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**Comptroller General  
of the United States**

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

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## **Decision**

**Matter of:** Blue Hackle Middle East, WLL--Costs

**File:** B-310566.3

**Date:** March 24, 2008

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Louis D. Victorino, Esq., Jonathan S. Aronie, Esq., Marko W. Kipa, Esq., Keith R. Szeliga, Esq., Sheppard Mullin Richter & Hampton LLP, for the protester. Captain Charles D. Halverson, Department of the Army, for the agency. Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

1. Request for recommendation that agency reimburse protester for the costs incurred in filing and pursuing initial and first supplemental protests is denied where the record does not establish that the protest grounds presented in those protests were clearly meritorious.
  2. Agency took prompt corrective action in response to issues first raised in a second supplemental protest; accordingly, there is no basis to recommend reimbursement of costs associated with that protest.
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### **DECISION**

Blue Hackle Middle East, WLL, requests that we recommend that the Department of the Army reimburse Blue Hackle for the costs incurred in filing and pursuing various protests challenging the Department of the Army's decision not to select Blue Hackle for award of a contract under request for proposals (RFP) No. W91GXX-07-R-0005 to provide security services in Iraq.

We deny the request.

On April 30, 2007, the agency issued the solicitation, which contemplated multiple awards of indefinite delivery, indefinite quantity contracts for security services in Iraq. Offerors were advised that source selections would be made on the basis of the following factors: technical capability, past performance, past experience, Iraqi participation, and price. Thereafter, timely proposals were received from 15 offerors, including Blue Hackle. Following receipt and review of the initial proposals, the agency established a competitive range consisting of the proposals of

13 offerors including one from Blue Hackle, conducted discussions with the competitive range offerors, and requested submission of final revised proposals (FRP). The FRPs were evaluated with the following results:

	<b>Past Performance</b>	<b>Past Experience</b>	<b>Technical Capability</b>	<b>Iraqi Participation</b>	<b>Price</b>
<b>Offeror A</b>	Outstanding/ Very Low	Very Strong	Outstanding	Exceptional	\$28,546,412
<b>Offeror B</b>	Outstanding/ Very Low	Very Strong	Outstanding	Exceptional	\$32,858,854
<b>Offeror C</b>	Outstanding/ Very Low	Very Strong	Outstanding	Exceptional	\$43,195,176
<b>Offeror D</b>	Good/Low	Very Strong	Outstanding	Exceptional	\$41,534,052
<b>Offeror E</b>	Outstanding/ Very Low	Very Strong	Acceptable	Exceptional	\$32,615,964
<b>Offeror F</b>	Outstanding/ Very Low	Strong	Acceptable	Exceptional	\$39,490,052
<b>Blue Hackle</b>	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
<b>Offeror G</b>	Good/Low	Very Strong	Good	Exceptional	\$41,939,265
<b>Offeror H</b>	Outstanding/ Very Low	Strong	Good	Exceptional	\$41,998,329
<b>Offeror I</b>	Good/Low	Strong	Good	Exceptional	\$47,430,684
<b>Offeror J</b>	Good/Low	Strong	Acceptable	Exceptional	\$40,583,616
<b>Offeror K</b>	Acceptable/ Moderate	Strong	Outstanding	Exceptional	\$34,763,785
<b>Offeror L</b>	Good/Low	Strong	Acceptable	Exceptional	\$40,365,542

Agency Report, Tab 10, Source Selection Decision, at 3.

On September 27, 2007, the proposals submitted by offerors A, B, C, D, and E were selected for contract awards; Blue Hackle’s proposal was not selected. Blue Hackle was notified of the source selection decisions and, thereafter, requested a debriefing; the debriefing was provided by the agency on October 2.

On October 5, Blue Hackle filed its initial protest; in that protest, Blue Hackle maintained that the agency had “failed to conduct equal and meaningful discussions with Blue Hackle.” Initial Protest at 6. On October 12, Blue Hackle filed its first supplemental protest; in that protest, Blue Hackle asserted that its rating with regard to the past experience factor should have been [deleted], rather than [deleted], and that its rating with regard to the technical capability factor should have been [deleted], rather than [deleted]. First Supp. Protest at 5-6. On November 5, the agency submitted a report responding to Blue Hackle’s initial and first supplemental protests; in that report, the agency maintained that the protests were without merit.

On November 15, Blue Hackle filed its second supplemental protest, asserting for the first time that the agency's statements in evaluating Blue Hackle's proposal under the past performance factor were inconsistent with the agency's statements in evaluating Blue Hackle's proposal under the past experience factor. Second Supplemental Protest at 23-28. This Office requested that the agency submit a report responding to the second supplemental protest by November 26.

