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**Comptroller General
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Decision

Matter of: Eagle Creek Marina

File: B-405220

Date: September 16, 2011

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Mark S. Johnson, Esq., General Services Administration, for the agency.

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DIGEST

Protest that agency should have been aware that the protester had erroneously included costs for features that were not required to be included in its offer for a lease of office space, and was required to advise the protester of this fact during negotiations, is denied where the solicitation clearly did not provide for these features and the agency was unaware of the protester's alleged misunderstanding.

DECISION

Eagle Creek Marina, of Rochester, New York, protests the award of a lease to Acquest South Park, LLC, of Rochester, New York, under solicitation for offers (SFO) No. 9NY2355, issued by the General Services Administration (GSA), for office space, with reserved and secured parking spaces, in the Rochester, New York, area.

We deny the protest.

The SFO provided for the award of a 10-year lease. SFO at 5. The SFO informed offerors that the leased space would be used by the Customs and Border Protection Air and Marine Office, Department of Homeland Security (DHS), as a new marine office. SFO at 51. The solicitation provided detailed specifications as to the agency's requirements, with the specifications setting forth requirements ranging from the location of the space and number of parking spaces, to general architectural requirements regarding the location of doors and windows, to more specific requirements regarding electrical distribution, and telecommunications distribution and equipment. The solicitation specified that award would be made "to the responsible Offeror whose offer conforms to the requirements of the SFO and is the lowest priced offer submitted." SFO at 8.

The agency received offers by January 22, 2011, and in accordance with the terms of the SFO, conducted negotiations with the offerors whose proposals were determined to be within the competitive range. Agency Report (AR) at 2. Final offers were received by March 28, and on June 7 the agency awarded the lease to Acquest South Park, which had submitted the lowest-priced offer that conformed to the requirements of the SFO. After requesting and receiving a debriefing, Eagle Creek filed this protest.

Eagle Creek asserts that it misinterpreted the SFO as requiring boat dockage, and that the agency “had actual or constructive knowledge” that Eagle Creek’s offer included costs for this feature. Eagle Creek argues that the agency was therefore required to advise the company during negotiations that the SFO did not require offerors to include costs for boat dockage. Protester’s Comments at 7.

In support of this contention, Eagle Creek states that in November 2010 it met with representatives of GSA and the DHS at the protester’s facility. The protester claims that “[a]t the meeting, DHS representatives expressed general approval of the building in which DHS’ offices would be located, and expressed specific approval of, desirability and need for use of dock facilities that would be available to DHS.” Protest at 3. The protester explains that based upon these statements, and section 1.4 of the SFO, which provides that “[t]he right to use appurtenant areas and facilities is included” in the offered lease, SFO at 5, it interpreted the SFO to “mean that dock usage was a requirement of the [s]olicitation and that the price proposal should include said required usage.” Protester’s Comments at 4; see Protest at 7.

The protester also points to a letter it sent to the agency after negotiations closed as confirmation of its belief during the procurement that dock usage was a requirement of the SFO. This letter “outline[s] some of the advantages the Eagle Creek site has to offer over other sites,” including the “[d]ocks at Eagle Creek,” “24 designated transient slips,” “launch ramp, hydraulic trailer [and] heated 40’ x 80’ service department building,” all of which would be “available to Homeland Security.” AR, Tab 9, Eagle Creek Letter to GSA, Mar. 31, 2011, at 1-2.

We first note that, although the initial version of the SFO posted on October 10, 2010, stated that GSA was seeking “to lease office space . . . and two boat slips,” the SFO, as amended and posted on January 11, 2011, and under which this lease was awarded, did not. Compare SFO 9NY2355 (Feb. 16, 2010) with SFO 9NY2355 (Jan. 7, 2011). That is, there was no mention in the SFO under which this lease was awarded of any requirement that boat slips or boat dockage be provided as part of the lease. Given the clarity of the solicitation, the protester’s asserted reliance on the views expressed by the DHS representatives in November 2010, as somehow adding a requirement for boat dockage or boat slips to the SFO, issued in January 2011, was misplaced. We have repeatedly held that oral advice that would have the effect of altering the written terms of a solicitation, even from the contracting officer, does not operate to amend a solicitation or otherwise legally bind the agency. Noble Supply and

_____, B-404731, Mar. 4, 2011, 2011 CPD ¶ 67 at 3; TRS Research, B-274845, Jan. 7, 1997, 97-1 CPD ¶ 6 at 3. This would be especially the case, where the alleged oral advice was given 2 months prior to the solicitation being reissued as amended.

