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Decision

Matter of: Piraeus International, Inc.--Costs

File: B-420363.3

Date: April 11, 2022

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Kathleen D. Martin, Esq., Department of State, for the agency.
Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Request that GAO recommend reimbursement of protest costs is granted where the initial protest arguments challenging the evaluation of the technical acceptability of the awardee's quotation were clearly meritorious because a reasonable inquiry by the agency would have revealed facts showing the absence of a defensible legal position, and where the agency unduly delayed taking corrective action.
2. Request that GAO recommend reimbursement of protest costs is denied where the requester's arguments that the solicitation required the agency to evaluate price realism were not clearly meritorious.
3. Request that GAO recommend reimbursement of protest costs is denied where the requester's arguments challenging the terms of the solicitation were dismissed as untimely. The fact that the agency subsequently took corrective action that, in effect, granted the relief sought by the requester, does not provide a basis for our Office to recommend reimbursement of costs.

DECISION

Piraeus International, Inc., of Baltimore, Maryland, requests that our Office recommend that the Department of State (DOS) reimburse its reasonable costs of filing and pursuing its protest (B-420363, B-420363.2) challenging the award of a contract to Export 220Volt Inc., of Houston, Texas, under request for quotations (RFQ) No. 19BE1021Q5000, which was issued by DOS for household appliances. Piraeus argues that the agency unduly delayed taking corrective action in response to what the requester contends were clearly meritorious challenges to the agency's evaluation of

Export 220's technical quotation, the evaluation of the awardee's price, and the terms of the solicitation.

We grant in part and deny in part the request.

BACKGROUND

DOS's European Logistical Support Office maintains an Expedited Logistics Program (ELP), through which various commercial items are stored for rapid deployment to various posts in Africa, Europe, and the Middle East. Contracting Officer's Statement (COS) at 1. The agency issued the solicitation on October 12, 2021, seeking quotations to provide 220volt/50hertz household electrical appliances to replenish depleted stocks of ELP inventory.¹ Agency Report (AR), Tab 1, RFQ at 3.

The agency issued the solicitation through the Unison Marketplace website, and required vendors to submit quotations through that website.² COS at 1. The solicitation was set aside for small businesses and was issued under the commercial item and simplified acquisition procedures of Federal Acquisition Regulation (FAR) parts 12 and 13. COS at 2; AR, Tab 2, Buy Details Document at 1-2. The solicitation anticipated the award of a fixed-price contract. RFQ at 3.

The RFQ included FAR provision 52.212-2(a), Evaluation-Commercial Items, but did not specify the basis upon which quotations would be evaluated. *Id.* at 32. The evaluation criteria and basis for award were identified in the Unison Buy Details document, which advised that the agency would "select for award the one responsible quote which conforms to the Bidding Requirements and Buy Terms in the auction, proposes a price that is fair and reasonable, and provides the Lowest Priced, Technically Acceptable (LPTA) quote meeting the specifications of the requirement." AR, Tab 2, Buy Details Document, at 2.

The solicitation identified eight brand-name household appliances, and specified quantities for each product. *Id.* Vendors were permitted to quote either the brand-name appliance or its equal, based on a list of minimum technical specifications for each brand-name appliance. AR, Tab 3, Technical Specifications, at 1-6.

¹ Although the solicitation was issued as an RFQ, the record and the parties' briefing refer interchangeably to bids, proposals, and quotations, and to bidders, offerors, and vendors. We use the terms quotation and vendor for the sake of consistency. As discussed below, we refer to the following two documents, collectively, as the solicitation: (1) the RFQ at Tab 1 of the agency report, and (2) the Buy Details Document, at Tab 2 of the agency report.

² Unison Marketplace, formerly known as FedBid, Inc., is a commercial online procurement services provider that operates a website to support federal procurements. Unison Website, www.unisonglobal.com/product-suites/acquisition/marketplace/ (last visited Apr. 1, 2022).

As relevant here, the solicitation also required vendors to be an authorized reseller or distributor of the quoted appliances:

Manufacturer Authorized Reseller/Distributor: To be considered for award, all Sellers must be manufacturer federally authorized distributors/resellers of the equipment/services they are offering with a demonstrated capability of delivering the entire order within the timeframes specified by the Buyer on the award. Sellers shall be required to provide documentation as proof of authorization to be considered for award.

AR, Tab 2, Buy Details Document at 3.

