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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Omega Systems, Inc.

**File:** B-298767

**Date:** November 6, 2006

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Tom W. Gilmore for the protester.

Raymond Fioravanti, General Dynamics C4 Systems, Inc., for the intervenor.

James B. McCloskey, Esq., U.S. Marine Corps, for the agency.

Peter D. Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protester's assertion that its proposal should be considered for award despite late final proposal revision (FPR) because it was "otherwise successful proposal that makes its terms more favorable to the government," is denied where record shows agency had determined prior to FPR request that protester's proposed price was not reasonable; protester's proposal thus was not "otherwise successful proposal."

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### DECISION

Omega Systems, Inc. protests the rejection of its proposal as late under request for proposals (RFP) No. M67854-06-R-7017, issued by the U.S. Marine Corps to design, integrate, produce and document the Tactical Data Network Data Distribution System-Replacement (TDN DDS-R) production model.

We deny the protest.

The RFP, issued on April 6, 2006, contemplated the award of a fixed-price contract to the firm submitting the proposal determined to be the "best value" under the following evaluation factors: technical, program management, past performance, and price. The technical factor contained a subfactor for integrated logistics support, under which proposals were to be evaluated for warranty performance, including warranty administration and claims procedures. The solicitation did not specify original equipment manufacturer (OEM) warranties, but the protester became aware that such warranties were in fact required.

The agency received initial proposals by April 27 and, after conducting discussions with Omega and General Dynamics C4 Systems, Inc. (GDC4S), the two offerors in the competitive range, the agency requested final proposal revisions (FPR) by 2 p.m. on June 13. On August 17, the agency requested second FPRs after advising the offerors of price concerns and amending the solicitation to change (among other things) the duration of the required warranties. GDC4S was informed at this time, through discussions, that OEM warranties were required. The second FPRs were due by 1 p.m. on August 22, but Omega did not submit its proposal until 1:02 p.m. The agency subsequently rejected Omega's proposal as late.<sup>1</sup> This protest followed.

Omega asserts that the agency was required to consider its late FPR pursuant to a solicitation provision stating that "a late modification of an otherwise successful proposal that makes its terms more favorable to the government will be considered at any time it is received and may be accepted." RFP § L-1 (incorporating Federal Acquisition Regulation (FAR) § 52.215-1). Omega maintains that its proposal was the only acceptable one--and thus was the "otherwise successful proposal" prior to the request for second FPRs--because it was the only one that offered the required OEM warranties; based on discussions it had with component manufacturers, Omega believes GDC4S's proposal could not have included the required OEM warranties.

Omega's argument is without merit. An "otherwise successful proposal" is one that would result in the award of the contract to the offeror regardless of the late modification; generally, this means that the government may accept a favorable late modification only from the offeror already in line for award. Seven Seas Eng'g & Land Surveying, B-294424.2, Nov. 19, 2004, 2004 CPD ¶ 236 at 4; Robotic Sys. Tech., B-271760, May 14, 1996, 96-1 CPD ¶ 229 at 3. The record shows that Omega's proposal would not have been in line for award prior to the late modification. In this regard, the agency informed Omega in its August 17 discussions (prior to the second FPR) that its price proposal was "unreasonably high, relative to the other offerors, and is potentially non-competitive." Agency Report (AR), exh. 16. Since the agency found that pricing changes were necessary in order for Omega's proposed price to be deemed reasonable, and required offerors to respond to the amended solicitation, its proposal was not the "otherwise successful proposal," and there thus was no basis for the agency to accept its late FPR.<sup>2</sup>

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<sup>1</sup> Omega initially asserted that the agency erred in determining that its proposal was late. However, the agency addressed this argument in its motion to dismiss, and Omega has not responded to the agency's position in its subsequent submissions; we therefore consider this argument abandoned. See Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 5 n.6.

<sup>2</sup> We note that the solicitation language provided only that the late modification "may be accepted," not that the agency was required to accept it if Omega's was the otherwise successful proposal. However, the parties have not argued this point, and we need not address it here.

Omega's argument also fails because the record does not support its conclusion that GDC4S's proposal was unacceptable. The RFP did not specify that OEM warranties were required--as noted, that requirement was established through agency communications with the offerors--and did not call for any specific showing in the proposals that OEM warranties were being offered. GDC4S took no exception in its second FPR to the agency's request during discussions that it provide OEM warranties, and provided a price for warranties under the appropriate CLIN, as required by the agency. See Gentex Corp., B-271381, June 18, 1996, 96-1 CPD ¶ 281 at 5 (offer was acceptable where it did not take exception to solicitation requirements). Since GDC4S's proposal complied with the terms of the solicitation, it was acceptable. See also TransAtlantic Lines, LLC, B-296245, B-296245.2, July 14, 2005, 2005 CPD ¶ 147 at 3-4.

The protest is denied.

Gary L. Kepplinger  
General Counsel