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**Comptroller General
of the United States**

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

Decision

Matter of: REMSA, Inc.--Costs

File: B-293771.2

Date: September 3, 2004

Robert E. Korroch, Esq., Williams Mullen, for the protester.
Terry Hart Lee, Esq., Department of Commerce, for the agency.
Henry J. Gorczycki, Esq., and David A. Ashen, 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 against alleged improper modification of contracts where the protest was rendered academic by the expiration of the contracts as a result of administrative lapse (rather than agency corrective action).

DECISION

REMSA, Inc. requests that our Office recommend that the agency reimburse REMSA's reasonable costs of filing and pursuing its protest of an alleged improper modification of contracts, Nos. EA1330-02-CQ-0002 and EA133F-03-CQ-0001, awarded to Atlantic Inspection Services, Inc. (AIS) by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for fishery observer services.

We deny the request.

The agency awarded the first contract to AIS in 2002 for a base period and 4 option years. The agency awarded the second contract in 2003 for a base period and 3 option years. The contracts were essentially identical; the purpose of the second contract was to use supplemental funding not previously available. Each contract provided for NOAA to pay AIS for observer services provided on fishing vessels operating out of ports from North Carolina to Maine. Both contracts had the same annual expiration date of April 30 unless the agency exercised options.

In early 2004, during the first option year of the first contract and the base period of the second contract, the agency issued regulations and procedures that would permit

a fishing vessel to operate in exempted fisheries if the owner or operator of the vessel retained and paid for an AIS fishery observer. On March 4, REMSA protested to our Office, alleging that, among other things, the agency's actions amounted to an improper modification beyond the scope of AIS's contracts, and contemplated the improper payment for the observer services from private funds.

On April 5, the agency submitted a report on the protest. REMSA submitted comments on April 15. On May 20, our Office requested additional information from the agency. On May 26, the agency submitted a response to our request. On May 27, our Office conducted a conference call to discuss issues and request additional information. On May 28, counsel for the agency notified our Office that both contracts had expired on April 30. According to the agency, no services had been performed by AIS at the request and expense of owners or operators of fishing vessels and, absent a current contract, AIS was not authorized to perform the services contemplated by the protested terms of the agency's regulations and procedures. On June 3, our Office dismissed REMSA's protest as academic.

REMSA thereupon requested that our Office recommend that the agency reimburse REMSA the reasonable costs of filing and pursuing its protest. REMSA alleges that the agency delayed taking corrective action 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) (2004); Shindong-A 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 agency continued to defend against the protest after the contracts had expired. The administrative contracting officer states that as a result of an administrative lapse by the procuring activity, a request to exercise options under either contract was not submitted to him until April 30, the day on which the contracts expired. The contracting officer explains that he did not have sufficient time to obtain the necessary contractor consent and legal review prior to the time the contracts expired and, therefore, he allowed the contracts to expire. The contracting officer further states that he did not consider the pending protests when he allowed the contracts to expire, and that he did not notify agency legal counsel at the time that the contracts had expired. There is nothing in the record that calls into

question the contracting officer's statement that the expiration of the contracts was the result of an administrative lapse rather than corrective action in response to REMSA's protest. Indeed, the fact that the agency continued to defend against the protest after the expiration of the contracts supports the agency's position that it did not take corrective action in response to the protest.

Since the agency did not take corrective action in response to REMSA's protest, and REMSA's protest was not sustained, there is no basis for recommending that the agency reimburse REMSA its protest costs.

The request is denied.

Anthony H. Gamboa
General Counsel