The agency received 13 quotations through the Unison website. COS at 1. Export 220 submitted the lowest-priced quotation of \$977,833, as well as an alternate quotation with the second-lowest price of \$1,007,927. *Id.* at 11. Piraeus submitted the third-lowest-priced quotation of \$1,132,908. *Id.* The agency found that Export 220's low-priced quotation was technically acceptable, and awarded the contract to that firm on November 5. *Id.* at 1, 6-8.

Piraeus filed a protest with our Office on November 15, challenging the award of the contract to Export 220. The requester raised four primary arguments: (1) for three of the appliances, Export 220 could not have quoted products that satisfied the minimum solicitation requirements; (2) the agency failed to determine whether Export 220 was an authorized reseller/distributor, as required by the solicitation; (3) the agency failed to evaluate the realism of the awardee's quoted price; and (4) the solicitation was defective because it did not include FAR clause 52.219-33, Nonmanufacturer Rule. Protest at 1-3.

Prior to the due date for the agency report, DOS filed two requests for dismissal of the protest. First, DOS argued that Piraeus's challenge to the terms of the solicitation concerning FAR clause 52.219-33 was untimely because it was filed after the time for receipt of quotations. 1st Req. for Dismissal at 3-4. Second, DOS argued that the requester was not an interested party to challenge the award to Export 220 because although the agency did not evaluate Piraeus's quotation prior to the filing of the protest, the agency contends that it would have rejected the quotation as unacceptable because the requester did not quote a fixed price as required, and instead placed an improper condition on its price with respect to the delivery terms. 2nd Req. for Dismissal at 2-5. Our Office provided Piraeus an opportunity to respond to both requests for dismissal in a consolidated filing.

Our Office granted the agency's request to dismiss the requester's challenge to the terms of the solicitation. GAO Response to Req. for Dismissal, Electronic Protest Docketing System (Dkt.) 17 at 1. We agreed with the agency that the argument was not timely because, as the requester conceded, it challenged the terms of the solicitation

after the time for receipt of initial quotations. *Id.* at 1. We rejected the requester's request that we consider the argument under the significant issue exception to the timeliness rules of our Bid Protest Regulations because it concerned a matter that had been addressed in prior decisions.³ *Id.* at 1-2.

We denied the agency's request to dismiss the protest for lack of interested party status, finding that the agency's argument that Piraeus's quotation did not include a fixed price as required was a disputed matter to be resolved on the merits based on a review of the record. *Id.* at 2. We further explained that dismissal was not appropriate because the agency's request for dismissal did not address whether there were other vendors that would be in line for award if the awardee's and requester's quotations were found unacceptable. *Id.*

On December 16, DOS filed its report responding to the protest. On December 27, Piraeus filed its comments on the agency's report and the following two supplemental protest arguments: (1) the agency improperly evaluated appliances identified in Export 220's quotation that did not meet the minimum solicitation requirements, including additional products not challenged in the initial protest; and (2) the awardee misrepresented that it was an authorized reseller/distributor of the appliances it quoted. Comments & Supp. Protest at 13-17.

On December 30, prior to filing its report responding to the supplemental protest, DOS advised our Office that it would take corrective action. The agency stated that it would cancel the award and cancel or revise the solicitation, as follows:

The scope of the corrective action will include rescinding the award and either amending or cancelling the Solicitation depending on the existing needs of the Department. A Solicitation amendment would include specific evaluation criteria and updated clauses including FAR 52.219-33 if deemed required and appropriate. The Department is reconsidering its acquisition due to supply chain issue[s] and may determine that cancellation of the Solicitation in its entirety is required.

Notice of Corrective Action at 1.

³ Our Bid Protest Regulations provide that "[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals." 4 C.F.R. § 21.2(a)(1). Our regulations provide that we may consider an untimely protest that "raises issues significant to the procurement system." 4 C.F.R. § 21.2(c). In order to prevent our timeliness rules from becoming meaningless, this exception is strictly construed and rarely used. *Vetterra, LLC*, B-417991 *et al.*, Dec. 29, 2019, 2020 CPD ¶ 15 at 3. We generally regard a significant issue as one of widespread interest to the procurement community that has not been considered on the merits in a prior decision. *Baldt Inc.*, B-402596.3, June 10, 2010, 2010 CPD ¶ 139 at 2-3.

Based on the agency's notice of corrective action, we found that the protest was rendered academic and therefore dismissed it. *Piraeus Int'l, Inc.*, B-420363, B-420363.2, Jan. 5, 2022 at 1 (unpublished decision). This request followed.