Nor do we agree with the protester that section 1.4 of the SFO, which provides that “[t]he right to use appurtenant areas and facilities is included” in the offered lease, SFO at 5, required that the protester make its facility’s boat slips and dockage available for use by the agency. The SFO does not include a definition of “appurtenant,” and none has been cited to by the parties. As such, we must accord that term its plain meaning. That is, “[t]he term “appurtenant in a lease is defined to include ‘everything which is necessary and essential to the beneficial use and enjoyment of the thing leased or granted.’” See Hammond-Warner v. United States, 797 F.Supp. 207, 210 (E.D.N.Y. 1992), citing Ruggiero v. Long Island Railroad, 161 A.D.2d 622, 555 N.Y.S.2d 401, 402 (2d Dep’t 1990)). This definition and understanding of “appurtenant” is consistent with the agency’s explanation that the SFO’s “Access and Appurtenant Areas” provision, as evidenced by the solicitation, is a standard clause included in all GSA SFOs “that affords the Government the right to use building lobbies, common hallways, plazas and other appurtenant areas and facilities.” Contracting Officer’s Statement at 4.

To construe this clause, as the protester asserts it did, that is, to essentially include in its offer of office space the entirety of its facility and all of its facility’s amenities at no cost to the government is simply unreasonable. To illustrate, under the protester’s asserted interpretation of section 1.4 of the SFO, the protester would have had to make available to the Government as part of its lease of certain office space on the third floor and all of the second floor of its “Eagle Creek Facilities Bldg.,” all of Eagle Creek’s boat dockage and 24 slips, as well as its launching ramp, hydraulic trailer, and service department building, as “appurtenant areas” at no additional cost.

We also note that Eagle Creek’s March 31 letter expressly recognized that Eagle Creek may be competing against offers providing inland facilities. In this regard, Eagle Creek’s March 31 letter recognized “that GSA is responsible for selecting the lowest priced facility,” with Eagle Creek then comparing its facility to a facility located inland, and positing that “this is not an apples to apples comparison, it is more like an apples to oranges situation.” The letter closes by stating that Eagle Creek “hope[s] that this outline of amenities available at Eagle Creek will make your decision easier in selecting a location that represents the best value for Homeland Security.” AR, Tab 9, Eagle Creek Letter to GSA, Mar. 31, 2011, at 2. Thus, Eagle Creek recognized that its offer may be competing in what is essentially a price competition, against offers for inland facilities (which, as recognized by Eagle Creek and by their very nature, cannot provide boat slips or dockage). Consequently, its asserted interpretation of the solicitation as requiring that facilities located on the water include in their lease price the costs for boat dockage and slips, while those offering facilities located inland or off the water would not have to include such costs, is patently unreasonable.

We also find the protester's position that the agency knew or should have known that Eagle Creek had allegedly included the costs for boat dockage and slips in its offer to be without merit. As for actual knowledge, the agency states that it was unaware during the course of this acquisition that Eagle Creek's offer included such costs. Contracting Officer's Statement at 5. There was nothing in Eagle Creek's offer indicating or otherwise providing for boat dockage, and the protester does not assert that it advised agency representatives during the competition that boat dockage was included in Eagle Creek's offer.

Further, we agree with the agency that Eagle Creek's letter of March 31, 2011, did little or nothing to clarify specifically what was included in Eagle Creek's offer. That is, while the letter references, among other things, the "[d]ocks at Eagle Creek," "24 designated transient slips," and the "launch ramp, hydraulic trailer [and] heated 40' x 80' service department building," which would be "available to Homeland Security," it also states that "Eagle Creek is offering up to 600 [square feet] of free secured storage." (emphasis added). AR, Tab 9, Eagle Creek Letter to GSA, Mar. 31, 2011, at 1-2. As pointed out by the agency, this letter does not state whether the boat dockage, slips, trailer, and building were going to be "made available" for a fee or at no cost (i.e., "free") to the agency.

Moreover, the record shows that negotiations with Eagle Creek closed on March 28. See AR, Tab 7, Agency Letter (Mar. 25, 2011). As such, Eagle Creek's March 31 letter, which the protester points to in support of its position that the agency knew or should have known that Eagle Creek had erroneously included the costs of boat dockage its offer, was submitted after the close of discussions. It is well established that an agency need not reopen discussions to resolve deficiencies first introduced by the offeror after discussions have closed. Ogden Support Servs., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 at 7; IPEC Advanced Systems, B-232145, Oct. 20, 1988, 88-2 CPD ¶ 380 at 4.

In sum, Eagle Creek's alleged misinterpretation of the SFO to require that its offer include costs associated with boat dockage and slips was a reasonable interpretation of the solicitation. In addition, the protester's assertion that the agency knew or should have known that Eagle Creek's offer erroneously included such costs, and should have raised that issue during discussions, is without merit.

The protest is denied.

Lynn H. Gibson
General Counsel