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Decision

Matter of: Amaze Technologies, LLC

File: B-419919.2

Date: February 10, 2022

Shane J., McCall, Esq., Nicole Pottroff, Esq., Christopher Coleman, Esq., John L. Holtz, Esq., and Kevin Wickliffe, Esq., Koprince McCall Pottroff LLC, for the protester. Colonel Frank Yoon, Lieutenant Colonel Matthew W. Ramage-White, Major Thomas Pfeifer, Kevin P. Stiens, Esq., Department of the Air Force, for the agency. David A. Edelstein, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse the protester's costs associated with filing and pursuing its protest of a term of a solicitation is granted where the protest was clearly meritorious and the agency unduly delayed taking corrective action until after the protest record was fully developed through Small Business Administration comments and the parties' responses to those comments.

DECISION

Amaze Technologies, LLC, a small business of Herndon, Virginia, requests that we recommend the firm be reimbursed its reasonable costs of pursuing its protest. The protester challenged the terms of Fair Opportunity Proposal Request (FOPR) No. FA4890-21-R-0001, issued by the Department of the Air Force for training, operations, communications, and administrative services. Specifically, the protester alleged that a solicitation term requiring joint ventures to possess a facility clearance violated a Small Business Administration (SBA) regulation regarding joint ventures. After our Office sought and received SBA's views on the matter and the parties filed responses to SBA's submission, the Air Force stated that it would take corrective action, and we dismissed the protest as academic.

We grant the request.

BACKGROUND

The Air Force issued the solicitation under the One Acquisition Solution for Integrated Services (OASIS) Small Business Pool contract, a governmentwide, indefinite-delivery, indefinite-quantity acquisition vehicle administered by the General Services Administration (GSA) and reserved for small businesses. FOPR at 1.¹ The solicitation sought information warfare training, operations, communications, and administrative services in support of the Department of the Air Force, Air Combat Command. *Id.*

Of relevance to Amaze's protest, the solicitation's evaluation factors required offerors to possess a top secret facility clearance, stating as follows:

Evidence of Top Secret Facility Clearance. The Government will verify the offeror possesses a valid/adjudicated Top Secret Facility Clearance. If the offeror does not have the required clearance at the time of proposal submission, the offeror will receive a rating of 'Fail' for this element, the proposal will not be evaluated further, and the offeror is not eligible for award.

FOPR at 12, ¶ 16.1.1.1.

Amaze is a small business mentor-protégé joint venture composed of two entities, each of which possesses a top secret facility clearance; however, the joint venture itself does not possess a facility clearance. See Protest at 2; Protest, exh. A, exh. B. Prior to the due date for receipt of proposals, Amaze and the Air Force engaged in email communication regarding whether this arrangement would satisfy the solicitation's facility clearance requirement. Protest at 3-5.

During this email exchange, the Air Force initially stated that joint ventures composed entirely of members with top secret facility clearances (such as Amaze) would meet the facility clearance requirement regardless of whether the joint venture itself possessed a facility clearance. Protest, exh. D, email between Air Force and Amaze. Ultimately, however, the Air Force decided to require that joint venture offerors themselves possess a top secret facility clearance, irrespective of the facility clearances held by their members. See Protest at 3-5. The Air Force confirmed this latter interpretation of the facility clearance requirement in answers to offerors' questions issued on May 4, 2021. Protest at 3; Protest, exh. E at 1, Question and Answer Matrix. On May 21, 2021, the Air Force amended the solicitation to include the statement: "In the case of Joint Ventures (JVs), the JV itself must possess the required clearance." Protest at 4; FOPR at 4.

¹ Unless otherwise specified, citations to protest filings with our Office are to filings made in the underlying protest, B-419919. The initial FOPR does not appear to be in the protest record. The final FOPR as amended on June 8, 2021, however, was attached to the agency's request for dismissal as attachment 1. See Req. for Dismissal, attach. 1 at 1-19. Page references to the FOPR are to that document.

