



Decision

Matter of: NextStep Technology, Inc.--Costs

File: B-421743.2

Date: August 16, 2024

Laurence L. Socci, Esq., The Socci Law Firm, PLLC, for the protester.
Michael L. Hoyle, Esq., Debra J. Talley, Esq., and Jennifer Janulewicz, Esq.,
Department of the Army, for the agency.
Thomas J. Warren, Esq., and Alexander O. Levine, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for recommendation that agency reimburse protester's costs associated with filing and pursuing its bid protest is dismissed as untimely where the request was submitted to the agency, and not GAO, more than seven weeks after GAO dismissed the protest following the agency's corrective action.

DECISION

NextStep Technology, Inc., a small business of Springfield, Virginia, requests that our Office recommend the firm be reimbursed the reasonable costs of filing and pursuing its protest. NextStep challenged the issuance of a task order to Gemini Industries, Inc., of Burlington, Massachusetts, under task order request for proposals (RFP) No. W15QKN-23-R-0STC, issued by the Department of the Army, U.S. Army Materiel Command, for programmatic support services.

We dismiss the request as untimely.

BACKGROUND

The agency first issued the RFP on January 19, 2023, seeking proposals for a task order under the General Service Administration's One Acquisition Solution for Integrated Services governmentwide acquisition contract to provide programmatic support services for the Deputy Assistant Secretary of the Army, Data, Engineering and

Software. RFP § A.¹ The RFP anticipated the issuance of a task order with fixed-price and cost-reimbursement line items to be competed in accordance with the fair opportunity ordering regulations in Federal Acquisition Regulation section 16.505. *Id.*

On March 12, the agency issued the task order to Gemini. On June 12, NextStep filed a protest with our Office challenging several aspects of the Army's cost realism analysis and evaluation of NextStep's technical proposal. Agency Report (AR), Tab 25, Protest at 3.²

On August 31, the GAO attorney assigned to the protest conducted a conference call with the parties to provide outcome prediction alternative dispute resolution.³ *NextStep Tech., Inc.*, B-421743, Sep. 5, 2023 (unpublished decision). During this call, the GAO attorney indicated that our Office would likely sustain NextStep's protest based on the protester's challenge to the agency's evaluation under the corporate experience factor.

Following this conference call, the Army notified our Office that it intended to take corrective action by terminating the award to Gemini, cancelling the RFP, and reviewing the agency's current requirements. AR, Tab 2, Corrective Action Notice. Based on this proposed corrective action, the Army requested the dismissal of NextStep's protest as academic. *Id.* In response, the protester objected to the basis of the Army's dismissal request and asked our Office to include a recommendation for the Army to pay NextStep its reasonable costs of filing and pursuing its protest. AR, Tab 24, Opposition to Dismissal Req.

On September 5, our Office dismissed NextStep's protest as academic based on the agency's decision to terminate the award and cancel the solicitation. *NextStep Tech. Inc., supra*. In the decision, our Office noted that if the protester wished to challenge the propriety of the Army's cancellation of the solicitation, it "may file a new protest in the Electronic Protest Docketing System consistent with our Bid Protest Regulations." *Id.*

¹ The RFP was amended five times, the last of which was on March 8, 2023. All citations to the RFP are to the conformed copy of the RFP following amendment 5, which was provided as tab 8 in the agency report submitted in response to the initial protest.

² All references to the AR, unless otherwise noted, refer to the agency report submitted following the request for a recommendation for reimbursement filed with our Office on April 15, 2024.

³ In an outcome prediction alternative dispute resolution conference, the GAO attorney assigned to the protest will inform the parties as to his or her views regarding whether the protest is likely to be sustained or denied. See 4 C.F.R. § 21.10(e); *First Coast Serv. Options, Inc.*, B-409295.4, B-409295.5, Jan. 8, 2015, 2015 CPD ¶ 33 at 3. The purpose of outcome prediction conferences is to facilitate the resolution of a protest without a formal decision on the merits by our Office. See *id.*

at 1 n.1. Additionally, our Office declined to issue a recommendation for the Army to pay the protester's reasonable costs of filing and pursuing the protest. *Id.* at 2. We noted, however, that should there be a dispute about whether the agency would agree to reimburse NextStep for its reasonable protests costs, then, under 4 C.F.R. § 21.8(e), "the protester may separately file a request for a recommendation on the reimbursement of costs in accordance with our Bid Protest Regulations."⁴ *Id.* at 2.

