon-cloud-contract-depositions/>; see also Serbu, *supra* note 2; see also Tom Temin, *Cancel JEDI? No Shame to DoD in Doing So*, FEDERAL NEWS NETWORK (May 19, 2021), <https://federalnewsnetwork.com/tom-temin-commentary/2021/05/cancel-jedi-no-shame-to-dod-in-doing-so/>.

⁴ Mila Jasper, *If the Pentagon Drops JEDI, Then What?*, NEXTGOV (May 17, 2021), <https://www.nextgov.com/it-modernization/2021/05/if-pentagon-drops-jedi-then-what/174093/>; see also Naomi Nix, *Judge Declines to Toss Amazon Suit Claiming Trump Blocked JEDI Bid*, BLOOMBERG (Apr. 28, 2021), <https://www.bloomberg.com/news/articles/2021-04-28/judge-declines-to-toss-amazon-suit-claiming-trump-cost-jedi-bid>; see also Carten Cordell, *Will the Department of Defense Cancel the Massive JEDI Contract? It's One of a Few Options*, WASH. BUSINESS JOURNAL (Apr. 30, 2021), <https://www.bizjournals.com/washington/news/2021/04/30/cancel-jedi-microsoft-aws.html>.

As you know, the JEDI solicitation envisioned an indefinite delivery/indefinite quantity (IDIQ) contract to construct and maintain a Department-wide cloud-based computing system capable of eventually holding the entirety of the Department's classified and unclassified data, as well as certain artificial intelligence (AI) programs.⁵ The Department consistently represented that a single awardee could receive up to \$10 billion over a ten-year performance period.⁶

From the beginning, allegations arose that the JEDI contract was "tailored," meaning that it was written to advantage a preferred vendor, reportedly Amazon.⁷ Multiple Department officials with Amazon affiliations reportedly failed to properly recuse themselves from this acquisition planning process, including, among other things, deciding upon the single-award approach for JEDI in violation of the Federal Acquisition Regulation (FAR) and numerous federal statutes.⁸

As I mentioned in previous letters, the Department's Office of the Inspector General (DoD OIG) completed an extraordinary report last year that reviewed the JEDI program and some conflicts of interest allegations. In addition to confirming allegations of impropriety in the

⁵ DEP'T OF DEF., DoD Cloud Strategy (2018), <https://media.defense.gov/2019/Feb/04/2002085866/-1/-1/1/DOD-CLOUD-STRATEGY.PDF>; see also Ben Tarnoff, *Weaponized AI is Coming. Are Algorithmic Wars Our Future*, THE GUARDIAN (Oct. 11, 2018), <https://www.theguardian.com/commentisfree/2018/oct/11/war-jedi-algorithmic-warfare-us-military>; see also Naomi Nix, *Google Drops Out of Pentagon's \$10 Billion Cloud Competition*, BLOOMBERG (Oct. 8, 2018), <https://www.bloomberg.com/news/articles/2018-10-08/google-drops-out-of-pentagon-s-10-billion-cloud-competition>; see also Patrick Tucker, *Google is Pursuing the Pentagon's Giant Cloud Contract Quietly, Fearing an Employee Revolt*, DEFENSE ONE (Apr. 12, 2018), <https://www.defenseone.com/technology/2018/04/google-pursuing-pentagons-giant-cloud-contract-quietly-fearing-employee-revolt/147407/>; see also Cheryl Pellerin, *Project Maven to Deploy Computer Algorithms to War Zone by Year's End*, DEP'T OF DEF. (July 21, 2017), <https://www.defense.gov/Explore/News/Article/Article/1254719/project-maven-to-deploy-computer-algorithms-to-war-zone-by-years-end/>; see also Daisuke Wakabayashi and Scott Shane, *Google Will Not Renew Pentagon Contract That Upset Employees*, N. Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/technology/google-pentagon-project-maven.html>.

⁶ Carl Weischenberg, *AWS, Oracle, and the Pentagon Continue Fight Over JEDI Cloud Contract*, SDX CENTRAL (Jan. 28, 2019), <https://www.sdxcentral.com/articles/news/aws-oracle-and-the-pentagon-continue-fight-over-jedi-cloud-contract/2019/01/>.

