



Decision

Matter of: Teledyne Brown Engineering, Inc.

File: B-418835; B-418835.2

Date: September 25, 2020

Andrew E. Shipley, Esq., Philip E. Beshara, Esq., Chanda L. Brown, Esq., and Jessica S. Aldrich, Esq., Wilmer Cutler Pickering Hale and Dorr, LLP, for the protester. Seth H. Locke, Esq., David E. Fletcher, Esq., Alexander O. Canizares, Esq., and Brenna D. Duncam, Esq., Perkins Coie LLP, for SGT, LLC, the intervenor. Vincent A. Salgado, Esq., Rosalind Cylar, Esq., and Warnecke Miller, Esq., National Aeronautics and Space Administration, for the agency. Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that individual having extensive involvement in essentially every aspect of the agency's acquisition has an apparent conflict of interest is sustained where the record shows that the agency recognized the apparent conflict, but failed adequately to investigate and mitigate it.

DECISION

Teledyne Brown Engineering, Inc., of Huntsville, Alabama, protests the award of a contract to SGT, LLC, of Greenbelt, Maryland, by the National Aeronautics and Space Administration (NASA) under request for proposals (RFP) No. 80MSFC19R0033, issued to acquire ground systems and operations services at Marshall Space Flight Center (MSFC) in Huntsville, Alabama. Teledyne argues that the agency miscalculated proposals, improperly engaged in discussions exclusively with SGT, and made an unreasonable source selection decision. Teledyne also argues that certain current and former NASA employees had conflicts of interest in connection with their activities surrounding the acquisition.

We sustain the protest.

BACKGROUND

The RFP contemplates the award, on a best-value tradeoff basis, of a cost-plus-award-fee type contract to provide the solicited services for a base period of one year and six option periods spanning an additional 7-year interval.¹ Firms were advised that proposals would be evaluated considering three equally-weighted factors--mission suitability, past performance and cost--and that the mission suitability and past performance factors, in combination, were significantly more important than cost. Agency Report (AR), exh. 47, RFP Conformed through Amendment No 0004, at M-1.

The mission suitability factor included three subfactors worth a total of 1,000 points: technical staffing and approach (worth up to 550 points); management and innovation approach (worth up to 300 points); and small business (worth up to 150 points). RFP at M-4. Firms also were advised that past performance would be assigned an adjectival rating of very high, high, moderate, low, or very low level of confidence (or neutral confidence where a firm had no record of past performance). *Id.* at M-7 to M-8. Finally, the agency advised that it would perform a cost realism evaluation to determine the realism of the offerors' proposed costs. *Id.* at M-5 to M-6.

The agency received a number of proposals in response to the solicitation. After evaluating proposals, the agency assigned the Teledyne proposal a total mission suitability score of 908 points, a very high level of confidence rating under the past performance factor, and determined that its most probable cost was \$715,396,413 (Teledyne's proposed cost was \$706,190,207). AR, exh. 118, Presentation to the Source Selection Authority, at BATES 3725.² The agency assigned the SGT proposal a total mission suitability score of 903 points, a very high level of confidence rating under the past performance factor, and determined that its most probable cost was \$651,625,392 (SGT's proposed cost was \$620,139,905). *Id.*

Using these evaluation results, the agency selected SGT for award on the basis of initial proposals, finding the proposals from SGT and Teledyne to be essentially equal under the non-cost factors, and basing the selection decision ultimately on SGT's lower evaluated cost. AR, exh. 142, Source Selection Decision, at BATES 4345, 46. After being advised of the agency's selection decision and requesting and receiving a debriefing, Teledyne filed this protest.

DISCUSSION

Teledyne makes a number of arguments in connection with the agency's evaluation of proposals under all three evaluation factors, and also argues that the agency engaged in discussions with SGT without similarly offering it an opportunity to engage in

¹ The first option is for a 2-year period; the remaining options are for 1-year periods.

² The agency applied a BATES page numbering system to the entire agency report. We cite to these page numbers throughout the decision.

discussions. In addition, Teledyne argues that one current agency employee and one former agency employee have conflicts of interest that taint the acquisition.

We have reviewed all of Teledyne's allegations and conclude that the record demonstrates that a current NASA employee who participated extensively throughout the acquisition process had an apparent personal conflict of interest that effectively taints the acquisition. Because of our conclusion, we need not discuss in any detail Teledyne's remaining conflict of interest allegation, its challenges to the agency's evaluation of proposals, or its argument relating to the conduct of discussions exclusively with SGT, in light of our recommendation for corrective action. We discuss our findings below.

