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**Comptroller General  
of the United States**

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

# Decision

**Matter of:** Takota Corporation--Costs

**File:** B-299600.2

**Date:** September 18, 2007

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Thomas R. Lynch, Esq., Bradley Arant Rose & White LLP, for the protester.  
Timothy A. Chenault, Esq., Department of Homeland Security, for the agency.  
Paula A. Williams, Esq., and Ralph O. White, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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## **DIGEST**

Request for recommendation that protest costs be reimbursed is denied where the record shows that there was no nexus between the bases of protest and the agency's corrective action.

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## **DECISION**

Takota Corporation requests that we recommend that it be reimbursed the costs of filing and pursuing its protest, including attorneys' fees, in connection with its protest of invitation for bids (IFB) No. HSCG83-06-B-3WF381, issued by the Department of Homeland Security, United States Coast Guard (the Coast Guard) for replacement pier services at the Coast Guard's Little Creek Station, in Norfolk, Virginia. In its protest, Takota challenged the agency's decision to cancel the initial solicitation instead of making award to Takota which had submitted the lowest bid. In addition, Takota challenged the Coast Guard's award of a contract to Jessico, Inc., at a higher price for the identical or substantially similar work without giving Takota an opportunity to compete.

We deny the request.

The Coast Guard issued the canceled IFB as a total small business set-aside on October 6, 2006, and bids were opened on November 16. Takota submitted the apparent low bid, which exceeded both the government estimate and available funds for the procurement. The record shows that even if additional funding was obtained, the agency was concerned that Takota's bid price was too close to the funding ceiling to cover any future changes to the IFB's scope of work. In addition, the agency had identified a need to add fuel dispensers to the pier services project, and

questions were raised regarding the stated need for a debris shield (as opposed to a lower cost, lower maintenance alternative). As a result, the agency decided to cancel the IFB on December 27, and bidders were notified of the cancellation by letters dated December 28. The next day, the agency offered the replacement pier services to the Small Business Administration (SBA) as a new requirement under the SBA's section 8(a) business development program.<sup>1</sup> According to the Coast Guard, it considered the offered requirement to be a new acquisition based on the addition of new work, the need for a higher funding level since the project was more expensive than anticipated, and the need to procure various requirements, such as the debris shield, as optional items.

Based upon the information provided by the Coast Guard, on January 4, 2007, the SBA accepted the procurement into the 8(a) business development program. Ultimately, on March 27, Jessico was awarded a noncompetitive 8(a) contract which included the new work for the fuel dispensers and the debris shield as initially required in the canceled IFB.

Takota protested the award to our Office on April 2, asserting, among other things, that this procurement was improperly conducted on a sole-source basis denying Takota an opportunity to compete for this work. In preparing its response to the protest for our Office, the agency reviewed the procurement and realized that the SBA had not been informed that the prior solicitation had been issued as a small business set-aside for replacement pier services. By letters dated April 17 and April 24, the Coast Guard informed the SBA of this omission and sought an opinion from the SBA about whether the revised solicitation qualified as a new requirement and, therefore, was appropriately handled as a noncompetitive 8(a) set-aside. On May 2, the Coast Guard filed its agency report with our Office responding to the issues raised by the protester, and advising our Office and Takota that the Coast Guard would take corrective action if the SBA made a determination that the offering was not a new requirement that could be placed under the 8(a) program.

The next day, the SBA advised our Office and the parties that, in its view, the requirements in the initial small business set-aside were virtually the same as the requirements offered to the 8(a) business development program. The SBA concluded that the Coast Guard's requirement for replacement pier services was not a new requirement that could be accepted by the SBA for performance under the 8(a) program. By letter dated May 7, the Coast Guard informed our Office that, consistent with the SBA's determination, the Coast Guard intended to terminate

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<sup>1</sup> Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (2000).

Jessico's contract and resolicit the acquisition other than under the 8(a) program. We dismissed the protest as academic on May 9.

Takota asks that we recommend that it be reimbursed its protest costs, including attorneys' fees, because the Coast Guard had unduly delayed taking corrective action in the face of the protester's assertedly meritorious protest. The Coast Guard argues against reimbursement of protest costs because, in its view, the corrective action taken was not related to matters raised by the protester in its protest. In addition, the agency argues that its response to the SBA's opinion was prompt, not unduly delayed, and that the initial protest was not clearly meritorious.

Where a contracting agency takes action which renders a protest moot 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. This imposition of costs is not intended as an award to prevailing protesters or as a penalty to the agency, but rather is designed to encourage agencies to take prompt action to correct apparent defects in competitive procurements. J.A. Jones Mgmt. Servs., Inc.--Costs, B-284909.4, July 31, 2000, 2000 CPD ¶ 123 at 3. 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 Environmental Solutions, Inc.--Costs, B-296136.2, June 20, 2005, 2005 CPD ¶ 121 at 2-3.

Applying these standards to the present case, we conclude that it is not appropriate to recommend that Takota recover its protest costs. As an initial matter, there was no nexus between the bases of protest raised by Takota in its protest letter and the basis for the Coast Guard's corrective action decision, which was taken in response to the SBA's opinion, and we note that the protester has not shown otherwise. See GPA-Buffer, LP, B-298953.2, Mar. 21, 2007, 2007 CPD ¶ 53 at 4. Moreover, the Coast Guard took corrective action no more than 4 days after the SBA's opinion was issued and 5 days after filing its agency report with our Office. Thus, even if we assume that Takota's initial protest grounds were clearly meritorious, the agency's corrective action was not unduly delayed and is precisely the kind of prompt agency action that our regulations are designed to encourage. Since the Coast Guard did not take corrective action in response to Takota's protest and Takota's protest was not sustained, there is no basis to recommend reimbursement of protest costs. Id.

The request for reimbursement of costs is denied.

Gary L. Kepplinger  
General Counsel