⁷ Memorandum from Dep't. of Def. to the Sec'y of the Mil. Dep'ts (Sept. 2017), https://federalnewsnetwork.com/wp-content/uploads/2017/11/091317_Shanahan_Cloud_Memo.pdf; see also Memorandum from Dep't. of Def. to the Sec'y of the Mil. Dep'ts (Jan. 2018), https://federalnewsnetwork.com/wp-content/uploads/2018/01/010418_shanahan_cloud_memo.pdf (On September 13, 2017, Deputy Secretary of Defense Shanahan issued a Department-wide memorandum titled, "Accelerating Cloud Adoption," directing a "tailored acquisition process." The process was directed to be split into two phases: a phase one "contract" for a cloud solution, and a phase two transition to "the acquired cloud solution." Deputy Secretary Shanahan's memo requested an "action plan and progress toward the action items" in two months and described next steps including: "Awarding the phase one contract."); Jared Serbu, *Amazon Asks Federal Court to Stop Work on JEDI Cloud Contract*, FEDERAL NEWS NETWORK (Jan. 23, 2020), <https://federalnewsnetwork.com/defense-main/2020/01/amazon-asks-federal-court-to-stop-work-on-jedi-cloud-contract/>; see also Julie Bort, *There's a New Snag for Amazon in the Winner-Take-All \$10 Billion Pentagon Cloud Contract, and it Could be Good News for Microsoft*, BUSINESS INSIDER (Feb. 19, 2019), <https://www.businessinsider.com/amazon-jedi-cloud-contract-snap-2019-2>.

⁸ John D. McKinnon, *Pentagon Weighs Ending JEDI Cloud Project Amid Amazon Court Fight*, WALL ST. J. (May 10, 2021), <https://www.wsj.com/articles/pentagon-weighs-ending-jedi-cloud-project-amid-amazon-court-fight-11620639001>; see also Adam Mazmanian, *Lawmakers Look to Revive Collusion Case Against Amazon in JEDI*, WASHINGTON TECHNOLOGY (May 4, 2021), <https://washingtontechnology.com/articles/2021/05/04/jedi-lee-buck-letter.aspx>; see also Bort, *supra* note 7; see also Katishi Maake, *Reported Revelation Pauses Legal Fight over JEDI Procurement*, WASH. BUS. J. (Feb. 21, 2019), <https://www.bizjournals.com/washington/news/2019/02/21/reported-revelation-pauses-legal-fight-over-jedi.html>; Deap Ubhi, @deapubhi, TWITTER (Jan. 30, 2017, 11:57 PM), <https://twitter.com/deapubhi/status/826293256249958404> (stating that he would "always be an Amazonian"); see also Bort, *supra* note 7; see also FAR 6.101(a) & (b); see also FAR 3.301(a) & (b); Steven L. Schooner, *Indefinite-Delivery/Indefinite-Quantity Contracts: Time to Correlate Practice and Policy?*, 32 NASH & CIBINIC REPORT ¶ 44 (September 2018) ("As has become practice, the DoD is merely ... papering over avoidance of the [Congressional] stated multiple-award policy.").

formation and design of the JEDI request for proposals [or RFP or solicitation], the IG found that Department employees had “lied” to the Department regarding their relationship with companies that were expected to bid on, or actively competing for, the JEDI contract.⁹ Nor does it appear that Department officials cooperated fully with the IG’s work.¹⁰

Further, high-level political leadership reportedly were both inexperienced and overly involved in the acquisition strategy for JEDI. Former Department officials familiar with the program’s inner workings have reported to me that a “cloud of uneasiness” hung over the acquisition process due to: 1) the pressure by political leadership to accelerate the JEDI acquisition and 2) the failure of political leadership to recognize their own lack of expertise in the government contracting process and the department’s limited experience in the extremely technical aspects of the cloud marketplace. These political appointees allegedly were zealous to quickly acquire JEDI for the Department even though they did not fully understand it.

Unfortunately, DoD OIG has not fully reviewed the complete universe of allegations involving the JEDI procurement. This has led to multiple court cases as well a sense in the industry that an amicable resolution is unlikely.¹¹ Public perception tees up a lose-lose scenario, in which an Amazon win would appear to confirm that the contract was designed for them, while an Amazon loss would suggest that the political deck was stacked against Amazon. Worse, the longer it takes to settle these disputes the more out of date the contract requirements become, resulting in the American warfighter receiving a less advanced product.