Brief History of the Acquisition

The solicitation at issue contemplates the award of a contract known as the Marshall operations services, systems and integration (MOSSI) contract. The contemplated contract is a follow-on effort to replace and consolidate two predecessor contracts at NASA, the Huntsville operations support center contract (the HOSC contract) and the mission operations and integration contract (the MO&I contract). The protester is the incumbent contractor for the MO&I contract, while another firm, COLSA Corporation, is the incumbent contractor for the HOSC contract.

In late August 2017, NASA initiated its acquisition process by appointing a number of agency employees to what it referred to as the procurement development team (PDT). AR, exh. 1, PDT Appointment Letter. The PDT was tasked with conducting market research in connection with the agency's requirements, developing an acquisition strategy/plan for the procurement, and preparing a "high-fidelity" draft solicitation (except for evaluation factors). *Id.* at 2. Members of the PDT were appointed at that time, but the membership of the PDT periodically changed after the initial appointments were made (we discuss one such change in detail below).

Following the appointment of the original PDT, on September 8, 2017, the agency issued a request for information (RFI) seeking capability statements from potential interested industry participants. AR, exh. 6, Initial RFI. This RFI broadly described the agency's requirements for the new acquisition, sought information about possible teaming arrangements that would allow the agency to consider whether the acquisition could be set aside for small businesses, and also published copies of the performance work statements (PWS) from the predecessor HOSC and MO&I contracts.

The record shows that the results of the agency's initial market research were presented to a group of interested agency employees on October 26, 2017. AR, exh. 9, Market Research Presentation. The focus of this presentation principally was to highlight information NASA had gathered regarding the question whether the acquisition could be conducted as some type of small business set-aside, or whether the

competition should be conducted on an unrestricted basis.³ The presentation reflects that a majority of the PDT members thought the acquisition should be conducted on an unrestricted basis, but a minority of the PDT members disagreed with this conclusion. *Id.* at BATES 000124-000125.

Thereafter, on March 21, 2018, the agency issued a second RFI. AR, exh. 15, Second RFI. This RFI was largely the same as the preceding RFI, but instead of including copies of the PWSs from the HOSC and MO&I predecessor contracts, this one included two documents, one entitled the MOSSI capacity parameter, and a draft PWS for the MOSSI acquisition. *Id.* at BATES 000152. Responses to the second RFI were due by April 6, 2018.

On April 25, the agency again conducted a market research presentation for interested agency employees. AR, exh. 19, Second Market Research Presentation. Among other matters, the presentation states that, beginning in February 2018, the PDT conducted a series of what are referred to as “bunker events” to develop a draft PWS and a list of parameters to capture the complexities and capacities of the work, and also to draft the second RFI. *Id.* at BATES 000234. Finally, the presentation reflects that, at this point, the PDT had reached consensus that the acquisition would be conducted on an unrestricted basis using full and open competition. *Id.* at BATES 000245-000247.

Subsequently, the agency conducted a procurement strategy meeting on September 26, 2018. During that meeting, the agency presented a relatively developed acquisition strategy. At this meeting NASA provided attendees with historical information relating to the agency’s prior acquisition of the services under the HOSC and MO&I contracts; identified a “top-level” MOSSI PWS, presented a cost estimate and various risk assessments; described the competition approach, contract type, and evaluation approach; and outlined a procurement schedule. AR, exh. 28, Procurement Strategy Meeting Presentation.

Thereafter, the agency appointed the source selection authority (SSA) and source evaluation board (SEB). AR, exhs. 30, 31, SSA Appointment Memorandum; SEB Appointment Memorandum. In addition, the agency completed preparation of a draft RFP that was published on January 31, 2019. AR, exh. 40, Draft RFP Cover Letter. Following release of the draft RFP, the agency engaged in other acquisition-related activities, such as preparing an independent government estimate (IGE). AR, exhs. 40, 41, Email correspondence relating to preparation of the IGE. The agency released the completed RFP on May 1, 2019. AR, exhs. 46, 47 MOSSI RFP Cover Letter, MOSSI RFP. At around that same time, the agency also prepared and executed a source selection plan for the acquisition. AR, exh. 49, Source Selection Plan.

³ The record shows that the predecessor HOSC contract had been a small business set-aside, while the MO&I contract had been awarded on an unrestricted basis. AR, exh. 9, Market Research Presentation, at BATES 000108.