On June 17, 2021, prior to the due date for receipt of proposals, Amaze protested to our Office. Amaze argued that the solicitation's facility clearance requirement, as clarified and amended, violated an SBA regulation regarding facility clearances of joint ventures. See Protest at 5-13. This regulation provides, in part: "[a] joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance." 13 C.F.R. § 121.103(h)(4).

At the time Amaze filed its protest, another protest raising virtually the same legal issue had been pending before our Office for several weeks. On May 21, 2021, InfoPoint, LLC filed a protest of the terms of a different Air Force FOPR under the same OASIS contract vehicle, and also argued that a requirement for joint ventures to possess their own facility clearances violated 13 C.F.R. § 121.103(h)(4). See *generally*, InfoPoint Protest, B-419856, May 21, 2021, at 7-9. In the InfoPoint protest, our Office sought SBA's comments on the matter and provided a deadline for SBA's comments of "the early part of the week of June 21." GAO Notice, B-419856, June 10, 2021, at 1.

On June 22, 2021 (*i.e.*, five days after Amaze filed its protest), the Air Force filed a notice advising of the existence of the InfoPoint protest and its similarity to Amaze's protest. Agency Letter to GAO, June 22, 2021, at 1-2. The Air Force wrote that the InfoPoint protest "rais[ed] virtually the same protest allegation Amaze raises in this protest," and informed our Office and Amaze that SBA's comments in the InfoPoint protest would be forthcoming by the end of the day. *Id.* at 1.

Also on June 22, SBA filed its comments in the InfoPoint protest. SBA Comments, B-419856, June 22, 2021, at 1-6. In general, SBA agreed with the protester's argument that the Air Force's joint venture facility clearance requirement violated the SBA regulation on the issue. *Id.* Importantly, the SBA comments also pointed to a provision of the National Defense Authorization Act for Fiscal Year 2020 (2020 NDAA) that expressly prohibits Department of Defense (DOD) agencies from requiring that a joint venture itself possess a facility clearance where all of its component members have the requisite clearance. See *id.* at 3-4. Specifically, section 1629 of the 2020 NDAA states:

TERMINATION OF REQUIREMENT FOR DEPARTMENT OF DEFENSE
FACILITY ACCESS CLEARANCES FOR JOINT VENTURES
COMPOSED OF PREVIOUSLY-CLEARED ENTITIES. A clearance for
access to a Department of Defense installation or facility may not be
required for a joint venture if that joint venture is composed entirely of
entities that are currently cleared for access to such installation or facility.

Pub. L. No. 116-92, tit. XVI, § 1629; 133 Stat. 1198, 1741 (2019).

On July 2, 2021, the Air Force requested that we dismiss Amaze's protest, arguing that Amaze had failed to state a valid basis for protest because the agency had not violated any applicable statute or regulation. See Req. for Dismissal. While Amaze had not cited section 1629 of the 2020 NDAA in its protest, the Air Force referenced and

acknowledged the relevance of the 2020 NDAA to Amaze's protest in its request for dismissal. See *id.* at 4 ("the Agency recognizes SBA's citation to the [2020] NDAA.").

On July 9, 2021, our Office denied the Air Force's request for dismissal, concluding that Amaze had raised adequate factual and legal grounds for a protest. GAO Notice, July 9, 2021. Our notice to the parties stated:

We intend to seek the views of the Small Business Administration (SBA) on the interpretation of the relevant statutory and regulatory provisions. The protester and agency will be permitted to comment on the SBA's filing. We are suspending the agency report requirement until this process is completed, at which time the parties should advise whether any further filings or responses are needed.

Id. at 1. Our Office requested that the protester and agency advise us if they had any objections or concerns with this approach. *Id.* Neither party raised any objections to the proposal.

