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Decision

Matter of: Fed Serve, LLC

File: B-423526; B-423526.2

Date: August 4, 2025

Jonathan Shaffer, Esq., and John M. Tanner, Esq., Haynes and Boone, LLP, for the protester.

Michael J. Farr, Esq., Erika Whelan Retta, Esq., and Craig M. Brunson, Esq., Department of the Air Force, for the agency.

Christine Martin, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the contracting officer's affirmative determination of responsibility is dismissed where the allegation does not meet the exceptions to trigger a review under our Bid Protest Regulations.

2. Protest challenging the evaluation of the awardee's past performance is dismissed for lacking a legally and factually sufficient basis of protest.

DECISION

Fed Serve, LLC, of West Fargo, North Dakota, protests the award of a contract to OK2 Construction, LLC, of Cleburne, Texas, under request for proposals (RFP) No. FA452824R0011, issued by the Department of the Air Force for construction services at Minot Air Force Base in Ward County, North Dakota. The protester asserts that the agency should have determined that OK2 is not a responsible offeror and that the agency unreasonably evaluated OK2's past performance.

We dismiss the protest.

BACKGROUND

The Air Force issued the RFP on August 20, 2024, for construction, sustainment, restoration, and modernization services at Minot Air Force Base. Agency Report (AR), Tab 6, RFP at 1, 8. The solicitation was issued pursuant to Federal Acquisition Regulation (FAR) part 15 as a small business set-aside and contemplated the award of

an indefinite-delivery, indefinite quantity contract to be performed over a 1-year base period and four 1-year option periods. *Id.* at 4-8.

Award would be made to the offeror providing the best value to the government considering price and two non-price factors: technical capability and past performance. AR, Tab 12, attach. 6, RFP Sections L and M at 5. Under the technical capability factor, offerors were to detail their organizational structure by identifying key personnel and describing their experience with similar projects, and by explaining the offeror's surge plan.¹ *Id.* at 5-6. Under this factor proposals would be assigned a rating of acceptable or unacceptable. *Id.* at 5. Under the past performance factor, offerors were to submit references demonstrating recent, relevant, and quality work.² *Id.* at 6. Also under this factor, proposals would be assigned a rating of substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence. *Id.* at 7. Price would be evaluated for reasonableness and balance. *Id.* at 7-8.

As relevant here, the RFP incorporated by reference FAR clause 52.236-7, Permits and Responsibilities, which provides in part that the "[c]ontractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work." Tab 6, RFP at 16.

The agency received seven proposals by the submission due date, including those of Fed Serve and OK2. Contracting Officer's Statement (COS) at 4. Their ratings were:

	Technical Capability	Past Performance	Price
Fed Serve	Acceptable	Satisfactory Confidence	\$6,558,200
OK2	Acceptable	Substantial Confidence	\$6,600,000

AR, Tab 35, Source Selection Decision Document (SSDD) at 6.

The source selection evaluation board (SSEB) evaluated proposals and compiled the results in a report that was submitted to the contracting officer, who was acting as the source selection authority (SSA). AR, Tab 34, SSEB Report at 2. As relevant here, the SSA determined that OK2 was a responsible offeror. AR, Tab 35, SSDD at 6; AR, Tab 22, OK2 Responsibility Determination at 2; AR, Tab 40, Memorandum on Contractor Responsibility at 1.

¹ Though the technical capability factor is not at issue here, we note that it included two subfactors: organizational structure and surge plan. Tab 12, attach. 6, RFP Sections L and M at 5-6. A surge plan refers to an offeror's plan to address surges in work at multiple work sites occurring at the same time. *Id.* at 1, 5-6.

² The RFP did not set a limit on the number of references that could be submitted. Tab 12, attach. 6, RFP sections L and M at 1, 6-7.

Further, in comparing the proposals of Fed Serve and OK2, the SSA determined that OK2's past performance involved very similar work compared to what is required here, particularly with regard to complexity and function. The SSA noted that OK2 successfully and recently completed multiple projects exceeding \$500,000 in value, and the majority of OK2's past performance projects were rated very relevant. AR, Tab 35, SSDD at 7. The SSA further noted that OK2's price was only \$41,800 higher than that of Fed Serve. The SSA determined that OK2's past performance was superior to Fed Serve's and warranted OK2's small price premium. *Id.* As a result, the SSA concluded that OK2's proposal represented the best value to the government.