Proposals were submitted in response to the RFP on June 17, 2019. From that date until late March 2020, the agency evaluated proposals. On March 27, the SEB briefed the SSA. AR, exh. 118, Presentation to the SSA. The agency subsequently prepared a source selection memorandum and a document entitled a “concurrence sheet” which appears to be the document that actually executes the source selection memorandum, which itself is undated and unsigned. AR, exhs. 141, 142, Source Selection Concurrence Sheet; Source Selection Memorandum. The concurrence sheet was signed by the SSA on May 21. Shortly thereafter, the agency advised the competing offerors of its selection decision. AR, exhs. 144, 145, Award Notice Letters.

The Current NASA Employee

As noted above, Teledyne argues that a current NASA employee who participated in the acquisition had an improper personal conflict of interest that tainted the acquisition. The protester argues that this NASA employee (whom we will refer to as Mr. X) had an ongoing personal relationship with an individual who holds a high-level position with COLSA, the predecessor prime contractor for the HOSC contract; COLSA is also a major subcontractor to the awardee, SGT. Teledyne argues that, because of this ongoing relationship, and in light of the extensive acquisition-related activities of Mr. X (discussed below), the acquisition has been tainted.

The agency responds that, while it was aware of Mr. X’s relationship, it took measures to mitigate the effect of the relationship that eliminated the possibility of prejudice either in favor of SGT or against the other offerors. As set forth in greater detail below, we find that the agency’s attempt to mitigate the effect of the relationship here was not sufficient to avoid the appearance of the conflict.

As noted above, the agency made periodic substitutions to the membership of the PDT which was originally appointed in August, 2017. One such substitution occurred on January 8, 2018, not long after the original PDT was appointed. On that date, Mr. X was appointed to lead the PDT. AR, exh. 13, PDT Appointment Memorandum for Record. After his appointment to the PDT, Mr. X effectively led the agency’s acquisition development effort from that time on. AR, exh. 161, PDT Kickoff Meeting Presentation.

Among his activities, Mr. X led the PDT in the “bunker events” noted above (these are described in the record as week-long, dedicated events) to develop the solicitation’s initial PWS, the MOSSI “guidelines and parameters” document, and the second RFI. AR, exh. 19, at BATES 000234. He also participated in the presentation of the second market research results that led to the agency’s decision to use a full and open competition acquisition strategy. AR, exh. 18, Market Research Presentation Sign-In Sheet.

Mr. X also led the PDT in the preparation of the initial “top level” PWS, the agency’s cost estimates, the agency’s risk assessments, the agency’s proposed evaluation approach, and the agency’s procurement schedule. The record shows that he was a co-presenter

of that information during the agency's September 26, 2018 procurement strategy meeting. AR, exh. 28, Procurement Strategy Meeting Presentation, at BATES 000276.

On September 28, 2018, Mr. X was appointed to the SEB (we discuss his activities as a member of the SEB in detail below).⁴ AR, exh. 31, SEB Appointment Memorandum. In addition to being appointed to the SEB, Mr. X continued to lead the PDT throughout NASA's acquisition cycle in the development of the draft RFP that was released in January 2019 (as well as the final RFP issued in May), and in the development of the source selection plan that was prepared around the time of the RFP's release.

In sum, the record shows that Mr. X exercised an ongoing, continuous leadership role in the development of virtually every aspect of the agency's acquisition, from formulating procurement strategy, contracting approaches, and cost estimates, to evaluating risks, to developing the central acquisition documents, such as the RFP and source selection plan. In addition, Mr. X participated extensively in the evaluation of proposals, was a voting member of the SEB responsible for assigning scores to the proposals, and participated in briefing the SSA on the results of the agency's evaluation.

The record also shows that throughout the period of time that Mr. X was engaged in the acquisition-related activities described above, he participated in weekly social gatherings with a group of friends. This group included a senior-level employee who works for COLSA (the predecessor prime contractor for the HOSC contract, and one of SGT's major subcontractors for the solicited requirement), as well as another individual who is an employee of KBR Wyle (SGT and KBR Wyle merged during the acquisition). In an affidavit prepared in response to the protest, Mr. X describes these gatherings as follows:

As conveyed to the legal office, I have attended this weekly social gathering with friends for the past 10 years. This gathering is for camaraderie, friendship, dinner, and to engage in competitive foosball. This gathering is amongst ten long-time friends of various occupations.

