

GAO Backs Army's Choice For \$37M Dam Support Deal

By **Nicole Rosenthal**

Law360 (May 31, 2022, 6:33 PM EDT) -- The U.S. Government Accountability Office denied a protest from a construction company that lost out to a competitor on a \$37.1 million Army contract for dam maintenance support, ruling that the military is entitled to "considerable discretion" when judging technical proposals.

In denying Shimmick Construction Co.'s claims that the U.S. Army unreasonably rejected its bid for the contract despite assigning it a "good" rating and mentioning no weaknesses, GAO general counsel Edda Emmanuelli Perez said the Army is still entitled to "considerable discretion" in making "subjective judgments" for service contracts.

"Technical evaluators are given the discretion to decide whether a proposal 'deserves a 'good' as opposed to a 'very good' rating," Perez wrote in the May 9 decision made public on Friday.

Shimmick had also claimed that the evaluation was biased because of the company's ongoing dispute with the Army over a request for equitable adjustment on a separate, ongoing project, but Perez ruled that the contractor could not provide evidence of bad faith or bias and had instead relied on "inferences drawn from the existence of an ongoing dispute."

"Our review of the record here provides no basis for us to conclude that the agency's evaluation was tainted by bias or bad faith," Perez wrote. "The mere existence of an ongoing dispute with the agency on another project and allegations of unreasonable evaluation do not, in and of themselves, constitute evidence of bias or bad faith."

The contractor additionally argued that the ongoing project, which the Army judged as "marginal" past performance, is not "substantially complete" or relevant enough to be judged as the work didn't include underwater or dredging work required for the dam contract. But Perez held that the Army's past performance evaluation is relevant to the criteria for the contract and that Shimmick's claim that the evaluation was irrelevant lacked merit.

The solicitation for the dam maintenance contract was issued in September 2021, intended for services to lift and set a dive deflector box at Olmsted Locks and Dam in Olmsted, Illinois. Proposals were evaluated based on the overall best value to the government, as well as past performance, technical capabilities and small business participation.

Shimmick's past performance was rated by the Army with "satisfactory confidence," compared to awardee C.J. Mahan Construction Company LLC's "substantial confidence," according to documents cited in the GAO opinion. Shimmick's technical standing was rated as "good" compared to Mahan's "outstanding," and both companies had "acceptable" small business participation. Mahan asked for \$37.1 million in its proposal, compared to Shimmick's \$35.8 million bid.

Shimmick also said that the Army was required to give it an opportunity to respond to its performance evaluation, but the Army countered that Shimmick already had a chance to respond in the project's Contractor Performance Assessment Reporting System report. Perez confirmed that Shimmick "provided extensive comments and additional information in response to the assessing official's ratings of marginal."

"The evaluation of past performance, by its very nature, is subjective and we will not substitute our

judgment for reasonably based evaluation ratings," Perez said. "An offeror's disagreement with an agency's evaluation judgments, without more, does not demonstrate that those judgments are unreasonable."

Neither the Army and nor counsel for Shimmick Construction Co. immediately responded to requests for comment.

Shimmick Construction Co. is represented by Giovanni M. Ruscitti, Justin C. Berg, Jack P. Storti, Benjamin F. Silfen of Berg Hill Greenleaf Ruscitti LLP.

C.J. Mahan Construction Company LLC is represented by Lawrence M. Prosen, Benjamin L. Williams and Josephine M. Bahn of Cozen O'Connor.

The U.S. Army is represented by Elisabeth A. Dixon, Matthew R. Keiser and Tarrah M. Beavin.

GAO attorneys Uri R. Yoo and Alexander O. Levine participated in the preparation of the decision.

The case is the matter of Shimmick Construction Company, Inc., file number B-420419.2, before the U.S. Government Accountability Office.

--Editing by Jill Coffey.