More than seven weeks later, on October 27, NextStep submitted a letter and associated invoices directly to the Army entitled "Request for a Recommendation of Reimbursement of Reasonable Costs," and stated that its request for reimbursement was made in accordance with 4 C.F.R. § 21.8(e). AR, Tab 7, Req. for Reimbursement, Oct. 27, 2023.

Over the next several months, counsel for NextStep and counsel for the Army corresponded numerous times, arguing about various alleged procedural and factual infirmities the Army identified in the protester's request for reimbursement. *See, e.g.*, AR, Tabs 10-11 (disputing, among other things, whether NextStep had submitted sufficient justification of its claimed costs or followed correct procedures).

Ultimately, on April 5, 2024, the Army's contracting officer issued a "final determination" denying NextStep's request for reimbursement on the basis that NextStep had never submitted a certified claim for reimbursement or provided adequate documentation in support of its October 27 request. AR, Tab 4, Final Agency Decision. In this decision, the contracting officer also informed NextStep that it had been required to submit a certified request supported by adequate documentation "within 60 days of GAO's decision on the protest matter," and since NextStep had failed to meet that deadline, which would have been November 6, any request now would be untimely. *Id.* at 2.

On April 15, NextStep filed a request for a recommendation for the reimbursement of costs with our Office, attaching the October 27 letter and associated invoices it had previously submitted to the Army. The requester asked our Office to "review the [Army's] determination" and "recommend approval of the external expenses of the protest in the amount of \$19,514.53." Req. for Costs at 1. NextStep noted that it first filed its request for reimbursement with the Army but that the Army had rejected that request because it was "untimely." *Id.*

⁴ The awarded value of the task order at issue exceeded \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under civilian-agency, indefinite-delivery indefinity-quantity contracts awarded under the authority of title 41 of the United States Code. 41 U.S.C. § 4106(f)(1)(B); *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 3-5.

DISCUSSION

NextStep requests that our Office recommend that the Army reimburse the requester's costs associated with filing and pursuing its bid protest after our Office dismissed its protest following notice of the Army's corrective action. Req. for Costs.

The Army responds that NextStep's October 27 request is untimely because its initial request for reimbursement was filed directly with the Army--and not GAO, and, in any event, was not filed with GAO within 15 days after the date the protester learned that GAO had closed the protest. Resp. to Req. for Costs at 2, 6-8. The Army asserts that to meet GAO's timeliness rules for requesting a recommendation for reimbursement under 4 C.F.R. § 21.8(e), NextStep should have submitted its request within 15 days directly to GAO (and not the Army) which, according to the agency, would have been by September 20, 2023; any request submitted to GAO after that date is untimely and should be dismissed. *Id.* at 6-8. In the alternative, the Army asserts that NextStep's submission of its claimed costs directly to the Army is premature. *Id.* at 11. The agency contends that GAO's rules on requests for reimbursement contemplate a recommendation from GAO before the invocation of any procedures under 4 C.F.R. § 21.8(f) designed to resolve disagreement between the parties about the reasonable amount of costs incurred. *Id.* at 8-9.

In response, NextStep does not contend that its October 27 submission to the Army met GAO's timeliness rules under 4 C.F.R. § 21.8(e). In fact, NextStep "concedes that the original filing was not within the time allotted[.]" Reply to Response at 3. NextStep argues, however, that the Army had a responsibility to inform NextStep that the request was filed with the wrong entity at the time it was received by the Army, on October 27. Further, NextStep asserts that by engaging in correspondence with NextStep after receipt of the October 27 letter, the Army gave NextStep the impression that it had followed the correct procedures, causing NextStep to incur additional time and expense in furtherance of its attempt to seek reimbursement. *Id.* at 2-3.

Under our Bid Protest Regulations, if an agency decides to take corrective action in response to a protest, our Office may recommend, if appropriate, that the agency pay the protester its reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. 4 C.F.R. § 21.8(e). If our Office does not make this recommendation when dismissing a protest, our regulations permit a protester to file a request that GAO recommend that costs be paid. *Id.* However, our regulations require that this request be filed not later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. *Id.*⁵

⁵ The procedural step of requesting a recommendation for the reimbursement of costs is critical because the mere fact that an agency decides to take corrective action does not, by itself, establish that a statute or regulation clearly has been violated or that a protester is entitled to protest costs. See *AAR Aircraft Servs.--Costs*, B-291670.6,

(continued...)

