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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: M&S Farms, Inc.–Costs

File: B-290599.3

Date: April 8, 2003

Richard C. Bradley III, Esq., Daniel Coker, Horton & Bell, for the protester. Henry J. Gorczycki, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an agency's implementation of the recommendation in a prior decision is protested, and the agency promises corrective action without undue delay, leading to dismissal of the protest, General Accounting Office will not recommend that the agency pay the protester's costs of pursuing the protest.

DECISION

M&S Farms, Inc. requests that our Office recommend reimbursement of its protest costs in connection with a protest of the amended terms of solicitation No. NAR020009, issued by the Department of the Interior, Bureau of Land Management, for a wild horse and burro adoption holding facility. That protest was dismissed after the agency promptly determined that corrective action was appropriate.

We deny the request.

On May 27, 2002, M&S Farms protested an award under the solicitation as previously issued. Our Office sustained the protest on the basis that the agency's evaluation was materially defective under every evaluation factor, as was the source selection decision. We recommended, in part, that the agency review its needs and amend, as appropriate, the solicitation and reimburse the protester its costs of pursuing the protest.¹ M&S Farms, Inc., B-290599, Sept. 5, 2002, 2002 CPD ¶ 174.

¹ The agency has agreed to pay the protester's claim for the costs of filing and pursuing the prior protest.

On November 6, the agency amended the solicitation. On December 9, several weeks prior to the due date for revised proposals, M&S Farms protested the terms of the solicitation, complaining that the terms were unduly restrictive of competition. On December 17, the agency notified our Office that it was taking corrective action by further amending the solicitation to address and resolve the protester's objections. On December 18, we dismissed the protest as academic.

On December 30, M&S Farms filed this request for reimbursement of the costs it incurred pursuing its second protest.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2003), provide that where an agency takes corrective action in response to a protest, our Office may recommend that the agency pay the protester its costs of filing and pursuing the protest. The intention behind implementing this regulation was not to award protest costs in every case in which an agency takes corrective action, but rather where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. American Lawn Serv., Inc.—Entitlement to Costs, B-271039.2, May 15, 1996, 96-1 CPD ¶ 228 at 2.

Here, the agency's promised corrective action that resulted in dismissal of M&S Farms' second protest as academic was submitted 8 days after the second protest was filed. We agree with the agency that the corrective action here was not unduly delayed.

M&S Farms argues, however, that in cases where an agency promises corrective action that results in dismissal of a protest and the agency subsequently fails to adequately implement the promised corrective action, we have recommended the reimbursement of protest costs. See, i.e., Louisiana Clearwater, Inc.—Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 5-6 (reimbursement of protest costs may be appropriate where the agency has promised to take corrective action leading to dismissal of a clearly meritorious protest and either (1) does not timely implement the promised corrective action, or (2) implements inadequate corrective action).

We do not find the rationale of Louisiana Clearwater, Inc. and similar cases applicable here. The protester's first protest challenging the agency's evaluation and source selection was resolved by our decision sustaining that protest. In response to our decision, the agency reviewed its needs and decided to amend the solicitation. M&S Farms' second protest challenged the solicitation amendments. Although M&S Farms argues that these new, alleged solicitation defects should be treated as part of the original protest, we find that they are a separate protestable event, and, as noted above, the agency took prompt corrective action in response to this second protest.

The request for our recommendation that M&S Farms be reimbursed its protest costs for its second protest is denied.

Anthony H. Gamboa
General Counsel