AR, exh. 182, Mr. X Affidavit at BATES 004881. Mr. X describes the COLSA employee, with whom he states he has had a friendship for 30 years, as follows: "He leads the Integrated Support Team (IST) for COLSA. The IST is a group of ground systems controllers that supports the International Space Station (ISS) program, Space Launch System (SLS), and a few other small projects." *Id.* at BATES 004882. In his affidavit, Mr. X. does not describe with particularity the KBR Wyle employee, but does refer to another individual that attends these gatherings as a Department of Defense logistics project manager. *Id.* at 004881. However, in an earlier e-mail prepared by Mr. X in September 2018, he describes one of the attendees of these weekly gatherings as

⁴ The record shows that Mr. X initially was identified as the chairman of the SEB, but subsequently he was actually appointed as only a "voting member" of the SEB, rather than as the chairman. *Compare* AR, exh. 161, PDT Kickoff Meeting Presentation, at BATES 004697 *with* AR, exh. 31, SEB Appointment Memorandum, at BATES 000362.

follows: “One of the individuals is employed by KBR Wyle and does DOD [Department of Defense] work related in logistics.” AR, exh. 167, Email Correspondence relating to Mr. X, at BATES 004710. We infer that the reference to the Department of Defense logistics manager in his affidavit prepared for this protest is a reference to the KBR Wyle employee identified in his earlier e-mail, based on the similarity between the job descriptions.

The record shows that Mr. X brought these weekly gatherings to the attention of agency officials on multiple occasions. As to the first instance, the record does not include any contemporaneous correspondence or other written evidence of his having raised the matter. However, in a document prepared after Mr. X brought the matter to the attention of NASA officials for a second time (the agency’s SEB mitigation plan), the following statement appears:

In April 2018, [Mr. X], PDT Chair, discussed his participation in a weekly social gathering with [name deleted], the attorney assigned to this procurement. He [Mr. X] advised Legal that a current HOSC contract employee of COLSA, who is a manager, also attends this gathering. Her advice to him was to be careful and not to have the appearance of a conflict.

AR, exh. 49, MOSSI Source Evaluation Plan, Attachment 2, SEB Mitigation Plan, at BATES 000910.⁵ The record therefore appears to show that, although Mr. X raised the matter of these weekly meetings with NASA officials as early as April 2018, NASA took no action, either to investigate, or to address, the possible conflict arising out of these circumstances.

The first contemporaneously documented evidence that Mr. X brought up the weekly social gatherings appears in an e-mail to agency procurement counsel dated September 26, 2018. AR, exh. 167, Email Correspondence between Mr. X and agency Counsel, at BATES 004710. Thereafter, Mr. X again wrote to agency procurement counsel on October 17, 2018. In this October e-mail, Mr. X makes specific reference to his September 26 e-mail, and to the fact that he was waiting for a written response to his request for an “impartiality determination” before executing his individual certificate for evaluation participants. *Id.* at BATES 004709. Notwithstanding that the ethics office had not yet rendered an opinion about the advisability of Mr. X’s participation as a member of the SEB in light of the weekly social gatherings, he was appointed to the SEB on September 28, 2018. AR, exh. 31, SEB Appointment Memorandum.

Sometime later, on November 13, 2018, NASA’s ethics counsel provided an opinion regarding the participation of Mr. X on the SEB in an e-mail to the agency contracting officer. That opinion provides:

⁵ The source evaluation plan was executed on May 16, 2019. The SEB mitigation plan is dated December 10, 2018.

Thank you [the contracting officer] for taking the time to speak with [procurement counsel] and I on Friday, November 2, 2018. During our conversation I raised concerns about [Mr. X's] participation on the Marshall Operations Services, Systems, and Integration (MOSSI) procurement source evaluation board (SEB) due appearance concerns. While under the facts described below there is no strict statutory or regulatory requirement for his disqualification, the appearance issues raised could create a risk to the procurement. The final decision regarding this matter rests with the Office of Procurement. My recommendation is offered for your consideration.

* * * * *

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. All SEB members should be vigilant to avoid any scenario which may lead a reasonable person to question their objectivity, give the impression that contractors are seeking to influence them, that contractors who are directly affected by the performance/nonperformance of their duties may be impacted, or that contractors have disproportionate access to them (e.g., during private dinners).