DISCUSSION

Piraeus requests that we recommend that DOS reimburse Piraeus its costs of filing and pursuing its protest in connection with the following three primary arguments: (1) the agency should have found Export 220's quotation technically unacceptable because it included appliances that did not meet the solicitation's minimum requirements, and the awardee misrepresented its status as an authorized reseller/distributor of the quoted appliances; (2) the solicitation required the agency to evaluate the realism of vendors' quoted prices, and the agency failed to do so; and (3) the solicitation was defective because it did not include FAR clause 52.219-33, Nonmanufacturer Rule. Request at 4-6. DOS contends that reimbursement is not warranted because the agency took prompt corrective action in response to arguments concerning the acceptability of Export 220's quoted products that were first identified in Piraeus's comments and supplemental protest, and because none of the initial protest arguments were clearly meritorious. Agency Response at 2-9.

We agree with the requester that its arguments regarding the agency's evaluation of the technical acceptability of the awardee's quotation were clearly meritorious and that the agency did not take prompt corrective action. We agree with the agency, however, that the other arguments were not clearly meritorious, and that they are severable from the arguments that merit a recommendation for reimbursement.

When an agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs if, based on the record, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 4 C.F.R. § 21.8(e); *AAR Aircraft Servs.--Costs*, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 5-6. As a general rule, as long as an agency takes corrective action in response to a protest by the due date of the agency report, we regard such action as prompt and will not grant a request to recommend reimbursement of costs. *Alsalam Aircraft Co.--Costs*, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 3.

A protest is clearly meritorious where it is not a "close question," e.g., where a reasonable inquiry by the agency into the protest allegations would have revealed facts showing the absence of a defensible legal position. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3; *First Fed. Corp.--Costs*, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2. The fact that an agency decides to take corrective action does not necessarily establish that the protest was clearly meritorious, i.e., that the agency did not have a defensible legal position. *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 3.

Generally, a successful protester should be reimbursed its incurred costs with respect to all the issues pursued, not merely those upon which it has prevailed. *The Salvation Army Cmty. Corr. Program--Costs*, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. In appropriate cases, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. *Burns & Roe Servs. Corp.--Costs*, B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81 at 3. In making this determination, we consider, among other things, the extent to which the claims are interrelated or intertwined, e.g., whether the successful and unsuccessful claims share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. See *Sodexho Mgmt., Inc.--Costs*, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29.

As a preliminary matter, we note that DOS's responses to the protest and the request for reimbursement distinguished between what it argued were the terms of the "solicitation" contained in Standard Form (SF) 33, provided at Tab 1 of the agency report, and "prepopulated . . . generic terms" in the Buy Details document on the Unison website through which the solicitation was issued, provided at Tab 2 of the agency report. Memorandum of Law (MOL) at 19; see also Agency Response at 4 n.3. To the extent the agency argues that the basis for evaluation and award and other mandatory terms and conditions identified in the Unison Buy Details document were not solicitation terms, we disagree.

Our Office has explained that where an agency uses a third party to conduct a procurement on its behalf, that third party acts as an agent for the agency conducting the procurement. *Latvian Connection, LLC*, B-410947, Mar. 31, 2015, 2015 CPD ¶ 117 at 4; *AeroSage LLC*, B-409627, July 2, 2014, 2014 CPD ¶ 192 at 4. As noted above, the SF 33 document that the agency refers to as the RFQ incorporated FAR provision 52.212-2, Evaluation-Commercial Items, but did not include any evaluation criteria or explain the basis on which the agency would award the contract. RFQ at 32. Instead, the Unison Buy Details document identified the basis upon which the agency would evaluate quotations and make award--including the evaluation criteria cited by Piraeus in its protest.⁴ AR, Tab 2, Buy Sheet Document at 2. Under these circumstances, we find that the terms of the Buy Details document were terms of the solicitation.

Technical Acceptability

Piraeus's initial protest argued that DOS unreasonably found Export 220's quotation technically acceptable with respect to the appliances quoted and the awardee's status as an authorized distributor/reseller of those products. Protest at 10-12. We agree with

⁴ Similarly, although DOS states that the solicitation was set aside for small businesses, the SF 33 document did not state the procurement was set aside; rather, the Buy Document stated that the procurement was set aside for small businesses. See COS at 2; RFQ at 1, 8-9; AR, Tab 2, Buy Details Document at 1-2.

the requester that its initial protest was clearly meritorious concerning one of the appliances quoted by the awardee, and that the agency failed to take timely corrective action in response to this argument.