On May 5, 2025, the agency notified Fed Serve that award had been made to OK2. AR, Tab 36, Notice of Unsuccessful Offeror at 1. Fed Serve did not request a debriefing. COS at 7. This protest followed.

DISCUSSION

Responsibility Determination

Fed Serve argues that the agency should have determined that OK2 is not a responsible offeror because OK2 does not have the licenses necessary to perform the required work and alleges that OK2 has breached federal contracts and violated state and federal law.

Our Office will generally not review an affirmative determination of responsibility by the contracting officer. 4 C.F.R. § 21.5(c). One circumstance in which we will make an exception to this rule is where a protest identifies evidence raising serious concerns that the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation in reaching the responsibility determination. *Id.* This exception was intended to encompass protests raising supported allegations that the contracting officer ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. *Major Contracting Servs.*, B-423191, Mar. 4, 2025, 2025 CPD ¶ 63 at 7-8.

The allegations that our Office have reviewed in the context of an affirmative determination of responsibility generally pertain to very serious matters such as potential criminal activity. *Marine Terminals Corp.--East, Inc.*, B-410698.9, Aug. 4, 2016, 2016 CPD ¶ 212 at 12 (fraud, criminal convictions, and improper reporting of earnings as examples of serious matters); *MVM, Inc.*, B-421788.3, B-421788.4, Mar. 5, 2024, 2024 CPD ¶ 63 at 9 (allegation included a False Claims Act violation); *Southwestern Bell Tel. Co.*, B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8-9 (allegation included Securities and Exchange Commission charges).

Fed Serve argues that the contracting officer should have reviewed the status of OK2's state licenses to perform construction services because the work to be performed will take place in North Dakota and the RFP included FAR clause 52.236-7, which the protester asserts requires offerors to have the licenses necessary to perform the work.

Supp. Comments at 7. The protester alleges that OK2 has been performing on federal contracts in North Dakota and Wyoming without licenses to do so, in violation of FAR clause 52.236-7, and therefore OK2 has breached federal contracts, and violated state and federal law. Protest at 16, 18; Comments & Supp. Protest at 6-8; Supp. Comments at 5, 9-10.

The Air Force responds that it reasonably determined that OK2 is a responsible offeror as it conducted its determination in accordance with applicable procurement laws and regulations and the terms of the RFP. Specifically, the agency contends that the contracting officer considered OK2's financial resources, performance history, business capabilities, and ethics, and found no evidence that OK2 was not responsible. COS at 8-10. The agency further contends that the solicitation did not require offerors to have state licenses prior to award and points to the fact that FAR clause 52.236-7 refers to performance requirements—that is, requirements the contractor, or awardee, must meet after award is made—not requirements offerors must meet before or at the time of proposal submission. The agency argues that, as a result, the contracting officer was not required to investigate whether OK2, or any other offeror, held state licenses or what the statuses of those licenses were. Memorandum of Law (MOL) at 10; Supp. COS/MOL at 5, 10-11.

The Air Force also states that there were no allegations against the awardee or evidence of criminal activity at the time of the responsibility determination and the contracting officer had no reason to suspect that OK2 may have breached federal contracts or broken state and federal laws. Therefore, the agency asserts that the protester has failed to demonstrate that the contracting officer ignored information that he was expected to consider, and the protester's allegations do not establish that information rising to the level of a very serious matter existed as the time of the responsibility determination. MOL at 10, 12-15; Supp. COS/MOL at 5, 8.

