

NASA Contract Termination Presents Key Bid Protest Lessons

By **Andrew Shipley** and **Philip Beshara**

In an important decision addressing the burden of proof in procurement integrity cases, the U.S. Government Accountability Office recently sustained a protest brought by Teledyne Brown Engineering Inc. against the \$651.6 million Marshall Space Flight Center operations, systems, services and integration, or MOSSI, contract.

NASA awarded the contract to SGT LLC, a business unit of KBRWyle.[1] The MOSSI contract was intended to provide operational support for NASA's space-based programs, including the International Space Station and the near-Earth asteroid detection system

In its decision, the GAO recommended that the MOSSI contract be terminated, that the solicitation be canceled, and that NASA begin its acquisition anew. In other words, the GAO pointedly told NASA to go back to square one for what has already been a multiyear acquisition process, and to do so "without the involvement of officials who have a conflict of interest."

Why such a sweeping rebuke? Because a member of NASA's source evaluation board, or SEB, who had also chaired the procurement development team for the MOSSI procurement was close personal friends with a high-level employee of one of the awardee's major subcontractors, COLSA Corp.

Mr. X — the name the GAO gave this official — met his COLSA friend, whom he had known for 30 years, for dinner every week throughout the entire procurement process — from the shaping of solicitation requirements, through the evaluation of proposals, right up to the award decision. An unnamed KBRWyle employee also joined these weekly dinners.

Mr. X did not hide his 30-year friendship with the COLSA employee from others at NASA. To the contrary, he brought the issue to the attention of agency officials and asked for an impartiality decision.

NASA's ethics lawyer reviewed the facts presented to her — it is unclear whether she knew of the KBRWyle employee's participation in the weekly dinners or that Mr. X had also chaired the procurement development team. She acknowledged that the final decision regarding the matter rested with NASA's Office of Procurement, but cautioned that, in her view, given Mr. X's "previous role as the MOSSI SEB chair and his current role as voting member, the level of scrutiny placed on him is significantly heightened."

Thus, she concluded that, "a reasonable person might question [Mr. X's] objectivity as it pertains to the MOSSI SEB, and I recommend in an abundance of caution, that he be removed from the SEB. Alternatively, [Mr. X] could mitigate these appearance concerns by refraining from participating in the dinners."



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Mr. X refused to stop attending the dinners, and NASA refused to remove Mr. X from the SEB because it deemed him vital to the procurement. NASA pointed out that the ethics opinion was merely a recommendation made in an abundance of caution, and that it explicitly acknowledged that there was no statutory or regulatory requirement that Mr. X be removed from the SEB.

NASA further argued that the mitigation measures it adopted in lieu of the ethics attorney's recommendation sufficed to protect the integrity of the procurement. These mitigation measures required Mr. X to adhere to ethical regulations, not disclose SEB activities and not directly evaluate any proposal involving COLSA.

The GAO disagreed with NASA that the mitigation measures were effective, noting that they circumscribed Mr. X's participation "only as it pertained to his direct evaluation of any proposal that included COLSA; otherwise he would participate fully in the scoring of all proposals, including any proposal involving COLSA."

NASA then argued that, in any event, procurement officials are presumed to act in good faith and that Teledyne had to prove the existence of actual bias that affected the award decision. NASA claimed that no such direct evidence existed in the record, and therefore Teledyne had not met its burden of establishing prejudice.

The GAO again disagreed and flipped the burden onto NASA to prove the absence of prejudice. The GAO introduced its analysis on the burden of proof issue by quoting at length Federal Acquisition Regulation 3.101-1, which "sets forth clear and unambiguous guidelines concerning the conduct of government personnel that engage in contracting activities."

This regulation provides that:

Government business shall be conducted in a manner above reproach ... The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in [g]overnment-contractor relationships.

Based upon this most fundamental guidance, the GAO explained that:

where an agency knowingly fails to investigate and resolve a question concerning whether an agency employee who actively and extensively engaged in procurement-related activities should have been recused from those activities, the existence of an actual or apparent conflict of interest is sufficient to taint the procurement.

In light of this legal principle, and given Mr. X's pervasive involvement in the MOSSI procurement, GAO held that it:

need not resolve whether or not Mr. X's participation in the acquisition resulted in actual prejudice against the other offerors, or in favor of SGT. In circumstances such as these, the potential harm flowing from an actual or apparent conflict of interest is, by its nature, not susceptible to demonstrate proof of bias or prejudice. Thus, where, as here, the record establishes that a conflict or apparent conflict of interest exists, and the agency did not resolve the issue, to maintain the integrity of the procurement process, we will presume that the protester was prejudiced, unless the record includes clear evidence establishing the absence of prejudice. No such evidence exists here.

Key Takeaways for Potential Protesters

The GAO's decision provides important takeaways for agencies and contractors.

Presumption of Prejudice Versus Presumption of Good Faith

Agencies often argue that because government officials are presumed to act in good faith, and because this presumption can be refuted only with "well-nigh irrefragable proof,"[2] protesters face a high bar when challenging the integrity of procurement actions.

The Teledyne decision, however, illustrates the difference between protests alleging specific bad faith actions on the part of procurement officials, and protests alleging behavior that, regardless of motive, casts a cloud over the integrity of the procurement.

Appearance of Impropriety Versus Actual Bias

Many GAO decisions addressing the appearance of impropriety involve situations where the awardee hired a former government official who, as a result of their previous government employment, had actual or potential access to competitively useful, nonpublic information regarding the protested procurement. The Teledyne decision makes clear that the proscription against the appearance of impropriety also applies to current procurement officials who fail to comply with the standard of conduct imposed on them by FAR 3.101-1.

Importance of Scrutinizing the Agency Record

The issues concerning Mr. X were raised in Teledyne's supplemental protest following receipt of the agency record. As the GAO noted in its decision, Teledyne had also asserted a number of other protest grounds. But because of its recommended corrective action — which calls for NASA to start the acquisition process anew — the GAO explained that it need not address Teledyne's other grounds in any detail.

The outcome in Teledyne highlights the importance of carefully reviewing the agency record for potential supplemental grounds of protest, as it is not at all unusual for such supplemental grounds to loom large in the ultimate outcome.

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[1] Teledyne Brown Engineering Inc., B-418835, B-418835.2, Sept. 24, 2020.

[2] Kalvar Corp. v. U.S., 543 F.2d 1298, 1301 (Ct. Cl. 1976).