Here, it is clear from the record that NextStep did not comply with our regulations and the strict regulatory timelines associated with filing a request for a recommendation for the reimbursement of costs. In this regard, following a decision where GAO has not recommended reimbursement in the decision, a protester must first timely file a request for a recommendation for the reimbursement of costs with GAO under the procedures outlined in 4 C.F.R § 21.8(e).⁶ See *Amaze Techs., LLC--Costs*, *supra* at 4 (dismissing untimely request for reimbursement when not filed within 15 days of the dismissal of the underlying protest as academic). If GAO then recommends that the agency pay costs, the protester may then proceed by following the procedures outlined in 4 C.F.R § 21.8(f), which require a protester to file a claim directly with the agency, detailing and certifying the time expended and costs incurred, within 60 days after receipt of GAO's recommendation that the agency reimburse the protester its costs.

The requester here skipped past the threshold requirement to obtain GAO's recommendation under 4 C.F.R § 21.8(e); instead, the requester submitted its request for costs and supporting invoices directly to the Army. See *Req. for Reimbursement*, Oct. 27, 2023. Nevertheless, despite the requester's efforts to seek reimbursement, we agree with the Army that NextStep's request here is untimely and must be dismissed.

As noted above, our regulations require that the protester's request for a recommendation for the reimbursement of costs be filed with our Office no later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. 4 C.F.R § 21.8(e). 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.

Our Office dismissed NextStep's initial protest on September 5, 2023, but NextStep did not file any request for reimbursement until 52 days later, on October 27. Additionally,

May 12, 2003, 2003 CPD ¶ 100 at 6. Rather, as a prerequisite to our issuing a recommendation for the reimbursement of costs following an agency's corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious; that is, not a close question. *Hanford Tank Closure Co., LLC--Costs*, B-418778.9, Nov. 16, 2020, 2020 CPD ¶ 380 at 5. Our Office determines that a protest allegation is clearly meritorious based on the record presented and the individual circumstances of the case. *Id.* Additionally, we only recommend reimbursement of protest costs in instances where the agency has unduly delayed taking corrective action in the face of a clearly meritorious protest. *Amaze Techs., LLC--Costs*, B-419810.4, Dec. 1, 2021, 2021 CPD ¶ 330 at 4 n.7.

⁶ We note that the requester has not asserted that the agency agreed to pay NextStep its reasonable protest costs. Accordingly, this decision does not involve a dispute, on the amount of costs to be paid, occurring after the agency has agreed to pay the requester its reasonable protest costs.

NextStep filed its initial request with the Army and not GAO. Indeed, NextStep did not file its request for a recommendation for reimbursement directly with GAO until April 15, 2024--over seven months after the date on which NextStep learned that GAO had closed its initial protest based on the agency's decision to take corrective action. Because NextStep filed its request for a recommendation for the reimbursement of costs more than 15 days after it learned of the closure of its earlier protest following the Army's corrective action, it is untimely. 4 C.F.R § 21.8(e); *Amaze Techs., LLC--Costs, supra*, at 4.

Although it concedes that its October 27 reimbursement request was "not within the time allotted," Reply to Response at 3, NextStep maintains that its request to our Office should not be dismissed because the Army engaged with NextStep after October 27 as if NextStep had followed the correct procedure for requesting the reimbursement of costs.

We do not agree. Our regulations contain strict rules for the timely submission of protests, comments, and requests for reconsideration or for a recommendation of reimbursement of costs. *HEJV Energetics Joint Venture, LLC--Costs*, B-413104.39, Aug. 5, 2019, 2019 CPD ¶ 286 at 4. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4.

Here, it is undisputed that NextStep's communications with the Army about its reimbursement request took place after October 27, which is more than 52 days following the date that our Office dismissed NextStep's protest.⁷ By October 27, any request by NextStep would have already been untimely under our regulations, so any subsequent communications between NextStep and the Army has no bearing on a resolution by our Office of a request for reimbursement given the lack of a timely request to our Office under 4 C.F.R § 21.8(e).

The request is dismissed.

Edda Emmanuelli Perez
General Counsel

⁷ We note that our decision directed the protester to file a request for a recommendation on the reimbursement of costs pursuant to 4 C.F.R. § 21.8(e) if there was a dispute about whether the agency would pay NextStep its reasonable protest costs. *NextStep Tech., Inc., supra* at 2.