We agree with the agency. The protester has not presented evidence that triggers an exception to the rule that our Office will not review an affirmative determination of responsibility. The record shows that the contracting officer conducted a thorough review of OK2's financial resources, performance history, business capabilities, and ethics to determine whether OK2 was responsible. The contracting officer noted that the agency received a completed financial institution reference sheet demonstrating that OK2 was in good financial standing with its bank and there was no indication that its financial status was poor. AR, Tab 33, Determination and Findings – Contractor Responsibility at 1. The contracting officer also found that OK2 had successfully performed multiple commercial projects based on the past performance information forms (PPIF) received and the contractor performance assessment reporting system (CPARS) results. *Id.* He further found that the federal awardee performance and integrity information system indicated that OK2 completed multiple projects and task orders at Minot Air Force Base and had minimal negative past performance ratings. *Id.* The contracting officer also noted that there was no indication that OK2 had poor

business practices, ethics, and OK2 was not listed on the excluded parties list³ or had any delinquent federal debt. *Id.*⁴

Additionally, there is no requirement in the RFP that offerors possess necessary licenses prior to award. As discussed above, the solicitation included FAR clause 52.236-7 regarding permits and responsibilities which required the *contractor* to obtain all state and local licenses necessary to complete performance. FAR clause 52.236-7 (emphasis added). The RFP did not contain any other requirements regarding licenses to be acquired before performance. Because the RFP did not require offerors to have the licenses before award, the contracting officer was not required to review the status of any offeror's state licenses. *Solar Plexus, LLC*, B-402061, Dec. 14, 2009, 2009 CPD ¶ 256 at 2-3 (finding that general solicitation provisions, such as FAR clause 52.236-7, mandating that the contractor comply with state laws, do not require an offeror to demonstrate compliance prior to award because such compliance is a performance requirement); *see also Al Baz 2000 Trading & Contracting Co., W.L.C.*, B-416622.2, Dec. 12, 2018, 2018 CPD ¶ 422 at 3 (explaining that contracting officers, as a general rule, are not competent to pass on the question of whether a particular local license or permit is legally required to perform a federal government contract and, for this very reason, the matter is made the responsibility of the contractor as reflected by FAR clause 52.236-7). Thus, we find that the protester has failed to demonstrate that the contracting officer ignored information that he should have considered.

Further, even if we agreed that the contracting officer ignored information such as the status of OK2's state licenses, the protester has failed to demonstrate that this is the kind of information that, "by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible." *Major Contracting Servs., supra*.

In this regard, the protester alleges that OK2 has been performing on federal contracts in North Dakota and Wyoming without the proper licenses, and therefore OK2 has violated various state and federal laws. Comments & Supp. Protest at 6-8; Supp. Comments at 5, 9-10. The evidence the protester provides to support these allegations are search results from state-run contractor databases that show a contractor's "standing." The protester obtained this information from each state's secretary of state public website. Comments & Supp. Protest at 6-8. At the time the protester conducted its search, North Dakota's secretary of state website showed that OK2 was in "Not Good Standing," and its current status was "Inactive – Involuntarily Revoked," and this information was listed as filed on September 26, 2016. Protest at 16; North Dakota, Secretary of State, <https://firststop.sos.nd.gov/search/contractor> (last visited

³ The excluded parties list is a list of persons or firms who are excluded from receiving federal contracts. 31 C.F.R. § 19.500.

⁴ In the Determination and Findings, the contracting officer forgot to "line through," meaning cross out, the "is not" responsible option to make it clear that he had determined that OK2 was responsible. COS at 9 n.1; AR, Tab 40, Memorandum on Contractor Responsibility at 1.

July 28, 2025). The protester claimed in its protest that OK2 was also not licensed to do business in Wyoming and provided a link to the search results for Wyoming's secretary of state website. Protest at 18; Comments & Supp. Protest at 4. The protester, however, did not state specifically what these search results showed.⁵

Based on the information from North Dakota and the information the protester alleges it obtained from Wyoming, the protester asserts that OK2 must have breached the federal contracts it is currently or has recently performed by not having these licenses. Supp. Comments at 7, 12. These types of speculative assertions, however, are insufficient to support a valid basis for protest. *Raytheon Blackbird Tech., Inc.*, B-417522, B-417522.2, July 11, 2019, 2019 CPD ¶ 254 at 3 (a protest allegation that relies on speculation is legally insufficient because our Office will not find improper agency action based on conjecture or inference). Moreover, they do not establish that OK2 has been found to have engaged in criminal activity or is being investigated for such activity. Compared to our decisions where there were credible allegations regarding very serious matters such as criminal activity, the evidence here is woefully insufficient. Evidence constituting a very serious matter includes information such as official input from state or federal authorities on such matters or an official investigation of such conduct or a criminal conviction. See, e.g., *Marine Terminals Corp.--East*, *supra*. Here, the protester has failed to actually demonstrate a very serious matter. As a result, this protest ground is dismissed.