On July 15, our Office issued a notice requesting "that the SBA provide its views on the statutory and regulatory issues raised in the protest and in the agency's request for dismissal." GAO Notice, July 15, 2021, at 1. This notice also set a schedule for further briefing: SBA's comments were due by July 26, 2021, and the protester's and agency's responses to SBA's comments were due ten days thereafter, on August 5. *Id.* The notice stated that the parties should advise by August 6 if they "believe[d] further filings or documents [were] needed by our Office to issue its decision in this proceeding." *Id.*

On July 26, 2021, the SBA filed its comments. These comments were largely repetitive of the SBA's prior comments in the InfoPoint protest. Compare SBA Comments at 1-6 with SBA Comments, B-419856, June 22, 2021, at 1-6. The SBA again expressed the position that the solicitation's requirement that joint ventures themselves possess the necessary facility clearance violated both the 2020 NDAA and the relevant SBA regulation. See SBA Comments at 1-6.

On August 5, 2021, the protester and the agency filed their responses to SBA's comments. The protester agreed with and joined in SBA's conclusions, and provided a detailed analysis of the legal issues raised by SBA's comments. See Protester's Resp. to SBA Comments at 1-9. The agency, however, disagreed with SBA's conclusion; with respect to the 2020 NDAA, the Air Force argued that section 1629 did not override the deference due to a preexisting DOD regulation regarding access to information, and that the use of the word "may" in section 1629 rendered it permissive rather than mandatory. See Agency's Resp. to SBA Comments at 6-9.

After the August 5 filings, neither party advised that further submissions were necessary. As a result, our Office did not request any further submissions and did not set a new due date for the agency report. See Electronic Protest Docketing System

(Dkt.) (showing no filings regarding the need for additional submissions or a revised agency report date).

On August 27, 2021, our Office sustained InfoPoint's protest. *InfoPoint, LLC*, B-419856, Aug. 27, 2021, 2021 CPD ¶ 290. With respect to the 2020 NDAA, we found:

[S]ection 1629 of the NDAA specifically states, and the plain meaning of the statute leads us to conclude, that it unambiguously prohibits DOD from requiring that a joint venture hold a facility clearance if the members of the joint venture hold the required facility clearances. We do not find, and the Air Force has not demonstrated, that there is any other reasonable meaning to this statutory language.

Id. at 5. Our Office also specifically rejected the Air Force's argument that section 1629 was permissive and that that preexisting DOD regulation was entitled to deference:

[W]e find that the plain language of the 2020 NDAA states that DOD "may not" require that a joint venture hold a facility clearance where the members of the joint venture hold the required facility clearances. Thus, even if [an existing DOD regulation requiring that joint venture awardees possess clearance] was DOD's regulatory implementation of the 2020 NDAA, the regulation would clearly be contrary to the plain language of the 2020 NDAA. Under such circumstances, our agency will recommend that the procuring agency follow the unambiguous language of the applicable statute, rather than a regulation that on its face conflicts with the statutory language.

Id. at 9. With respect to this same argument by the Air Force, our decision continued:

The agency's argument . . . ignores the clear and unambiguous command by Congress that DOD may not require a joint venture to hold a facility clearance where the joint venture members hold the required facility clearances. The fact that the statute conflicts with what the agency contends are existing regulations does not provide a basis to avoid the requirement to follow the plain language of the statute.

Id. at 10.

Shortly after our decision in *InfoPoint* was issued, our Office inquired whether it would "affect the agency's position" with respect to Amaze's protest. Dkt. No. 24. On September 1, 2021, the agency informed our Office that it would likely take corrective action within two weeks. Agency Letter to GAO, Sept. 1, 2021, at 1. On September 8, the Air Force stated that it would take corrective action by "amend[ing] the FOPR to comply with the 2020 NDAA and SBA regulation by extending eligibility for award to unpopulated joint ventures (JVs) where all partners to the unpopulated JV individually possess the requisite facility security clearance (FCL)." Notice of Corrective Action at 1. On September 9, 2021, we dismissed the protest as academic. *Amaze Technologies, LLC*, B-419919, Sept. 9, 2021 (unpublished decision).