As discussed above, the solicitation required vendors to quote brand name or equivalent household appliances that met the specified minimum technical requirements. AR, Tab 2, Buy Details Document at 2; Tab 3, Technical Specifications at 1-6. The solicitation also required vendors to be authorized resellers or distributors of the quoted appliances. Buy Details Document at 3.

Piraeus initially argued that, based on its review of Export 220's website and other market research, the awardee could not have quoted the following brand-name products or equivalents required by the solicitation: (1) Arctic King upright freezer, model AFND21A4W; (2) Whirlpool electric range, model 4KWFE7685EW; and (3) a 50-gallon electric water heater that met the minimum requirements, which the requester represented could only be satisfied by State model ES652DOCTU. Protest at 10-12. The requester also argued that, based on its review of the awardee's website and the requester's knowledge of the awardee's "known trade partnerships," Export 220 was not an authorized distributor/reseller of appliances that would meet the brand name or equivalent requirements of the solicitation. *Id.* at 12.

DOS's response to the protest explained that the agency reviewed the products quoted by Export 220 and found that they all met the solicitation's minimum requirements. COS at 11. The technical evaluation provided by the agency in the agency report consisted of the following statement in an email from an agency representative responding to a request by the contracting officer to review Export 220's quotation: "I looked at all the appliances and they all look good to me." AR, Tab 8, Email from Agency Systems Manager to Contracting Officer, Oct. 25, 2021, at 1.⁵ The contracting officer also states that he reviewed the awardee's quotation and found that the appliances met the minimum requirements. COS at 11. The contracting officer's statement responding to the protest included excerpts copied from the awardee's quotation, detailing a "crosswalk" between the solicitation's minimum requirements and the specifications of the quoted upright freezer, electric range, and electric water heater. COS at 12-15.

With regard to the requester's challenge to the awardee's status as an authorized distributor/reseller, the agency noted that neither Piraeus's nor Export 220's quotations provided information concerning their relationships with manufacturers. COS at 6. As discussed above, the solicitation stated that vendors must be "authorized distributors/resellers of the equipment/services they are offering," and that "[s]ellers shall be required to provide documentation as proof of authorization to be considered for award." AR, Tab 2, Buy Details Document, at 3. The contracting officer stated that he interpreted these solicitation terms to require "self-certification" of a vendor's reseller

⁵ Aside from this email, the agency did not provide any other documents detailing the evaluation or a formal award decision.

status, and that submission of a quotation was sufficient to establish self-certification. COS at 6-7.

Although the agency argued that submission of a quotation was sufficient to satisfy what it characterized as the solicitation's self-certification requirement, in response to the protest the contracting officer also "requested that Export 220 submit confirmation of its authorized re-seller status." *Id.* at 7. The agency received and provided in the agency report letters from manufacturers to Export 220, all of which were dated after the award and the filing of the protest. AR, Tab 9, Export 220 Reseller Letters at 1-10. The contracting officer stated that these letters confirmed that Export 220 was an authorized reseller/distributor. COS at 7.

Piraeus's comments and supplemental protest argued that the record confirmed that Export 220's quotation included a 50-gallon water heater that did not meet the minimum specifications because it offered a temperature range of 90 to 150 degrees Fahrenheit, rather than the 90 to 160 degree range required by the solicitation. Comments & Supp. Protest at 7. The requester also raised supplemental arguments that the awardee's quotation included three additional appliances that did not meet the solicitation's minimum requirements: (1) a refrigerator/freezer that was a different color; (2) a clothes washer that did not have the required number of speeds and water levels; and (3) a stacked washer/dryer that did not have the required electrical plug. *Id.* at 16-17. The requester further argued that the letters provided by Export 220 to the contracting officer after award and the filing of the protest did not establish that the awardee was an authorized distributor/reseller of the appliances identified in its quotation. *Id.* at 9-11, 13-15.