There have now been three major bid protests since 2018 challenging different elements of the JEDI contracting process. On August 8, 2018, Oracle filed a pre-award bid protest with the Government Accountability Office (GAO) arguing that JEDI’s single source structure violated Federal law, JEDI’s “gate” criteria unduly restricted competition, and that JEDI was subject to conflicts of interest related to the procurement.¹² On October 10, 2018, International Business

⁹ “Mr. Ubhi committed ethical violations when he lied, or failed to disclose information, on at least three occasions, in an effort to conceal relevant information from, or mislead, his Amazon and DoD supervisors and DoD [Standards of Conduct Office] officials....” REPORT ON THE JOINT ENTERPRISE DEFENSE INFRASTRUCTURE (JEDI) CLOUD PROCUREMENT, INSPECTOR GEN. DEP’T OF DEF., REPORT NO. DODIG-2020-079 (Apr. 13, 2020); see also *Postscript II: Enhanced Debriefings*, 34 NASH & CIBINIC REPORT ¶ 26 (May 2020) (highlighting, among other things, “that the debriefing-preparation rubric employed by the DOD at the conclusion of the JEDI procurement has little in common with the aspiration of the enhanced debriefing initiative, best practices, or the common justifications for the debriefing mandate....”), <https://ssrn.com/abstract=3598373>.

¹⁰ Indeed, the DoD IG explained that: “We sought to review whether there was any White House influence on the JEDI cloud procurement. We could not review this matter fully because of the assertion of a “presidential communications privilege,” which resulted in several DoD witnesses being instructed by the DoD Office of General Counsel not to answer our questions about potential communications between White House and DoD officials about JEDI. Therefore, we could not definitively determine the full extent or nature of interactions that administration officials had, or may have had, with senior DoD officials regarding the JEDI Cloud procurement.” DOD IG Report at 6–7.

¹¹ Temin, *supra* note 3.

¹² *Oracle America, Inc.*, B-416657 et al.

Machines (IBM) filed its own protest also challenging various aspects of the JEDI procurement.¹³ The GAO denied Oracle's protest on November 14, 2020, and IBM's on December 11, 2018. Oracle then filed suit in the United States Court of Federal Claims, which denied Oracle's protest.¹⁴ The Court of Appeals for the Federal Circuit affirmed the decision,¹⁵ and Oracle has sought review by the United States Supreme Court.¹⁶ On November 22, 2019, following the Department's award of JEDI to Microsoft, Amazon filed its own protest in the Court of Federal Claims, based, in large part, on allegations of political interference.¹⁷ The Court of Federal Claims denied motions to dismiss brought by the United States and Microsoft.¹⁸

The Department recently provided Congress a briefing paper asserting that this most recent case, should it proceed, would impose significant and burdensome discovery obligations on the Department. The case would require many senior level Department officials as well as current and former White House officials to testify or produce materials.¹⁹ The ongoing proceedings also would further delay the ever-extending timeline for this project. In my October 5, 2020, letter I asked if the Department considered it necessary to review the technical parameters of the contract due to the procurement delays and the speed at which cloud computing is growing and changing.²⁰ Although the Department assured me that its existing parameters were adequate, the industry's actions seem to contradict this statement as, by and large, the cloud computing industry has moved away from single vendor designs. Multiple other federal agencies have followed suit.

Specifically, in November 2020 the Central Intelligence Agency (CIA) awarded a cloud computing contract to five separate providers: Amazon, Microsoft, Google, Oracle, and IBM.²¹ This award worth "tens of billions" was created as a highly flexible vehicle for cloud services;

¹³ *International Business Machines*, B-416657.5; Aaron Gregg, *GAO Axes IBM's Bid Protest, Tearing Up a Court Battle Over Pentagon's \$10 Billion Cloud Effort*, THE WASHINGTON POST (Dec. 11, 2018), <https://www.washingtonpost.com/business/2018/12/12/gao-axes-ibms-bid-protest-tearing-up-court-battle-over-pentagons-billion-cloud-effort/>; see also Press Release, IBM, JEDI: Why We're Protesting (Oct. 10, 2018), <https://www.ibm.com/blogs/policy/jedi-protest/>.

¹⁴ *Oracle America, Inc. v. United States and Amazon Web Services, Inc.*, No. 18-1880C (COFC).

