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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Baine Clark--Costs

File: B-290675.3

Date: September 23, 2002

Joseph G. Billings, Esq., for the protester.

Daniel N. Hylton, Esq., Department of Agriculture, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that protest costs be reimbursed based upon the agency's corrective action is denied where the record does not establish that the protest was clearly meritorious.

DECISION

Baine Clark requests that our Office recommend that it be reimbursed the reasonable costs of filing and pursuing its protest challenging the terms of the Department of Agriculture's proposed lease of a fixed-wing aircraft to be used by the agency in support of its predator control activities in the state of Wyoming.

We deny the request.

The western regional office of the Animal and Plant Health Inspection Service, Wildlife Services, Department of Agriculture, provides various programs, including predator control services, in Wyoming. In support of its predator control services, the agency leased three aircraft for use in Wyoming: two airplanes from Baine Clark and one airplane from the Wyoming Wool Growers Association (WWGA). In April 1992, the agency decided that it needed to lease a fourth aircraft for use in Wyoming and that it would restrict this lease to an Aviat A-1B Husky, as the aircraft, in order to test and evaluate that particular model.

On June 10, 2002, Baine Clark filed a protest and, after receipt of the agency's report, a supplemental protest to our Office, complaining that Agriculture had unduly restricted the lease to an Aviat A-1B Husky aircraft, that the solicitation was insufficiently detailed to allow for the preparation of quotes, and that the agency was

biased in favor of the WWGA. In defending its actions, Agriculture explained the basis for its restriction to an Aviat A-1B Husky aircraft, and denied that its purchase request was insufficiently detailed or that it was biased in favor of the WWGA.

On August 1, we dismissed as untimely Baine Clark's allegation that the solicitation was insufficiently detailed, because the record established that the protester believed at the time it filed its initial protest that the solicitation was insufficiently detailed but did not raise this issue until its supplemental protest after the filing of the agency's report. Also, on August 1, we requested additional information from Agriculture concerning Baine Clark's remaining protest allegations. Prior to submission of this additional information, Agriculture informed our Office and the protester that it would take corrective action by amending the solicitation to provide that lessors may quote an Aviat A-1B Husky aircraft or equivalent. The agency stated that it took this corrective action "to avoid additional delay."

On August 13, based upon the agency's corrective action, we dismissed as academic Baine Clark's complaint that the solicitation had been improperly restricted to an Aviat A-1B Husky aircraft. Subsequently, on August 21, we dismissed Baine Clark's remaining protest allegation that the agency was biased in favor of the WWGA because Baine Clark's allegations did not demonstrate that any of Agriculture's actions amounted to bias or that these actions translated into action that unfairly or prejudicially affected the protester's competitive position.

Baine Clark requests that we recommend that it be reimbursed its protest costs because Agriculture had unduly delayed taking corrective action in the face of the protester's assertedly meritorious protest, challenging the restriction of the solicitation to the lease of an Aviat A-1B Husky.

Under the Competition in Contracting Act of 1984, our Office may recommend that protest costs be reimbursed only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (2000). Our Bid Protest Regulations provide that where the contracting 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) (2002). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs only where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5; LB&M Assocs., Inc.--Entitlement to Costs, B-256053.4, Oct. 12, 1994, 94-2 CPD ¶ 135 at 4. Thus, as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. Georgia Power Co.; Savannah Elec. and Power Co.--Costs, B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81 at 5. A protest is "clearly meritorious" where the record plainly establishes that the agency prejudicially violated a procurement

statute or regulation. Tri-Ark Indus., Inc.—Declaration of Entitlement, B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101 at 3.

Here, the protest was not clearly meritorious. As described above, only one of Baine Clark's protest allegations—its allegation concerning the restriction of the lease to an Aviat A-1B Husky—was not dismissed by our Office. Although it was in response to this allegation that Agriculture took corrective action, we cannot say from the record before us that this complaint was clearly meritorious.

Baine Clark argued that other aircraft (for example, the Aviat A-1) would satisfy the agency's needs. Agriculture responded that other aircraft that had been used by the agency, such as the Piper Super Cub, would not meet the agency's needs because of that aircraft's shorter fuel range and slower ferrying speed. The agency also stated that it had used the older Aviat A-1, modified for the agency's purposes, but the supplemental type certificate (STC) from the Federal Aviation Agency allowing Agriculture to use the A-1 model would expire in 2004 and could not be renewed. Agriculture stated that it restricted the solicitation to the lease of the newer Aviat A-1B Husky to allow the agency to test and evaluate the aircraft prior to time when the older model could no longer be flown. Baine Clark disagreed with the agency's assertion that the STC for the Aviat A-1 would expire or could not be renewed.¹

In response to the party's arguments during the protest proceedings, we requested further information from the agency concerning, in part, the agency's ability to continue to use the older Aviat A-1. Agriculture elected to take corrective action (by opening the competition to an Aviat A-1B Husky or equal) prior to providing additional information, which resulted in the dismissal of this allegation. The record was not completed with respect to this issue, and we find that there is not sufficient information in the record to determine whether or not Agriculture could continue to fly the Aviat A-1 after 2004. Moreover, it is not clear in the record before us that the agency acted unreasonably in restricting the solicitation to an Aviat A-1B to allow the agency to test the capability of that aircraft, assuming that the agency could no longer use the older Aviat A-1. From the record before us, we cannot say that the agency prejudicially violated a procurement law or regulation.

The request for a recommendation that protest costs be reimbursed is denied.

Anthony H. Gamboa
General Counsel

¹ Baine Clark does not claim that the Piper Super Cub will meet the agency's needs.