We first address Piraeus's arguments concerning the acceptability of appliances quoted by Export 220. In response to the request for reimbursement, DOS first argues that the requester's initial protest arguments were speculative because they were not based on actual knowledge of the awardee's quotation, and therefore did not state valid bases of protest. Agency Response at 3; see MOL at 8-10. In light of its position that the arguments should have been dismissed, the agency contends that it had a reasonable basis to defend against the protest rather than take corrective action. *Id.* at 3-4. Next, the agency argues that it first became aware through the comments and supplemental protest of the requester's allegations that some of the appliances quoted by Export 220 did not meet the minimum solicitation requirements. *Id.* at 7-8. The agency argues that reimbursement is not warranted because it took prompt corrective action in response to the supplemental arguments. *Id.*

We conclude that Piraeus's arguments concerning the acceptability of the appliances quoted by the awardee were raised in the initial protest, and that the arguments were clearly meritorious. At their core, the requester argued that DOS could not have reasonably found Export 220's quotation technically acceptable. See Protest at 10-12. The requester specifically identified three appliances and argued that the awardee could not have quoted those name brand products or their equivalents. *Id.* at 10-11. The contracting officer's response to the protest addressed those arguments on the merits,

and included excerpts copied from the awardee's quotation detailing the specifications of the quoted upright freezer, electric range, and electric water heater. COS at 12-15. As relevant here, the excerpt of the awardee's quotation concerning the electric water heater included in the contracting officer's statement clearly showed that the water heater offers a temperature range of 90 to 150 degrees Fahrenheit, rather than the 90 to 160 degree range required by the solicitation. *Id.* at 15; AR, Tab 3, Technical Specifications at 6; Tab 6, Export 220 Quotation at 8. The agency does not dispute that the electric water heater does not satisfy the minimum requirements. See Agency Response at 7.

On this record, we find that a reasonable inquiry by DOS into the challenges initially raised in the protest should have included a review of the awardee's quotation and the agency's evaluation, and that such an inquiry should have identified the deficiency with the quoted electric water heater. We therefore conclude that the protester's argument that the agency should have found the awardee's quotation technically unacceptable, based on the appliances quoted, was clearly meritorious. See *CW Gov't Travel, Inc.--Costs*, B-419193.3, May 6, 2021, 2021 CPD ¶ 213 at 7. Because the agency did not take corrective action until after Piraeus filed its comments and supplemental protest, we also find that the corrective action was unduly delayed. We therefore recommend the agency reimburse Piraeus's costs for pursuing this protest issue.

With regard to the requester's argument concerning Export 220's status as an authorized reseller/distributor, we think that it addresses the same issue raised in the requester's challenge to the agency's evaluation of the quoted appliances, that is, whether the awardee's quotation was technically acceptable. Because we find that the challenges to the evaluation of the products quoted by Export 220 and the awardee's status as an authorized reseller/distributor both address the same issue of technical acceptability, we need not separately address whether the requester's argument concerning the reseller relationship was clearly meritorious.⁶ We therefore also recommend that the agency reimburse Piraeus's challenge regarding Export 220's status as an authorized reseller/distributor. See *The Salvation Army Cmty. Corr. Program--Costs*, *supra* (a successful protester should be reimbursed its incurred costs with respect to all the issues pursued, not merely those upon which it has prevailed).

Price Realism

Next, Piraeus argued in its initial protest that the solicitation required the agency to conduct a price realism analysis, and that the agency failed to do so. Protest at 12-13. We agree with the agency that the solicitation did not require a price realism analysis, and that the requester's arguments were therefore not clearly meritorious.

⁶ We note, however, that Piraeus's protest and comments did not clearly explain how it could have been prejudiced by the awardee's failure to provide documentation that it was an authorized distributor/reseller when the requester's quotation also did not provide this information.

When awarding a fixed-price contract, an agency is generally only required to determine whether the offered prices are fair and reasonable. FAR 15.402(a). An agency may, however, conduct a price realism analysis in awarding a fixed-price contract for the limited purpose of assessing whether an offeror's or vendor's low price reflects a lack of technical understanding or performance risk. *Id.*, FAR 15.404-1(d)(3); *Emergint Techs., Inc.*, B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. Even where a solicitation does not expressly require a price realism evaluation, we will conclude that such an evaluation is required where the solicitation states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and advises offerors or vendors that the agency could reject proposals or quotations, or assign technical risk based on this evaluation. *DynCorp Int'l LLC*, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9; *GlobalOpal, LLC*, B-408414.7, B-408414.8, Mar. 19, 2014, 2014 CPD ¶ 140 at 4.

Here, the solicitation stated that “[q]uotes determined to be incomplete, unreasonable, or unrealistic will not be considered for award.” AR, Tab 2, Buy Details Document at 2. Piraeus argued that this provision required the agency to conduct a price realism analysis, and that the agency failed to assess whether Export 220's price was realistic to perform the work, *i.e.*, provide the quoted appliances. Protest at 12-13; Comments & Supp. Protest at 11-13.

