

# Decision

**Matter of:** Amaze Technologies, LLC--Costs

**File:** B-419810.4

**Date:** December 1, 2021

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Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Request for recommendation that agency reimburse the protester's costs associated with filing and pursuing its bid protest is dismissed as untimely where the request was submitted more than three months after the agency's decision to take corrective action.

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## DECISION

Amaze Technologies, LLC, of Herndon, Virginia, requests that our Office recommend that the Department of the Air Force reimburse the firm its reasonable costs of filing and pursuing its protest challenging the removal of its proposal from further consideration under fair opportunity proposal request (FOPR) No. FA8773-21-R-8002, for defensive cyberspace operations support services.

We dismiss the request as untimely.

## BACKGROUND

The solicitation was issued on January 25, 2021, as an 8(a) set-aside, to holders of the General Services Administration's "One Acquisition Solution for Integrated Services" indefinite-delivery, indefinite quantity (IDIQ) contract.<sup>1</sup> Contracting Officer's Statement

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<sup>1</sup> Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the Small Business Administration to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation 19.800. This  
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(COS), B-419810.3, at 3. The FOPR contemplated the issuance of a task order, on a best-value tradeoff basis, to provide support services to the Air Force's Computer Emergency Response Team in the areas of cyber defense, network operations, and information protection. *Id.* at 2-3. Relevant here, the FOPR also established that, to be considered for award, a qualified offeror must have an active top secret facility clearance at the time of proposal submission. *Id.* at 4.

Amaze, a mentor-protégé joint venture between AttainX Inc. and 22nd Century Technologies, Inc., was among the vendors that submitted task order proposals by the March 1 closing date. On April 23, the Air Force notified Amaze of the removal of its proposal from further award consideration because Amaze, the joint venture itself, did not itself possess a top secret facility clearance.<sup>2</sup> *Id.* at 10.

On May 3, Amaze filed a protest with our Office challenging the removal of its proposal from further consideration. Protest, B-419810.2, May 3, 2021 (.2 protest). On May 17, before the due date for the filing of its agency report, the Air Force notified our Office that it was taking corrective action by amending the FOPR and reevaluating all proposals, including the proposal submitted by Amaze. Notice of Corrective Action, B-419810.2, May 17 2021. We subsequently dismissed Amaze's .2 protest as academic. *Amaze Techs., LLC*, B-419810.2, May 26, 2021 (unpublished decision).

On June 7, Amaze filed a second protest with our Office challenging the terms of the amended FOPR. Protest, B-419810.3, June 7, 2021 (.3 protest). Specifically, Amaze argued the solicitation's new requirement that a joint venture competing for the award must itself have a top secret facility clearance was inconsistent with statutory and regulatory provisions concerning the evaluation of the capabilities of the members of small business joint ventures. *Id.* at 1, *referencing* FOPR amend. 4, attach. 1, at 8.

On August 31, after the issuance of our decision in *InfoPoint LLC*, B-419856, Aug. 27, 2021, 2021 CPD ¶ 290,<sup>3</sup> the Air Force again decided to take corrective action by amending the FOPR and extending eligibility for award to unpopulated joint ventures

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program is commonly referred to as the 8(a) Business Development program (or simply "8(a) program").

<sup>2</sup> Amaze represents that both individual members of the joint venture, but not the joint venture itself, possess top secret facility clearances. Protest, B-419810.2, May 3, 2021, at 2, 8.

<sup>3</sup> The *InfoPoint*, protest involved an almost identical challenge to a solicitation requirement that a joint venture competing for the award (as opposed to the individual members of the joint venture) hold a top secret facility clearance. In that decision, we found the requirement was prohibited by the National Defense Authorization Act for fiscal year 2020 as well as by regulations issued by the Small Business Administration. *InfoPoint LLC*, *supra* at 4-10.

where all members to the unpopulated joint venture individually possess the requisite facility clearance.<sup>4</sup> Notice of Corrective Action, B-419810.3, Aug. 31, 2021. We then dismissed Amaze's .3 protest as academic. *Amaze Techs., LLC*, B-419810.3, Sept. 2, 2021 (unpublished decision).

On September 15, Amaze filed this request for a recommendation for reimbursement of its protest costs.<sup>5</sup>

## DISCUSSION

Amaze requests that our Office recommend, pursuant to section 21.8(e) of our Bid Protest Regulations, that the agency reimburse Amaze its costs associated with filing and pursuing its .2 protest. Req. for Costs at 1. The requester asserts that it is entitled to be reimbursed for costs because its protest was clearly meritorious, and "the fact that [the agency] took corrective action does not excuse the unnecessary amount of time it took for [the agency] to take corrective action."<sup>6</sup> *Id.* Req. for Costs at 1.