Past Performance Evaluation

Fed Serve also argues that the agency unreasonably evaluated OK2's past performance and that OK2 should have received a rating lower than substantial confidence. The only evidence Fed Serve offers to support this claim is the same evidence it offered to support its challenge to the responsibility determination – that is, its own allegations that OK2 has serious past performance issues. Protest at 21 (“OK2 has publicly known past performance problems, including performing over \$22 million in contracts in Wyoming without a valid license . . . [t]hese are serious past performance issues that call into question its ability to perform.”); Comments & Supp. Protest at 11 (“OK2 has publicly known past performance problems, including contracting violations, false statements, and false claims, including performing federal government contracts in North Dakota and Wyoming without required state licenses.”).

In its proposal, OK2 provided five PPIFs, each describing a separate project that OK2 performed. The PPIFs included examples of past projects such as: (1) renovation work performed on the fitness center pool at Ellsworth Air Force Base in South Dakota for \$1,257,942; (2) roof repair services also performed at Ellsworth Air Force Base for \$2,823,298; (3) lighting repair work at McConnell Air Force Base in Kansas for

⁵ When GAO conducted its own search, it found that as of July 15, 2025, OK2 is listed as active and in good standing with the state of Wyoming. Wyoming, Secretary of State, <https://wyobiz.wyo.gov/Business/FilingDetails.aspx?eFNum=246015190130207234252023212136204136254242145167> (last visited July 29, 2025).

\$914,700; (4) renovations to dorm rooms at Yellowstone National Park in Wyoming for \$886,252; and (5) remodeling a building at Robins Air Force Base in Georgia for \$3,645,528. AR, Tab 50, Ellsworth AFB(1) PPIF at 1; AR, Tab 51, Ellsworth AFB(2) PPIF at 1; AR, Tab 52, McConnell AFB PPIF at 1; AR, Tab 53, Yellowstone PPIF at 1; AR, Tab 54, Robins AFB PPIF at 1.

The agency also obtained three CPARS reports for OK2: one for its work at Yellowstone, another for its work at McConnell, and the third for its work at Robins. AR, Tab 55, Yellowstone CPARS at 1; AR, Tab 56, McConnell CPARS at 1; AR, Tab 57, Robins CPARS at 1. All of the CPARS listed either very good or satisfactory past performance ratings. The agency determined that all OK2's references were relevant because they occurred within the last three years, exceeded \$500,000, and involved work similar to the work required here. The agency concluded that it had substantial confidence in OK2's ability to perform because OK2 received satisfactory or higher ratings on all its projects. AR, Tab 42, OK2 Past Performance Evaluation at 2. Fed Serve does not challenge any of these specific findings.

Here, the protester does not discuss any of the awardee's past performance references or provide any details to support its challenge to the past performance evaluation. The protester only references the arguments and evidence it presented under its challenge to the affirmative responsibility determination. As a result, we dismiss this argument as lacking a legally and factually sufficient basis of protest. 4 C.F.R. § 21.5(f); *Chugach Logistics-Facility Serv. JV, LLC*, B-421351, Mar. 21, 2023, 2023 CPD ¶ 80 at 6 (protest challenging the past performance evaluation as unreasonable is dismissed as speculative where the protester did not provide any details or discuss the quality of the awardee's past performance references).⁶

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel

⁶ The protester also asserts that the agency conducted a flawed best-value tradeoff analysis. The protester contends that, based on the other alleged errors in the agency's evaluation, OK2 should not have been chosen for award. Protest at 22; Comments & Supp. Protest at 12. Because we dismissed the protester's challenge to the agency's responsibility determination and its challenge to the past performance evaluation, we also dismiss this challenge as derivative and lacking a legally and factually sufficient basis of protest. 4 C.F.R. § 21.5(f); *NetCentrics Corp.*, B-421172.2, B-421172.3, Oct. 23, 2023, 2023 CPD ¶ 247 at 22.