

*C. C. Cunningham*



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: SWD Associates

File: B-226956

Date: July 17, 1987

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### DIGEST

Protester has not carried its burden of proof of showing agency misled it during negotiations where the protester's version of what was said in the negotiations is no more persuasive than the agency's version of negotiations.

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### DECISION

SWD Associates has protested the decision of the General Services Administration (GSA) not to reopen discussions with all competitive offerors under solicitation for offers (SFO) No. GS-05B-14403, for 200,000 square feet of leased office space in Chicago, Illinois, to house the regional headquarters of the Department of Health & Human Services.

We deny the protest.

The SFO required that offers be for space located in a quality building of sound and substantial construction as described in the SFO, have a potential for efficient layout, and be within the stated square footage range in order to be considered. The SFO contained guidelines--but not detailed layout plans--with respect to quantities of materials, including general requirements such as outlets, doors, partitions, and special requirements for conference and computer rooms. The detailed layout was to be developed and provided after award. The SFO set forth a cost mechanism for the awardee to receive credit against the guideline quantities if the items were retained in the eventual plans and construction after contract award. Award was made to an offeror that proposed a significantly lower lease price than SWD.

SWD protests that it was repeatedly told during discussions prior to the submission of its best and final offer (BAFO) that it should predicate its offer on the assumption that it was required to gut and rebuild the interior of the premises even though the government was an existing tenant of the

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building. SWD claims that after it submitted its BAFO, GSA then denied telling SWD of any such requirement. SWD also claims that GSA apparently advised other offerors of existing buildings to base their proposals on the amount of risk they were willing to assume regarding how much finishing of the buildings would be required. SWD claims that it was therefore misled into computing and proposing too high a rental price and that GSA should have reopened discussions.

GSA denies having advised SWD to base its proposal on the assumption the occupied building had to be completely gutted or totally demolished and completely renovated to satisfy the occupant's floor plan requirements. GSA explains that it conducted extensive discussions with SWD regarding significant renovations to its building to meet fire safety and access for handicapped persons requirements but, in response to SWD's queries, advised that the government occupants' floor plans would be supplied only to the successful offeror. GSA states that in negotiations it emphasized that the terms of the SFO provided that the awardee would receive credit in the rental payments against any quantity of existing finishing that is retained in the government's space plans. GSA's position is that under the SFO, an offeror of any existing building must make assumptions regarding the amount of existing finishing to be retained and base its proposal on the amount of risk, if any, that it is willing to assume. GSA claims that it was first apprised of SWD's contention that it had been told to gut the building several months after receipt of the BAFO's.

The protester bears the burden of affirmatively proving its case. American International Rent a Car, B-215018, Sept. 25, 1984, 84-2 C.P.D. ¶ 354. SWD has furnished no evidence other than the statements of its representatives that refute GSA's account of the negotiations. The SFO did not require or imply that existing buildings must be gutted and rebuilt to meet the occupant's requirements. The floor plans were to be supplied to the successful offeror, and the SFO had provision for some rental adjustment based upon the amount of gutting necessary. Moreover, the RFP states that "oral explanations or instructions given to a prospective offeror are not binding" and that information necessary to submit offers or that would be prejudicial to other prospective offerors is required to be furnished promptly to all offerors. Also, the awardee confirmed that although it too based its proposal on gutting its existing building, this was its own choice based on "a businessman's risk" that GSA could order gutting under the RFP. Since the protester's version of what was said in the negotiations is no more persuasive than GSA's position, the protester has not carried its burden of proving that GSA misled it during

discussions. See Professional Review of Florida, Inc.;  
Florida Peer Review Organization, Inc., B-215303.3,  
B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶ 394.

SWD's protest is denied.



Harry R. Van Cleve  
General Counsel