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Past Performance

XPO Protest Upends \$7B Freight Services Award

BY DANIEL SEIDEN

A defense agency must reassess a \$7 billion freight services contract awardee's credentials following XPO Logistics' protest of a flawed past performance evaluation, the Government Accountability Office (GAO) ruled (*XPO Logistics Worldwide Gov't Servs. LLC*, GAO, B-412628, 3/14/17, decision released 3/21/17).

The GAO said it couldn't tell from the protest record how the U.S. Transportation Command justified assigning a "satisfactory confidence" rating to awardee Crowley Logistics Inc., which itself successfully protested the agency's award to another company last year.

The GAO also said the agency should determine whether its evaluation criteria truly reflect agency needs and seek revised proposals if necessary.

A past performance evaluation generally falls within a contracting agency's discretion, but the GAO will question an agency's conclusions if they are unreasonable or undocumented.

The GAO "emphasizes the need for agencies to document not only their evaluation decisions but also their rationales underlying those decisions," William F. Savarino, a partner with Cohen Mohr LLP in Washington, told Bloomberg BNA.

"This is particularly important in the context of an agency's past performance evaluation, where the agency must devise a meaningful way to compare an offeror's past efforts with the awarded efforts," he said.

XPO Logistics also argued that Crowley's pricing was unbalanced, but the GAO said this challenge should have been raised before the solicitation's closing date.

Past Performance Efforts. The U.S. Transportation Command sought to award a contract to provide transportation and transportation coordination services for Defense Department freight shipments between locations within the continental U.S., Alaska and Canada.

The solicitation required offerors to identify all of their most relevant contracts and/or efforts within the past three years.

The agency initially selected GENCO Infrastructure Solutions Inc. — now a FedEx subsidiary — but reopened the competition after Crowley's protest at the GAO. The agency then selected Crowley's \$7.1 billion offer over XPO's \$7.7 billion offer.

Rating Not Supported. The GAO threw out the award because the protest record didn't show how the agency concluded that Crowley's past efforts supported the evaluation rating it received, it said. The past performance report didn't show what benchmarks the agency used to evaluate those efforts, the GAO said.

The value of Crowley's past efforts were "extremely small relative to the value of the requirement," which suggested a misplaced assessment, the GAO added.

This decision is "a good reminder that the GAO reviews an agency's conclusion based on the rationality of an analysis used in the evaluation, not the rationality of an analysis that maybe the agency could have used, but there is no evidence in the record showing it did use," said Adam K. Lasky, a partner with Oles Morrison Rinker & Baker, Seattle.

The agency suggested that it could reach its conclusion by following a specific formula, but there is no evidence in the record that the agency relied upon that formula in the evaluation, Lasky said.

Crowell & Moring LLP represented XPO Logistics. Wiley Rein LLP represented Crowley Logistics.

To contact the reporter on this story: Daniel Seiden in Washington at dseiden@bna.com

To contact the editor responsible for this story: Jerome Ashton at jashton@bna.com