



# Bid Protest Weekly

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## **Introduction**

General Counsel, P.C.'s Government Contracts Practice Group is pleased to provide you with the *Bid Protest Weekly*. Researched, written and distributed by the attorneys of General Counsel, P.C., the *Bid Protest Weekly* allows the Government Contract community to stay on top of the latest developments involving bid protests by providing weekly summaries of recent bid protest decisions, highlighting key areas of law, agencies, and analyses of the protest process in general.

General Counsel, P.C.'s Government Contracts Group has over fifty years of combined government contract law experience (both as in-house and outside legal counsel), helping clients solve their government contract problems relating to the award or performance of a federal government contract, including bid protests, contract claims, small business concerns, and teaming and subcontractor relations.

If you have any questions or comments regarding the discussed content, or questions about bid protests, please feel free to contact the attorneys at General Counsel, P.C. at (703) 556-0411 or visit us at [www.generalcounselaw.com](http://www.generalcounselaw.com).

## 1. Sletten Companies/Sletten Construction Company, B-402422, April 21, 2010

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**Link:** [GAO Opinion](#)

**Agency:** General Services Administration

**Disposition:** Protests denied.

**Keywords:** Proposal Acceptability; Clarifications; Discussions

**General Counsel P.C. Highlight:** RFP technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award.

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The GSA Public Buildings Service issued an RFP for the construction of a new federal courthouse in Billings, Montana. The RFP was a two staged, design and build competition. Under phase I, the agency sought submissions from interested firms to determine which qualified firms would be invited to provide technical and price proposals under phase II. Under Phase I, the GSA received 20 proposals and selected six offerors to move to the final Phase II of the competition, including Sletten and M.A. Mortenson, the eventual awardee.

The Phase II RFP provided for award on a best value basis and identified the following technical evaluation factors in descending order of importance: design concept, no-cost test fit, and project management plan. The technical factors were considerably more important than price. The RFP required offerors to provide specific design elements and to include site plans, scaled drawings and included space requirements for court personnel and various other tenant agencies, such as the United States Marshal Service, Executive Office of the United States Attorney, United States Probation Office and the GSA Public Building Service.

The technical evaluation team found Sletten's proposal did not comply with a number of solicitation requirements, including that Sletten did not submit scalable drawings of the site plan, failed to provide mandatory BOMA space calculations on the drawings, and submitted floor plans that were missing required items. After submission of proposals, Sletten notified the agency that its proposal contained errors in the space allocation and submitted revised space allocations. The technical evaluators found that the revised space allocations were inconsistent with other parts of the proposal and could not be verified because the proposal

failed to include some required drawings. Sletten’s proposal was evaluated as “marginal,” but included a proposed price that was approximately 10% less than Mortenson’s price. The Agency judged that all offerors’ proposals would require extensive revision to become compliant with the RFP requirements except for Mortenson’s. The Agency judged that Mortenson’s proposal met the RFP requirements, offered a fair and reasonable price, and was thus selected to be the best value for the government. Following award to Mortenson, Sletten protested.

Sletten challenged its technical evaluation and the Agency’s failure to engage in either clarifications or discussions. The GAO noted that clearly stated RFP technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. The record in this case shows that Sletten’s proposal did not comply with a number of solicitation requirements, which the source selection officials found to be proposal deficiencies.

Sletten also argued that its proposal deficiencies could have been cured by clarification questions from the evaluators. “Clarifications” are limited exchanges between the government and offerors that may occur when award without discussions is contemplated. Such communications with offerors, however, may not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. Because Sletten’s proposal deficiencies could be cured only by substantial proposal revisions, Sletten would have required discussions, not mere clarifications to become acceptable. The RFP put offerors on notice that the Agency intended to make award without discussions unless the agency deemed that discussions were deemed necessary. Such discussions were not necessary in this case because Mortenson submitted an acceptable proposal with a fair and reasonable price. The agency exercised its discretion not to open discussions and made award to Mortenson. Such an award was proper and reasonable, and therefore GAO denied Sletten’s protest.

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**Milani Construction, LLC, File: B-401942, Date: December 22, 2009**

**Link:** [GAO Opinion](#)

**Agency:** Department of the Interior, National Park Service

**Disposition:** Protest Sustained in part.

**Keywords:** Price reasonableness; Price realism

**General Counsel P.C. Highlight:** An agency’s concern in making a “price reasonableness” determination focuses primarily on whether the offered prices are higher than warranted. Although not required, an agency may also provide for a “price realism” analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror’s low price reflects on its understanding of the contract requirements or the risk inherent in an offeror’s approach.