On September 22, 2021, Amaze filed this request.

DISCUSSION

Amaze requests that our Office recommend reimbursement of its attorneys' fees and costs in pursuing its protest. Req. for Costs. In support of its request, Amaze contends that its protest was clearly meritorious and that the agency unduly delayed taking corrective action. *Id.* at 6-10.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs under 4 C.F.R. § 21.8(e) if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *East Coast Nuclear Pharmacy--Costs*, B-412053.5, Aug. 31, 2016, 2016 CPD ¶ 249 at 5.

While the Air Force generally opposes Amaze's request, the agency does not contest Amaze's assertion that its protest was clearly meritorious. Resp. to Req. for Costs at 1-3. Instead, the Air Force argues primarily that our Office should consider its corrective action as not unduly delayed, because it took corrective action before any deadline to file an agency report. *Id.* at 2. The Air Force notes that our Office suspended the agency report requirement on July 9, 2021, and had not reestablished a new deadline for the agency report by the time that it took corrective action. *Id.*

Based on our review of the record, and as discussed below, we conclude that Amaze's protest was clearly meritorious and that the Air Force unduly delayed taking corrective action. Accordingly, we grant Amaze's request.

Clearly Meritorious

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.² *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. *ANAMAR Environmental Consulting, Inc.--Costs*, B-411854.4, B-411854.7, Nov. 9, 2016, 2016 CPD ¶ 327 at 6. The existence of any defensible legal position or close question is sufficient to show that a protest allegation was not clearly meritorious so as to warrant reimbursement of protest costs. *Id.*

Here, we conclude that Amaze's protest was clearly meritorious because the solicitation's facility clearance requirement was expressly prohibited by the 2020 NDAA. In this regard, it is evident that the language of the solicitation required that a joint venture hold its own facility clearance even if all members of the joint venture held the required clearance. See FOPR at 4 ("In the case of Joint Ventures (JVs), the JV itself must possess the required clearance."). Further, it is clear that this requirement is

² While the agency has not contested that Amaze's protest was clearly meritorious, our Office nevertheless must resolve this issue in order to reach our decision.

expressly prohibited by the 2020 NDAA's command that "clearance for access to a Department of Defense installation or facility may not be required for a joint venture if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility." Pub. L. No. 116-92, tit. XVI, § 1629; 133 Stat. 1198, 1741 (2019). In other words, we find that a reasonable inquiry into the protest allegations clearly would have shown that the solicitation here did precisely what the 2020 NDAA says it could not do.³

Moreover, as we explained in *InfoPoint*, our interpretation of section 1629 of the 2020 NDAA is a "plain meaning" reading. See *InfoPoint*, *supra* at 5. The Air Force was unable to advance--and we did not find--any other reasonable meaning to the statutory language. *Id.* We noted that procuring agencies are required to follow the unambiguous language of statutes rather than a regulation that conflicts with that language. *Id.* at 9 (citing *Small Business Administration--Recon.*, B-401057.2, July 6, 2009, 2009 CPD ¶ 148 at 5). We concluded and that the agency's arguments against complying with section 1629 of the 2020 NDAA "ignore[d] the clear and unambiguous command by Congress." *Id.* at 10.

In these circumstances, the merit of Amaze's protest of the solicitation's facility clearance requirement did not present a close question, and the protest's merit should have been apparent to the agency upon reasonable inquiry into the protest allegations. See *ANAMAR Environmental Consulting*, *supra* at 6. Accordingly, we conclude that Amaze's protest was clearly meritorious.

Unduly Delayed Corrective Action

Having found Amaze's protest to be clearly meritorious, our Office must next determine whether the Air Force unduly delayed taking corrective action.