The Air Force responds that the protester's request is untimely insofar as it was filed more than 3 months after our Office dismissed Amaze's .2 protest. Resp. to Req. for Costs at 2. In this regard, the Air Force asserts that despite being notified of the agency's intent to take corrective action on May 17, and GAO's dismissal of the protest on May 26, Amaze did not file its request here until September 15. *Id.* Additionally, the agency contends that it did not unduly delay taking corrective action in connection with the .2 protest, as the corrective action occurred prior to the filing of the agency report. *Id.* at 1-2. We agree with the agency in both regards.

Under our Bid Protest Regulations, if an agency decides to take corrective action in response to a protest, our Office may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and

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<sup>4</sup> As relevant here, a joint venture is "populated" where personnel who will perform work under a contract are employed by the joint venture itself; a joint venture is "unpopulated" where personnel who will perform work under a contract are employed by the firms that comprise the joint venture. See 13 C.F.R. § 121.103(h).

<sup>5</sup> As the value of the task order at issue is estimated to be greater than \$10 million, the procurement here is within our jurisdiction to hear protests related to the issuance of task orders under IDIQ contracts awarded by civilian agencies. Resp. to GAO Req., Nov. 10, 2021; 41 U.S.C. § 4106(f); *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

<sup>6</sup> Amaze also requests that our Office recommend its entitlement to costs associated with its .3 protest, which the Air Force does not dispute. Resp. to Req. for Costs at 1. As there is no disagreement regarding this aspect of the protester's request, we need not consider it further.

consultant and expert witness fees.<sup>7</sup> 4 C.F.R. § 21.8(e). The protester must file the request no later than 15 days after the date on which the protester learned that GAO had closed the protest due to the agency's taking corrective action. *Id.*; *Chase Supply, Inc.--Costs*, B-411059.3 *et al.*, May 17, 2016, 2016 CPD ¶ 135 at 3 n.4 (dismissing requests for recommendation for reimbursement of costs that were not timely filed). Filings not received in accordance with the timeframe established under our bid protest regulations are considered untimely. *The Continuum Eng'g--Recon.*, B-410298.2, Feb. 12, 2015, 2015 CPD ¶ 79 at 1-2.

We find Amaze's request here to be untimely. There is no dispute that we dismissed the .2 protest due to the agency's taking corrective action on May 26, and Amaze did not file its request that our Office recommend the agency pay the protester the associated protest costs until September 15. As this filing occurred more than 15 days after the protester learned of the closure of the earlier protest in question, it is untimely. 4 C.F.R. § 21.8(e); *Kord Techs., Inc.*, B-417748.5, Apr. 17, 2020, 2020 CPD ¶ 158 at 4 n.3.

Amaze argues that the Air Force's corrective action in response to the .2 protest was "nominal" in nature (*i.e.*, it only inserted the improper facility clearance requirement expressly into the solicitation), and thereby "forc[ed] Amaze to further avail itself of the protest process." Req. for Costs at 1. Amaze also argues that the costs for its .2 protest are "intertwined" with those of the subsequent .3 protest, and that "up until receiving the notice of the [agency's] corrective action in response to the InfoPoint, LLC decision, Amaze had no basis upon which to request costs." Comments at 2. We disagree.

Here, Amaze was aware that the Air Force's corrective action in response to the .2 protest was allegedly "nominal" when the solicitation was amended on June 2 and at the time Amaze filed its .3 protest on June 7. However, Amaze did not seek the reimbursement of its .2 protest costs before September 15. The request for reimbursement of costs was not part of Amaze's .3 protest filing. See Protest, B-419810.3, June 7, 2021. Further, Amaze fails to explain why, if the protester was of the view that the .2 protest was in fact clearly meritorious, the protester needed to wait until after the agency's corrective action in the .3 protest to file its request for costs for the earlier .2 protest. Quite simply, Amaze cannot have it both ways, *i.e.*, assert that its

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<sup>7</sup> We will make such a recommendation, however, only in instances where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. *Synchron, LLC--Costs*, B-412622.4, Aug. 31, 2016, 2016 CPD ¶ 250 at 4-5. In general, if an agency takes corrective action in response to a protest by the due date for its report in response to the protest, we consider such action to be prompt (*i.e.*, not unduly delayed), and will not recommend reimbursement of protest costs. *Southern Aire Contracting, Inc.--Costs*, B-418070.3, Feb. 21, 2020, 2020 CPD ¶ 73 at 3.

.2 protest was clearly meritorious as filed but also argue that it had no basis upon which to request costs before the agency the agency took corrective action in the .3 protest in response to the *InfoPoint* decision.

Moreover, even if we were to find the request to be timely--which we do not--as explained above, we only recommend the reimbursement of protest costs in instances where the agency unduly delays taking corrective action in the face of a clearly meritorious protest, and we generally consider the filing of the agency report as the measure of prompt, as compared to unduly delayed, corrective action. *Southern Aire Contracting, Inc.--Costs, supra*. As the Air Force took corrective action in response to Amaze's .2 protest prior to the filing of the agency report, and the protester was not put through the process of process of filing comments in response thereto, we do not consider the corrective action taken in response to the .2 protest to be unduly delayed.

The request is dismissed.

Edda Emmanuelli Perez  
General Counsel