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Milani Construction, LLC, of Washington, D.C., protested the award of a contract to Corinthian Contractors, Inc., of Arlington, Virginia, under an RFP issued by the National Park Service, Department of the Interior (DOI), for the rehabilitation of Anacostia Park, Washington, D.C.

The RFP called for award of a fixed priced construction contract covering substantial road demolition, construction, and reconstruction in the park as well as other park construction projects. The Park Service originally estimated the project would cost \$6.8 million. Each proposal was to be evaluated under the following criteria: technical merit, past performance, and price. Technical and past performance together were roughly equal to price. The Park Service intended to select the offeror proposing the best value for the government in accordance with the terms of the solicitation.

Milani proposed to perform the project for \$4.48 million and Corinthian, the eventual awardee, proposed to perform for \$4.9 million or 9.8% higher. The Park Service Technical Evaluation Panel considered Milani’s lower price to present a higher risk of performance problems. The TEP also concluded that Milani’s low price for the paving line item, when combined with the Milani’s lack of experience in this area, indicated that Milani might not completely understand the paving requirements. Milani’s technical proposal was third highest while Corinthian’s proposal was the highest rated technically. The source selection authority determined that Corinthian’s highest technically rated, higher-priced proposal represented the best value to the government.

Milani argued that the RFP informed offerors only that their prices would be evaluated for reasonableness and balance and not whether the proposed fixed price was realistic or reflected on the offeror’s ability to perform the work. An agency’s concern in making a “price reasonableness” determination focuses primarily on whether the offered prices are higher than warranted. Although not required, an agency may also provide for a “price realism” analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror’s low price reflects on its understanding of the contract requirements or the risk inherent in an offeror’s approach. However, where there is no relevant evaluation criterion pertaining to

low generally concerns the offeror's responsibility, i.e., the offeror's ability and capacity to successfully perform the contract at its offered price.

Milani argued, in effect, that the agency's use of a "price realism" analysis without adequate warning in the RFP amounted to an undisclosed evaluation criteria in this fixed price competition, where the offeror and not the Government bears the risk of loss if the proposed price is too low. The GAO agreed.

Since the submission of even a "below-cost" price is not by itself improper, offerors competing for award of a fixed-price contract must be given reasonable notice that a business decision to submit a low-priced proposal will be considered as reflecting on their understanding or the risk associated with their proposal. Because the RFP in this case did not provide that notice, the Agency's use of a "price realism" analysis was improper and prejudicial to Milani. The GAO sustained the protest and recommended that the Agency re-evaluate the existing proposals or amend the solicitation to give offerors fair warning of their intent use a price realism analysis and offerors then be provided with an opportunity to submit final proposal revisions.

### 3. Corners Construction, B-402465, April 23, 2010

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**Link:** [GAO Opinion](#)

**Agency:** Veterans Administration

**Disposition:** Protest denied.

**Keywords:** Service Disabled, Veteran Owned Set Aside

**General Counsel P.C. Highlight:** The VA's statutory authority to make SDVOSB set aside awards requires that the SDVOSB be on the VA's current database at the time of award before it can receive an award.

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The Veterans Administration maintains its own database of Service-Disabled, Veteran-Owned Small businesses ("SDVOSBs") that are eligible to receive contracts under solicitations issued by VA as SDVOSB set-asides. 38 C.F.R. part 74 (2009). Eligible businesses are placed on the list for 1 year, after which they must re-apply to maintain its position on the list. The VA's statutory authority to make SDVOSB set aside awards requires that the SDVOSB be on the VA's current database at the time of award before it can receive an award.

Corners Construction submitted a bid to the Veterans Administration for carpet replacement. At the time of bid submission, Corners Construction was listed in the VA's SDVO database. At the time of bid opening, Corners Construction was still listed in the VA's SDVO database and Corners was found to be the low bidder. Just over three weeks later, when the VA intended to issue the award to Corners, the VA officials found that Corners' database registration had expired and Corners had not re-submitted its application for recertification. Consequently, the VA awarded the contract to the next-lowest offeror. Corners protested, claiming that because it was listed in the VA's database at the relevant times of proposal submission and bid opening, that was sufficient to qualify Corners for award. The GAO disagreed.

The statute granting VA authority to set aside procurements for SDVOSB concerns provides that "[a] small business concern may be awarded a [SDVOSB set-aside] contract . . . only if the small business concern . . . [is] listed in the database of veteran-owned businesses. . . ." The VA construed this statute to mean that the offeror had to be listed in the database on the day the award is made, rather than at some other relevant time. The GAO defers to an agency's interpretation of the statutes and regulations that it is charged to implement, so long as the interpretation is reasonable. The GAO found the VA's interpretation to be reasonable. The GAO denied Corners's protest.