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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Tremco Incorporated--Costs

File: B-310927.2

Date: April 21, 2008

Peter F. Garvin, III, Esq., and Grant H. Willis, Esq., Jones Day, for the protester.
Charlma Quarles, Esq., Kenneth MacKenzie, Esq., and Edward Carney, Esq.,
Department of Veterans Affairs, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of protest costs is denied where record fails to establish that the agency delayed taking corrective action in the face of a clearly meritorious protest.

DECISION

Tremco Incorporated requests that we recommend reimbursement of the costs it incurred in connection with filing and pursuing a protest challenging the selection of Alliance Roofing as the successful vendor under request for quotations (RFQ) No. VA-241-07-RQ-0179, issued by the Department of Veterans Affairs (VA) for roof replacement work at the Brockton, Massachusetts campus of the VA Boston Healthcare System.

We deny the request.

On December 10, 2007, Tremco filed a protest with our Office, alleging that Alliance's quotation improperly included work not available under its Federal Supply Schedule contract; alternatively, Tremco contended that, if Alliance's quotation failed to include open market items, it would not meet all of the RFQ's requirements. On January 9, 2008, the due date for the agency's report in response to the protest, the VA reported to our Office that it was taking corrective action, by terminating the award and resoliciting the requirement, since further review of the procurement had revealed that the successful vendor's bond had not been timely submitted. Consequently, we dismissed Tremco's protest, since the agency's termination of the

award and resolicitation of its requirement rendered the protester's challenge to the source selection academic.

By letter of January 14, Tremco filed its current request for a recommendation for reimbursement of the firm's costs of filing and pursuing its protest.¹ Tremco alleges that the agency's corrective action was unduly delayed and that it was taken in response to meritorious protest contentions.

Where a contracting agency takes action which renders a protest academic prior to our issuing a decision resolving the merits of the protest, our Office may recommend that the protester be reimbursed the costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2007); Information Ventures, Inc.--Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2. We will recommend that a protester be reimbursed its protest costs only where, under the facts and circumstances of a given case, the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Advanced Env'tl. Solutions, Inc.--Costs, B-296136.2, June 20, 2005, 2005 CPD ¶ 121 at 2-3. Generally, where an agency takes corrective action on or before the due date for its report in response to the protest, we consider the agency's corrective measures to have been taken promptly; a protester does not have to file comments or pursue the protest further when the corrective action is taken prior to the submission of a report on the merits of the protest. See Alaska Structures, Inc.--Costs, B-298156.2, July 17, 2006, 2006 CPD ¶ 109 at 4; The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3.

In our view, the protester's request for reimbursement of protest costs is based on an argument that neither establishes the meritorious nature of its protest issues (which, in any event, are unrelated to the basis upon which the agency took corrective action) nor demonstrates that the agency unduly delayed taking corrective action. The protester instead essentially suggests that, since the agency had told it, during its agency-level protest, that a bond had been submitted by Alliance, but apparently had not noticed the untimely nature of the bond, the agency's subsequent rejection of the Alliance quotation based on the untimely bond after Tremco filed a protest with our Office constitutes unduly delayed corrective action. Tremco generally contends that if the impropriety regarding the bond had been discovered during the agency-level protest (even though Tremco did not raise any issue regarding the bond), and if the

¹ On the same date, Tremco also filed a protest of the agency's intended corrective action, contending that instead of resoliciting the requirement, the agency should select Tremco as the successful vendor to perform the work required under the RFQ. The agency filed a report on the merits of that protest responding to Tremco's protest contentions. Tremco failed to file comments on the report, as required, and its protest was dismissed.

Alliance quotation had been rejected earlier because of the impropriety, Tremco would not have had to file its protest to our Office, and, as a result, it should be reimbursed for the costs of doing so.

We see no basis to recommend recovery of protest costs here, since Tremco's theory lacks the essential elements necessary to support a recommendation for reimbursement of protest costs. As an initial matter, there is no nexus between Tremco's protest contentions and the basis for corrective action; Tremco never raised the timeliness of the awardee's bond in its protest to our Office. Thus, Tremco has no basis for reimbursement on that issue. See Takota Corp.--Costs, B-299600.2, Sept. 18, 2007, 2007 CPD ¶ 171 at 3. In any event, with regard to Tremco's specific protest allegations, since there was no report submitted by the agency, there is nothing in the record that supports Tremco's general allegation that its protest was meritorious. See Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 8 n.8. With regard to Tremco's protest, it is clear that the agency's corrective action was not unduly delayed, since it was communicated to us by the due date for receipt of the agency report in response to the protest. See The Sandi-Sterling Consortium--Costs, *supra*. The record shows that it was only after further review of the procurement in preparation of its agency report to our Office in response to Tremco's protest that the agency discovered the issue that led to the prompt corrective action. Since the agency's corrective action has not been shown to have been taken in response to clearly meritorious issues raised by the protester, and, moreover, was not unduly delayed, there is no basis to recommend reimbursement of protest costs.

The request for reimbursement of costs is denied.

Gary L. Kepplinger
General Counsel