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**Comptroller General
of the United States**

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

Decision

Matter of: Advanced Environmental Solutions, Inc.--Costs

File: B-296136.2

Date: June 20, 2005

William E. Hughes, III, Esq., Whyte Hirschboeck Dudek S.C., for the protester.
Michael J. O'Farrell, Jr., Esq., and Major Rebecca R. Vernon, Department of the Air Force, for the agency.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO will not recommend reimbursement of the costs of protest challenging contract award based on improper evaluation of past performance, where protest was rendered academic by agency's decision to terminate the contract and make a new award decision in response to Small Business Administration's decision that awardee was not eligible for award.

DECISION

Advanced Environmental Solutions, Inc. (AES) requests that our Office recommend that the agency reimburse AES's reasonable costs of filing and pursuing its protest of a contract under solicitation No. FA8101-05-R-0003, awarded to Eason Enterprises OKC LLC by the Department of the Air Force to transport and dispose of hazardous waste.

We deny the request.

The RFP, which was set aside for service-disabled, veteran-owned small business concerns, provided for a "best value" award, considering price/cost, past performance, and mission capability factors. The solicitation specified that the agency's source selection decision would be based on a past performance/price tradeoff of those offers that were determined to be technically acceptable.

The Air Force awarded the contract to Eason, and AES protested on March 28, 2005, raising challenges to Eason's technical acceptability and the agency's past performance and price evaluation. Our Office dismissed all but the past

performance allegation on April 20 because the dismissed grounds failed to state a valid basis of protest within GAO's jurisdiction.

The Air Force filed its report in response to the protest and AES filed comments responsive to the report on May 10. On the very next day, the agency notified our Office that the Small Business Administration (SBA) had sustained a separately filed protest challenging Eason's small business status and eligibility for award. As the Air Force advised:

Based upon this decision, the Agency is in the process of considering whether the award to Eason should be terminated, which would in the Air Force's view render AES' current GAO protest (B-296136) academic or moot.

Facsimile Transmittal from Air Force to GAO, May 11, 2005, at 1. The next day, the agency notified our Office that "in light of the SBA's decision, the Contracting Officer has decided to terminate the award previously made to Eason." The agency also stated that it "intend[ed] to re-open discussions, request revised proposals, conduct evaluations of such revised proposals, and then make a new award decision, including a new Performance Price Tradeoff with Technical Acceptable Determination, if necessary."¹ Letter from Air Force to GAO, May 12, 2005, at 1; Facsimile Transmittal from Air Force to GAO, May 13, 2005, at 1. Our Office dismissed the protest as academic on May 13.

AES requests that our Office recommend that the Air Force reimburse its reasonable costs of filing and pursuing the protest. AES contends that the SBA's decision did not "require the extensive corrective action taken by the agency," and that the announced corrective action--which included seeking revised proposals and performing a new evaluation--was in response to its clearly meritorious protest.

Our Office may recommend that an agency reimburse a protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e) (2005); Shindong-A

¹ In its report in response to AES's request for costs, the Air Force now states that it has been apprised that Eason has appealed the SBA size determination and that the agency's current position is that it would reinstate Eason's contract without conducting any further discussions or making a new award decision if that firm's size appeal is successful. If the Air Force in fact does not undertake its previously proffered corrective action, on which basis we dismissed AES's protest as academic, AES would be entitled to have its prior protest reinstated, provided it timely files a protest of the agency's failure to implement the corrective action.

Express Tour Co., Ltd.--Costs, B-292459.3, Mar. 25, 2004, 2004 CPD ¶ 75 at 5. However, where the agency action that rendered a protest academic does not constitute corrective action in response to the protest, our Office will not recommend reimbursement of protest costs. Bionetics Corp.--Entitlement to Costs, B-270323.3, Aug. 16, 1996, 96-2 CPD ¶ 70 at 5; H. Watt & Scott Gen. Contractors, Inc.--Request for Declaration of Entitlement to Costs, B-257776.3, Apr. 6, 1995, 95-1 CPD ¶ 183 at 2-3; Loral Fairchild Corp.--Entitlement to Costs, B-251209.2, May 12, 1993, 93-1 CPD ¶ 378 at 2.

Here, the Air Force made clear that it was terminating the contract in response to the SBA's decision, and not due to protest issues pending before our Office. While AES hypothecates that this was not the reason for the agency's initiation of corrective action, as evidenced by the agency's decision to reopen discussions, AES has provided no basis for us to conclude that the corrective action was not the direct result of the adverse size determination regarding Eason.² Since the agency did not take corrective action in response to AES's protest and AES's protest was not sustained, there is no basis for recommending that the agency reimburse AES its protest costs.

The request is denied.

Anthony H. Gamboa
General Counsel

² The agency explains that its decision to re-open discussions was based on an incorrect belief that offers had expired, a concern that the change in performance period caused by the GAO stay of performance may require pricing changes, and because the contracting officer "felt that AES would be pleased by the opportunity to re-open discussions and revise its proposal." Air Force Response to Request for Costs, June 10, 2005, at 2. The fact that the agency determined to broaden its corrective action, in part, in an attempt to appease the protester does not alter the underlying basis for corrective action in the first place, which was in response to the SBA's decision.