On the issue of undue delay, the agency contends that our Office generally finds corrective action to be prompt, and not unduly delayed, where it is taken prior to the due date of the agency report. Resp. to Req. for Costs at 1-3. The agency points out that our Office suspended the agency report deadline on July 9, 2021, and never reestablished a new deadline. *Id.* at 2. The protester responds that our Office will recommend reimbursement of costs where a protester is required to expend additional

³ We reach this conclusion even though Amaze's protest made only regulatory arguments and did not mention the 2020 NDAA. See Protest at 5-13. Reasonable agency inquiry would have disclosed the conflict between the solicitation and section 1629 of the 2020 NDAA. The agency is, of course, charged with knowledge of the 2020 NDAA; the general rule that "everyone is charged with knowledge of the United States Statutes at Large" applies to the government as much as it applies to other litigants. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 385, 68 S. Ct. 1, 92 L. Ed. 10 (1947). In any event, the record demonstrates that the agency actually knew from the early stages of Amaze's protest of the relevance of the 2020 NDAA. See Agency Letter to GAO, June 22, 2021, at 1 (acknowledging relevance of SBA Comments in *InfoPoint*); SBA Comments, B-419856, June 22, 2021, at 3-4 (arguing the 2020 NDAA issue); Req. for Dismissal at 4 ("the Agency recognizes SBA's citation to the [2020] NDAA.").

time or resources responding to the agency's arguments. The protester argues that it was required to expend resources to respond to both the agency's request for dismissal and the SBA's filings. Protester's Reply to Resp. to Req. for Costs at 4-5. The protester further argues that in certain circumstances, our Office has shown a willingness to recommend reimbursement of costs even where corrective action preceded the filing of an agency report. *Id.* at 6 (citing *Louisiana Clearwater, Inc.--Recon. and Costs*, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209).

At the outset, we have long recognized that "[i]n 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 and will not recommend reimbursement of protest costs, even where the protest is clearly meritorious." *NARCORPS Specialties, LLC*, Jan. 21, 2021, B-418971.4, 2021 CPD ¶ 61 at 5. Nevertheless, under the unique circumstances of this protest, we find that the agency unduly delayed taking corrective action.

As stated above, our Office may recommend reimbursement of costs where an agency unduly delays taking corrective action in the face of a clearly meritorious protest. *East Coast Nuclear Pharmacy, supra* at 5. We have explained that this principle is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. *Id.* See also *Southern Aire Contracting, Inc.--Costs*, B-418070.3, Feb. 21, 2020, 2020 CPD ¶ 73 at 3 (where an agency unduly delays corrective action, it "caus[es] a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief."); *Chase Supply, Inc.--Costs*, B-411059.3 *et al.*, May 17, 2016, 2016 CPD ¶ 135 at 8 (recommending costs where agency did not take "appropriate and prompt steps to investigate and resolve" a clearly meritorious protest issue).

Our Office has generally used the agency report due date as a presumptive deadline for prompt corrective action because, prior to submission of the agency report, any delay in taking corrective action "[does] not result in the protester's being put to the time and expense of filing comments in response to the report." *Southern Aire, supra* at 3. And, in a typical protest before our Office, the agency report is the first substantive filing to which a protester must respond.⁴ See Bid Protests at GAO: A Descriptive Guide,

⁴ One exception to this is when a request for dismissal is filed before the due date for the agency report. In such situations, even though a protester may file a substantive objection to dismissal, our Office typically does not consider subsequent corrective action to necessarily be unduly delayed. For example, in *Southern Aire*, as in the instant protest, the agency filed a request for dismissal prior to the agency report due date, to which the protester was required to respond. See *Southern Aire* at 1-2. We nevertheless concluded in *Southern Aire* that the agency did not unduly delay taking corrective action when it took corrective action prior to our Office reestablishing a due date for the agency report. *Id.* at 2-4. Consistent with this, our decision to recommend reimbursement to Amaze here is not based on the need for Amaze to respond to the

GAO-18-510SP (10th ed. 2018), at 13-22 (describing our bid protest process after a protest is filed). Accordingly, our general practice regarding corrective action taken prior to the due date for the agency report is a useful guide for assessing whether the agency has caused the protester to expend unnecessary time and resources. However, as this protest demonstrates, there may be rare circumstances in which the agency's delay in taking corrective action requires a protester to make further use of the protest process in order to obtain relief and causes the protester to incur unnecessary effort and expense in pursuing its remedies before our Office, even where no agency report is filed. See *Southern Aire*, *supra* at 3; *East Coast Nuclear Pharmacy*, *supra* at 5.