In my view, the long history of the private dinners hosted by civil servants and contractors, including [the COLSA employee], and attended by [Mr. X], raises an appearance concern. Despite speculation about the possible retirement by [the COLSA employee], at this time, he remains a COLSA manager on the HOSC contract. *In conclusion, it is my view that based on these facts 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 until after the retirement of [the COLSA employee] or until after the conclusion of the SEB.*

AR, exh. 169, Ethics Opinion, at BATES 004714, 15 (emphasis supplied). Of significance, the ethics opinion appears to be confined to the question of Mr. X's participation as a member of the SEB. The opinion makes no mention of the fact that Mr. X had been participating extensively in the agency's acquisition activities as the lead of the PDT, or that the ethics attorney even was aware of those activities in addition to Mr. X's proposed participation as a member of the SEB. The opinion also make no reference to the KBR Wyle employee that attends the weekly social gatherings, or that the ethics attorney was made aware of that individual's employer.

Notwithstanding the explicit advice of the NASA ethics attorney, Mr. X specifically declined to refrain from attending the weekly social gatherings, and NASA decided to allow his continued participation as a voting member of the SEB. The agency's SEB mitigation plan states the agency's rationale as follows:

The recommendation notes that there is no statutory or regulatory requirement for his disqualification and that the final removal decision rests with the Office of Procurement. It is noted that [Mr. X], citing longstanding friendships, has declined to abstain from these weekly social dinners until SEB completion, as suggested as a possible mitigation measure in the email.

Numerous deliberations have been held on this matter between the Office of Procurement and the requiring organization (HP01) taking into consideration [Mr. X's] integral role in the development of the procurement strategy and solicitation due to his extensive program knowledge. His continued involvement with this SEB is deemed vital to the successful completion of this procurement.

AR, exh. 49, MOSSI Source Evaluation Plan, Attachment 2, SEB Mitigation Plan, at BATES 000910.

In addition to this finding, the SEB mitigation plan outlines certain restrictions that were deemed adequate mitigation measures by the agency. These measures included the following: (1) adherence by Mr. X to procurement integrity regulations as well as standards of ethical conduct; (2) a requirement that Mr. X would not discuss or disclose SEB activities outside of the SEB-controlled access area; and (3) that Mr. X would not evaluate any proposal involving COLSA. AR, exh. 49, MOSSI Source Evaluation Plan, Attachment 2, SEB Mitigation Plan, at BATES 000911. The mitigation plan acknowledges, however, that Mr. X would continue to participate in the evaluation of all other proposals not involving COLSA. The plan also acknowledges that Mr. X would continue to participate in the overall scoring of all proposals, including any proposal involving COLSA. *Id.* This mitigation plan was signed by the agency's director of procurement.

To summarize, NASA concluded that, because the agency ethics attorney noted in her opinion that there were no absolute statutory or regulatory requirements mandating Mr. X's removal from the SEB; because Mr. X refused to refrain from attending the weekly social gatherings; and because Mr. X already had participated so extensively in the agency's acquisition activities to date and was viewed as vital to the success of the procurement, the agency would allow Mr. X to continue participating as a member of the SEB. His participation would be circumscribed, but 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 reached these conclusions, notwithstanding that the agency ethics attorney had recommended that Mr. X be removed from the SEB.

Legal Standard

The Federal Acquisition Regulation (FAR) sets forth clear and unambiguous guidelines concerning the conduct of government personnel that engage in contracting activities. The most fundamental guidance provides as follows:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

FAR 3.101-1. We have recognized 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 a conflict of interest is sufficient to taint the procurement. *Satellite Tracking of People*, B-411845, B-411845.2Nov. 6, 2015, 2015 CPD ¶ 347; cf. *The Jones/Hill Joint Venture*, B-286194.4, et al., Dec, 5, 2001, 2001 CPD ¶ 194 (agency improperly failed to recognize, in the context of an A-76 procurement, the appearance of a conflict created where government employee that prepared the solicitation's performance work statement and request for proposals was later assigned to assist in-house employees with preparation of the agency's most efficient organization).

Areas of Concern

As discussed, the record shows that Mr. X was extensively involved in virtually every aspect of the agency's acquisition process; that he maintained an ongoing personal relationship with both a high-level employee at COLSA, as well as another KBR Wyle employee; and that NASA, despite being made aware of the existence of these relationships, nonetheless elected to allow Mr. X's continued involvement in the acquisition, notwithstanding what amounts to at least the appearance of a conflict of interest on the part of Mr. X.⁶ We have several concerns.

