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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: The Williams Brothers Corporation of America

File: B-293352

Date: February 26, 2004

Richard L. Moorhouse, Esq., L. James D'Agostino, Esq., Leigh T. Hansson, Esq., and Natalia W. Geren, Esq., Reed Smith, for the protester.

Robert J. McCall, Esq., General Services Administration, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly waived solicitation requirement that offers include a conditional commitment of financing for construction of a building to be leased is denied where record shows that neither protester's nor awardee's offer included commitments that satisfied the solicitation requirements, and that agency thus treated the two firms equally.
 2. Protest that agency improperly changed two solicitation requirements in awarding lease is denied, where protester does not allege or show that it was competitively prejudiced by the agency's actions.
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DECISION

The Williams Brothers Corporation of America protests the award of a lease to H.H. Drew, LLC under General Services Administration (GSA) solicitation for offers (SFO) No. 3VA0054, for a facility to be occupied by the Bureau of Alcohol, Tobacco and Firearms in Front Royal, Virginia. Williams maintains that Drew's offer did not include required evidence of a conditional commitment of funds, and that the agency improperly modified two material terms of the SFO in the awarded lease.

We deny the protest.

The SFO contemplated the award of a lease for approximately 25,000 rentable square feet for a base period of 10 years, with two 5-year options. Offerors were advised that the agency would make award to the firm submitting the lowest-priced offer conforming to the requirements of the SFO. The agency received two offers and made award to Drew as the firm submitting the lowest-priced conforming offer.

Williams maintains that one aspect of Drew's offer did not conform to the requirements of the SFO. Specifically, the SFO required offerors to submit with their proposals satisfactory evidence of at least a conditional commitment of funds in an amount necessary to prepare the leased space for occupancy; the conditional commitment had to be signed by an authorized bank officer and state, at a minimum, the amount of the loan, its term in years, the annual interest rate, and the length of the loan commitment. SFO at 14. Williams asserts that the letter submitted by Drew was inadequate because it states that it was prepared based on the parties' preliminary discussions to facilitate an extension of credit, and then states as follows: "This letter is not a promise, commitment or an agreement to lend money to, provide financing for, or grant or extend credit to Applicant and may not be relied upon by you [the applicant] or any third party as such." Agency Report (AR), exh. 6, at 1. The protester maintains that, by its terms, the letter submitted by Drew is inadequate because it expressly does not make a commitment of any sort.

The agency's acceptance of Drew's letter was unobjectionable because, while we agree that the letter did not satisfy the SFO requirements, the record shows that Williams' own conditional commitment letter was at least as deficient. In this regard, Williams' letter, in its entirety, provides only as follows regarding the conditional commitment:

I enjoyed the discussion relating to your project with the Bureau of Alcohol, Tobacco and Firearms Rental Building. [deleted], as always, is very interested in your projects and we would like the opportunity to be involved in the financing of your project.

We would like to pursue the details of your project once you have secured the deal with ATF. Once we receive the completed package we will be able to review and discuss a detailed plan of action. Upon final approval, we would issue a commitment based upon the project needs and our ability to meet those needs.

AR, exh. 4, at 110. Thus, like Drew's letter, Williams' letter in no way expresses a conditional commitment to provide funds; rather, it merely provides that a commitment may be issued in the future, after award. Unlike Drew's letter, moreover, Williams' letter did not include any of the required details--such as the amount or purpose of the loan, its term in years or the interest rate. We conclude that, to the extent the agency waived the conditional commitment requirement for Drew, it also waived the requirement for the protester. Under these circumstances, there is no basis for us to find that Williams was competitively prejudiced by the agency's actions; this argument thus provides no basis for sustaining the protest. See Food Servs., Inc., B-243173, B-243173.2, July 10, 1991, 91-2 CPD ¶ 39 at 6 n.2; Mediq Equip. & Maint. Servs., Inc., B-242222, Mar. 26, 1991, 91-1 CPD ¶ 328 at 3. Williams also alleges that the agency improperly changed two aspects of the requirement in the awarded lease as compared to the terms of the SFO--first, while

the SFO called for the award of a 10-year lease with two 5-year options, the lease as awarded is for only 10 years, with no options, and second, while the SFO called for occupancy no later than May 2004, the lease as awarded calls for occupancy 180 days after approval of the tenant improvement drawings.

As with the conditional commitment of funds issue, we have no basis for finding prejudice to the protester based on the change in the lease term. A firm's yearly price typically would be expected to increase, rather than decrease, where a shorter lease term is imposed, since costs associated with preparation of the leased space for occupancy, for example, would have to be amortized over a shorter period of time. Williams does not argue that it would have lowered its price in response to the changed lease term. Under these circumstances, we have no basis for finding prejudice.

As for the occupancy date, the change appears to be largely form over substance. The lease provides for a maximum of approximately 60 days for preparation and approval of the tenant improvement drawings, AR, exh. 13, at 19, so, including the 180-day period specified for construction of the tenant improvements, the premises must be ready for occupancy 240 days after award. Given that the lease was awarded on September 25, 2003, the occupancy date in the awarded lease remains sometime during May 2004, as specified in the SFO. In any case, as with the other deficiencies discussed above, Williams neither argues nor demonstrates that it would have changed its offer based on the alleged change in the occupancy date.

The protest is denied.

Anthony H. Gamboa
General Counsel.