¹⁵ *Oracle American, Inc. v. United States and Amazon Web Services, Inc.*, 2019-2326, https://www.pacermonitor.com/view/IKEXRLI/Oracle_America_Inc_v_US_cafc-19-02326_0082.0.pdf

¹⁶ *Oracle American, Inc. v. United States and Amazon Web Services, Inc.*, Pet. for Cert. pending, (filed), <https://www.law360.com/articles/1355060/attachments/0>; *Oracle American, Inc. v. United States and Amazon Web Services, Inc.*, Reply Br. No. 20-1057 at pg. 10 (filed May 2021), https://www.docketalarm.com/cases/Supreme_Court/20-1057/Oracle_America_Inc_Petitioner_v._United_States_et_al/05-17-2021-Reply_of_petitioner_Oracle_America_Inc/0517111629101-Main_Document/ (showing that Oracle told the Supreme Court that DoD is not entitled to deference in policing its own criminal misconduct in this context.).

¹⁷ *Amazon Web Services Inc. v. United States and Microsoft Corp.*, No. 19-1796C (COFC).

¹⁸ <https://www.law360.com/articles/1380449/attachments/0>

¹⁹ Memorandum from the Dep't. of Def. to Congress (Jan. 28, 2021), <https://federalnewsnetwork.com/wp-content/uploads/2021/02/INFO-PAPER-UPCOMING-JEDI-CLOUD-LITIGATION-MILESTONE.pdf>

²⁰ Letter from Charles E. Grassley, Chairman, S. Comm. on Fin., to Mark Esper, Sec'y of Def., Dep't of Def. (Oct. 5, 2020), [https://www.grassley.senate.gov/imo/media/doc/2020-10-05%20CEG%20to%20DOD%20\(JEDI%20II\).pdf](https://www.grassley.senate.gov/imo/media/doc/2020-10-05%20CEG%20to%20DOD%20(JEDI%20II).pdf).

²¹ Chris Ciccio, *CIA Awards Cloud Computing Contract Worth Billions to Firms Including Amazon, Microsoft, Google*, FOX BUS. (Nov. 20, 2020), <https://www.foxbusiness.com/technology/cia-awards-cloud-computing-contract-worth-billions-to-amazon-microsoft-google-ibm-and-oracle-report>; see also Frank Konkel, *CIA Awards Secret Multibillion-Dollar Cloud Contract*, NEXTGOV (Nov. 20, 2020), <https://www.nextgov.com/it-modernization/2020/11/exclusive-cia-awards-secret-multibillion-dollar-cloud-contract/170227/>; see also Carten Cordell, *CIA Awards Multibillion-Dollar Cloud Contract to Multiple Vendors*, WASH. BUS. J. (Nov. 20, 2020), <https://www.bizjournals.com/washington/news/2020/11/20/microsoft-aws-among-c2e-cloud-contract-awardees.html>.

those in charge within the Intelligence Community (IC) can select providers on the basis of the contractor's ability to meet specific IT needs.²² Essentially, the IC selects the best contractor for the job and is neither hampered nor impeded by the inflexibilities often found in typical government contracts. I believe the multi-vendor operation fosters an atmosphere of competition, innovation, and flexible services. Further, it ensures that we don't put all of our national security eggs in one basket. This could be a win-win solution for our warfighters, the Department, and the American taxpayer.

As public servants, it is of the utmost importance that we be good stewards of the resources provided by the American people. That requires us to carefully examine the apparent conflicts of interest regarding the JEDI program and take actions to ensure that future negotiations follow all legal and ethical standards. That accountability also demands a balance between entering into contracts that provide the most efficiency while also exercising fiscal responsibility with taxpayer funds. So, before continuing in costly, drawn-out disputes, I would encourage the Department to carefully analyze its options and utilize a solution that will be reliable, adaptable, and profitable for the Department's widespread demands. Further, the questions I previously posed remain unanswered and continue to linger over the JEDI program. I fear the Department's continued failure to provide forthright answers will continue to erode public trust in its cloud computing goals. I look forward to your expeditious reply. Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Judiciary

²² Konkel, *supra* note 21; see also Billy Mitchell, *CIA Quietly Awards C2E Cloud Contract Possibly Worth Billions*, FEDSCOOP (Nov. 20, 2020), <https://www.fedscoop.com/cia-quietly-awards-billion-dollar-c2e-cloud-contract/>; see also Phil Goldstein, *Where Will the CIA Go with Its New Cloud Contracting Vehicle?*, FEDTECH (Dec. 10, 2020), <https://fedtechmagazine.com/article/2020/12/where-will-cia-go-its-new-cloud-contracting-vehicle>.