We find that the solicitation did not expressly state that the agency would conduct a price realism analysis, and that the language quoted above did not obligate the agency to do so. In this regard, while the solicitation stated that unrealistic quotations would not be considered for award, it did not state that the term “unrealistic” applied to price, nor did it state that prices would be evaluated to assess whether they were so low as to pose risk concerning a vendor's understanding of the solicitation's technical requirements. On this record, we conclude that the requester's argument was not clearly meritorious, and therefore find no basis to recommend reimbursement of the requester's costs of filing and pursuing the protest in connection with this argument. We also find that the challenge to the evaluation of the awardee's price is severable from the requester's clearly meritorious challenge to the evaluation of the technical acceptability of the awardee's quotation, as the arguments rely on distinct legal and factual arguments. See *Hewlett Packard Enter. Co.--Costs*, B-413444.3, Mar. 3, 2017, 2017 CPD ¶ 85 at 9.

Untimely Solicitation Challenge

Next, Piraeus argued in its initial protest that the solicitation should have included FAR clause 52.219-33, Nonmanufacturer Rule. Protest at 1-3. The requester argued, in the alternative, that the agency should not have set aside the procurement for small businesses, and that the agency should cancel the solicitation and issue it on an unrestricted basis. *Id.* at 3.

The requester acknowledged that its challenge was untimely, but requested that we nonetheless consider the matter under our significant issue exception to our timeliness

rules. *Id.* at 2. As discussed above, we dismissed this argument as untimely because it challenged the terms of the solicitation after the time for submission of quotations, and also found that there was no basis to consider this argument under the significant issue exception. GAO Response to Req. for Dismissal, Dkt. 17 at 1-2.

Although we dismissed Piraeus's challenge as untimely, the agency's corrective action stated that, in the event the agency amended the solicitation, such an "amendment would include specific evaluation criteria and updated clauses including FAR 52.219-33 if deemed required and appropriate." Notice of Corrective Action at 1. Additionally, the requester notes that the agency issued a revised solicitation on January 26, 2022, on an unrestricted basis. Requester's Comments at 8. The requester argues that the agency's proposed corrective action and subsequent issuance of a revised solicitation demonstrate that its initial protest arguments were clearly meritorious and therefore merit a recommendation for reimbursement.

As our Office has explained, we will not recommend reimbursement of protest costs for arguments that were not timely raised.⁷ *Agile-Bot II, LLC--Costs*, B-418264.4, July 30, 2020, 2020 CPD ¶ 258 at 8-9. In this regard, our Office will recommend that an agency reimburse protest costs where the agency unduly delays taking corrective action in response to an argument that was clearly meritorious. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. In essence, a finding by our Office that an argument was clearly meritorious means that we would have sustained the protest had we issued a decision on the merits, and that such a decision would not have been a "close call." See *id.* A protest argument that was dismissed, therefore, cannot be viewed as clearly meritorious, because there is no possibility that our Office would have sustained a protest ground that was dismissed as untimely. For these reasons, we find no basis to recommend that the agency reimburse the requester's costs concerning its untimely challenge to the terms of the solicitation.

CONCLUSION AND RECOMMENDATION

In sum, we conclude that Piraeus's initial arguments that DOS improperly found Export 220's quotation to be technically acceptable were clearly meritorious and that the agency unduly delayed taking prompt corrective action in response to them. For these reasons, we recommend that DOS reimburse Piraeus's reasonable costs of filing and pursuing its protest, including attorneys' fees, with regard to its challenge to the technical acceptability of the awardee's quotation. Piraeus should file its claim for costs,

⁷ We also note that it is within an agency's discretion to take corrective action regardless of whether a protest was timely; all that is required is that the agency have reasonable concerns that errors in the procurement occurred. *Optimum Mgmt. Sys., LLC*, B-299322.3, May 23, 2007, 2007 CPD ¶ 106 at 3; *Jones Lang LaSalle Americas, Inc.*, B-406019.2, Feb. 14, 2012, 2012 CPD ¶ 98 at 4.

detailing and certifying the time expended and costs incurred, with the agency within 60 days of this recommendation. 4 C.F.R. § 21.8(f)(1).

The request is granted in part and denied in part.

Edda Emmanuelli Perez
General Counsel