Here, on July 9, 2021, our Office informed the parties that we intended to seek SBA's input and to require the parties to respond to SBA's comments. GAO Notice, July 9, 2021, at 1. On July 15, 2021, our Office sought SBA's input, and informed the parties of the schedule for future briefing. GAO Notice, July 15, 2021, at 1. Our notice invited the parties to inform us whether they believed any further submissions were required for our Office to make its decision. See *id.* At this point, the agency was firmly on notice that SBA would file its comments by July 26, 2021, and that the protester would be required to respond to those comments by August 5. The agency was also on notice that, absent request by the parties to present further information, our Office could consider the protest record fully developed and render our decision based on the SBA comments and the parties' responses alone. Of note, all of this briefing was set to occur after the initial due date for the agency report, which was July 19, 2021, and over a month after the agency had already received SBA's June 22 comments in the InfoPoint protest, which raised the same issue. See Acknowledgement of Protest and Notice of Protective Order at 1; SBA Comments, B-419856, June 22, 2021.

While our Office never received a formal agency report or comments on an agency report, we find that the protest record here was fully developed after the parties responded to the SBA's comments on August 5. Despite this, the agency did not indicate an intent to take corrective action until September 1, 2022, which was 76 days after Amaze filed its protest and nearly four weeks after the record was fully developed.

This timeline does not demonstrate that the agency took appropriate and prompt steps to investigate and resolve the issue of whether the solicitation violated the 2020 NDAA, which was apparent from the text of the solicitation and the statute. See *Chase Supply*, *supra* at 8. And, other than its reliance on the argument that it took corrective action prior to the reestablishment of a due date for the agency report, the agency does not explain why its corrective action should be considered prompt under these distinct conditions.

Given the unique circumstances of this protest, and given the clear merit of Amaze's protest as discussed above, we conclude that the agency's decision to delay corrective

agency's request for dismissal, but, as discussed below, on the agency's delay in taking corrective action until after the protest record was fully developed through SBA's comments and the parties' responses to those comments--a circumstance not present in *Southern Aire*.

action until after Amaze had reviewed and responded to the SBA comments caused Amaze to “expend unnecessary time and resources to make further use of the protest process in order to obtain relief” and to “incur unnecessary effort and expense in pursuing its remedies before our Office.” *Southern Aire, supra* at 3; *East Coast Nuclear Pharmacy, supra* at 5. Therefore, notwithstanding the fact that our Office never reinstated the agency report deadline, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.⁵

RECOMMENDATION

We recommend that the Air Force reimburse the protester its reasonable costs of filing and pursuing its protest, including attorneys’ fees. The protester should submit its claim for costs associated with the protest, detailing and certifying the time expended and costs incurred, directly to the Air Force within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The request is granted.

Edda Emmanuelli Perez
General Counsel

⁵ While our Office recommends reimbursement here, we note that we do not do so on the basis of the *Louisiana Clearwater* exception, which is not applicable. In *Louisiana Clearwater*, we recommended reimbursement of a protester’s costs associated with two protests where the agency’s corrective action in response to the first protest failed to address the meritorious issues, which necessitated the protester’s filing of the second protest. See *Louisiana Clearwater, supra* at 5-6. Thus, *Louisiana Clearwater* applies only where an agency’s failure to take appropriate corrective action in response to one clearly meritorious protest forces the protester to file a second protest. That situation is not present here.