First, it is evident from a reading of the ethics attorney's opinion that, while she concluded that there may have been be no strict statutory or regulatory requirement

⁶ The precise role of the KBR Wyle employee is not clear from the record, nor is it entirely clear what business segment of KBR Wyle employs this individual. We focus on this individual because the record shows that during the acquisition, there was a series of merger actions that ultimately led to SGT becoming merged with a successor entity known as KBR Wyle Services, LLC. KBR Wyle Services, LLC became the offeror/ultimate awardee in lieu of SGT as a result of these merger activities. See AR, exhs. 112, Letter of Merger Notice, SGT, LLC; 129, Clarification of Legal Entity Request; 132-136 Response to Legal Entity Letter with Supporting Documentation; 139 KBR Merger Summary.

precluding Mr. X's participation as a member of the SEB, she also concluded that Mr. X should be removed from the SEB, or refrain from attending the weekly social gatherings. The agency ethics attorney's opinion thus recognizes the overarching FAR mandate quoted above, namely, that government employees strictly avoid not only actual conflicts of interest, but also avoid even the appearance of a conflict of interest. Despite her recommendation, NASA elected to allow Mr. X to be a member of the SEB.

Second, even if we were able to conclude that NASA's decision to permit Mr. X to participate as a member of the SEB was reasonable, none of the agency's ethics review activities or deliberations considered his extensive, ongoing participation in the agency's acquisition activities as the lead of the PDT. In that role, Mr. X led the agency in performing market research, in shaping the agency's procurement strategy, and in drafting the RFP, the basis for proposal evaluation, and the source selection plan. The agency's failure to consider Mr. X's participation in the weekly social gatherings in light of his role as the lead of the PDT--or even to bring those activities to the attention of the ethics attorney--further undermines the reasonableness of the agency's decision to allow Mr. X also to be a member of the SEB.

Third, the agency also entirely failed to investigate any concerns that might arise as a consequence of Mr. X's relationship with the other participant at the weekly social gatherings, the KBR Wyle employee. It may be that NASA could reach a well-reasoned conclusion with respect to that individual, but it does not appear that the agency considered this issue during its deliberations.

Finally, although the agency did adopt some mitigation measures, it is not evident how those measures could be adequate in light of the totality of the circumstances. Those measures provide no guard against Mr. X's extensive activities in shaping the acquisition in general or in performing many of the detailed, sensitive tasks associated with his role as lead of the PDT. In addition, it is not evident how those measures would protect against the possibility of Mr. X influencing the evaluation of proposals from offerors other than SGT, nor is it evident why the agency concluded that it would be acceptable for Mr. X to vote on the scoring of the SGT proposal.

As noted, the agency argues that, even if we conclude that Mr. X has an actual or apparent conflict of interest, Teledyne was not competitively prejudiced because of the mitigation strategy adopted by the agency. However, we are not persuaded that the agency's mitigation strategy provides an effective means for ensuring that no other offeror was prejudiced for the reasons detailed above.

In any event, we 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 demonstrable proof of bias or prejudice. *Satellite Tracking of People supra* at 8. 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. *Id.* No such evidence exists here.

Conclusion

In summary, the record shows that throughout his extensive participation in this procurement, Mr. X also was routinely participating in a weekly social gathering that was attended by a high-level COLSA employee, and a KBR Wyle employee who remains unidentified in the record, and whose position with KBR Wyle is unknown.

These circumstances--viewed in a light most favorable to Mr. X--create at least the appearance of a conflict of interest here. At the same time, we cannot know whether any improper influence has occurred, nor, as a practical matter, can the agency now determine, after the fact, or with any reasonable degree of certainty, whether the acquisition has been tainted by Mr. X's actions. That is why government employees are required to avoid strictly not only actual conflicts of interest, but also even the appearance of any conflict of interest. FAR 3.101-1.

In the final analysis, Mr. X's actions have created a concern that the integrity of the acquisition process as a whole has, or may have been, compromised. It is precisely for this reason that our decisions uniformly apply a presumption of prejudice, both in circumstances where the record demonstrates an actual conflict of interest, as well as those instances where there is an apparent conflict of interest. The potential harm flowing from an actual or apparent conflict of interest is, by its nature, not susceptible to demonstrable proof of bias or prejudice. *Satellite Tracking of People supra.* at 8.

RECOMMENDATION

Because we conclude that the apparent conflict on the part of Mr. X was not adequately addressed, and because the ultimate impact of the apparent conflict fundamentally undercuts any confidence in the integrity of the acquisition, we recommend that the agency terminate the contract awarded to SGT for the convenience of the government. We further recommend that the agency cancel the RFP, begin its acquisition anew, and proceed without the involvement of individuals who have a conflict of interest. Finally, we recommend that the agency reimburse Teledyne the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel