



## Decision

**Matter of:** DGR Associates, Inc.--Costs

**File:** B-401791.5

**Date:** February 16, 2010

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Darcy V. Hennessy, Esq., Hennessy and Boe, P.A., for the protester.  
Christopher S. Cole, Esq., Department of the Air Force, for the agency.  
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the  
General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Request for recommendation that portion of protest costs be reimbursed is denied where record fails to establish a nexus between the bases of protest raised by the protester and the basis for the agency's corrective action.

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### DECISION

DGR Associates, Inc., of Dallas, Texas, requests that we recommend that it be reimbursed a portion of the costs that it incurred in protesting the award of a contract to Inuit Services, Inc., of Anchorage, Alaska, under request for proposals (RFP) No. FA5004-09-R-C014, issued by the Department of the Air Force for military family housing maintenance services at Eielson Air Force Base, Alaska. Specifically, DGR asks that it be reimbursed for protest costs that it incurred after the agency was placed on notice that Inuit was not a small business and thus was ineligible for award under the solicitation, which was set aside for qualified Historically Underutilized Business Zone (HUBZone) small business concerns.

We deny the request.

The contracting officer notified DGR of the award to Inuit, the offeror submitting the lowest-priced proposal that had received a past performance rating of substantial confidence, on August 10, 2009. DGR protested to our Office on August 20, arguing that the agency lacked a basis for assigning Inuit a past performance rating of substantial confidence. The protester asserted in this connection that Inuit's Small Business Administration (SBA) profile and information on Fedvendor.com both indicated that Inuit lacked recent relevant experience. DGR also filed a timely protest of Inuit's size status.

On September 1, counsel for Inuit notified the parties and GAO that Inuit had recalculated its average annual revenues for the past 3 completed fiscal years and made a preliminary determination that it did not meet the size standards for the contract, and that, given these circumstances, it could not and would not accept the award. By letter of September 3, the Air Force notified our Office that “[i]n light of the Awardee’s intent to withdraw from the award of the contract and because the prices on the proposals have expired,” it intended to resolicit the requirement. Air Force Letter to GAO, Sept. 3, 2009. On September 9, SBA issued a size status determination finding that Inuit was ineligible for award under the referenced solicitation because it was other than a small business concern. By email of September 15, the Air Force informed us that it was terminating Inuit’s contract. The Air Force subsequently learned that Inuit intended to appeal the SBA ruling, however, and by email of September 17, the agency advised our Office that it had decided not to terminate Inuit’s contract until SBA had decided the appeal.

While these events were transpiring, our Office continued with development of the protest before us. In late September, the agency furnished a report responding to the protester’s allegation that Inuit lacked recent relevant experience and thus could not reasonably have been assigned a past performance rating of substantial confidence, and on October 5, DGR filed its comments on the agency report.

In its comments, DGR raised additional arguments that were based on information furnished in the agency report. The protester argued that in evaluating the awardee’s past performance, the agency had failed to consider the scope and range of Inuit’s involvement in the contracts identified in its proposal; in the foregoing connection, DGR noted that Inuit had been the prime contractor on only one of the projects that it had listed.

On October 9, SBA denied Inuit’s size status appeal. On October 23, the Air Force notified us that it was terminating Inuit’s contract, and that “because the contract requirements [had] changed,” it intended to resolicit the requirement. On October 28, we dismissed DGR’s protest of the award to Inuit as academic.

DGR argues that it should be reimbursed for the costs that it incurred in preparing its comments on the agency report because the filing of these comments would have been unnecessary if the agency had terminated Inuit’s contract at the time it was informed that SBA had determined Inuit to be other than small and thus ineligible for award in mid-September.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed where we find that the agency’s action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2006). Our Bid Protest Regulations provide that where the contract agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(e) (2009). This does not mean that we will recommend that costs be

reimbursed in every case in which an agency takes action that renders a protest academic; rather, we will recommend that a protester be reimbursed its costs only where the record establishes that (1) the agency action that rendered the protest academic was taken in response to the protest, and (2) the agency unduly delayed taking the action in the face of a clearly meritorious protest. RANA Tech.--Costs, B-400471.2, Feb. 3, 2009, 2009 CPD ¶ 38 at 3.

Here, it is apparent from the record that the Air Force took the corrective action of terminating Inuit's contract in response to the SBA determination that Inuit was other than small, rather than in response to the arguments raised by the protester in its submissions to our Office. Because the record fails to establish a nexus between the grounds of protest raised by the protester and the agency's corrective action, there is no basis for us to recommend that DGR recover any portion of its protest costs.

The request is denied.

Lynn H. Gibson  
Acting General Counsel