Prior to the deadline for submitting a report on the second supplemental protest, the agency advised this Office and the protester that it was taking corrective action. Specifically, by memorandum dated November 26, the contracting officer stated that the agency would reevaluate Blue Hackle's proposal and make a new source selection decision "[b]ased on Blue Hackle's supplemental protest ground that [the agency] inconsistently evaluated Blue Hackle's Past Experience and Past Performance submissions."<sup>1</sup> Contracting Officer's Memorandum, Nov. 26, 2007. We dismissed Blue Hackle's protests based on the agency's pending corrective actions.<sup>2</sup>

On December 12, Blue Hackle submitted this request that we recommend reimbursement of protest costs related to filing and pursuing its various protests. The agency has opposed the requested recommendation, maintaining that the issues raised in the initial and first supplemental protests were not clearly meritorious and that, with regard to the issue triggering the corrective action, which was first raised in the second supplemental protest, the agency's corrective action was prompt.

Pursuant to the Competition in Contracting Act of 1984 (CICA), our Office may recommend that protest costs be reimbursed where we find that an agency's action violated a procurement statute or regulation, 31 U.S.C. § 3554(c)(1) (2000), and our Bid Protest Regulations provide that where a contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed for its protest costs. 4 C.F.R. § 21.8(e) (2007). However, our Regulations do not contemplate a recommendation for reimbursement of protest costs in every case in which an agency takes corrective action; rather, such recommendation is appropriate only where an agency unduly delays corrective action with regard to a clearly meritorious protest.<sup>3</sup> Thus, as a prerequisite to our recommending

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<sup>1</sup> The agency subsequently determined that, in conjunction with its corrective action, it would reopen discussions with Blue Hackle and permit submission of another final revised proposal. Letter from Agency to Blue Hackle (Dec. 6, 2007).

<sup>2</sup> Agency counsel has advised this Office that the corrective action was completed in December 2007, and that Blue Hackle was not selected for award. Blue Hackle did not protest the agency's reevaluation and decision.

<sup>3</sup> As a general rule, so long as an agency takes corrective action in response to a protest prior to the deadline for submission of its protest report, we regard such action as prompt, and decline to consider favorably a request to recommend

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reimbursement of protest costs where a protest has been dismissed based on the agency's corrective action, it must be clear that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, that is, a protest presenting issues for which there were no defensible legal positions. See PADCO, Inc.--Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3; Yardney Technical Prods., Inc., B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

Based on our review of the record here, we cannot conclude that the issues presented in Blue Hackle's initial and supplemental protests were clearly meritorious. Specifically, without further information, the record does not clearly establish that the agency failed to conduct meaningful and equal discussions with Blue Hackle.<sup>4</sup> Similarly, based on our review of the record, we are unable to conclude that Blue Hackle's proposal clearly should have been rated [deleted], rather than [deleted], under the past experience factor or [deleted], rather than [deleted], under the technical capability factor.<sup>5</sup> Accordingly, we cannot recommend reimbursement of costs associated with the initial and first supplemental protests.

With regard to Blue Hackle's assertion that the documentation supporting the agency's evaluation of Blue Hackle's proposal under the past performance and past experience factors were inconsistent--an issue first raised in the second supplemental protest--there was no undue delay in the agency's corrective action. That is, the agency took corrective action prior to the deadline set by this Office for

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reimbursement of protest costs. See, e.g., The Sandi-Sterling Consortium--Costs, B-296246.2, Sept. 20, 2005, 2005 CPD ¶ 173 at 2-3.

<sup>4</sup> For example, Blue Hackle complained that the agency conducted face to face discussions with other offerors, but not with Blue Hackle, and asserts that the discussions with other offerors must have been more extensive than the discussions with Blue Hackle. However, there is no requirement that either the form or the content of discussions be identical for each offeror; to the contrary, discussions are to be tailored to each offeror's proposal. See Federal Acquisition Regulation § 15.306(d)(1), (e)(1); PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD ¶ 48 at 6. Accordingly, without additional information regarding the substance of the discussions, Blue Hackle's allegations are not clearly meritorious.

<sup>5</sup> A procuring agency's technical evaluators have considerable latitude in assigning ratings which reflect their subjective judgments of a proposal's relative merits. See, e.g., I.S. Grupe, Inc., B-278839, Mar. 20, 1998, 98-1 ¶ 86 at 5. Nothing in Blue Hackle's protests or the agency's report responding to the protests clearly established that the agency's ratings were unreasonable.

responding to that matter. Accordingly, we cannot recommend reimbursement of costs associated with the second supplemental protest.

The request for recommendation of cost reimbursement is denied.

Gary L. Kepplinger  
General Counsel