

SERVICE CONTRACT EXTENSIONS MUST MEET THE SAME REQUIREMENTS AS ALL OTHER CONTRACTS

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Many government contracts for services include extensions beyond the initial contract period. Such priced options (extensions) may be exercised by the government in accordance with the terms of the contract and with government contracts law. But what happens if the government does not actually exercise an option (extension) as required by the contract and the law. The answer is simple, there is no extension, and the contractor has no contract, and no basis for payment.

JEM Transport found out the hard way. *JEM Transport, Inc. v. United States*, No. 14-518 (Fed. Cl. March 2, 2015). JEM entered into a contract with the U.S. Postal Service (“USPS”) to deliver mail in Florida. The contract was properly renewed twice, and could be renewed further upon “mutual agreement of the parties.” The contract was set to expire on April 30, 2012. On April 5, 2012, the USPS contracting officer informed his staff that the contract “could now be extended.” On April 6, 2012, a Purchasing and Management Specialist at USPS sent JEM documents which would have modified the contract to extend it until June 30, 2015. The email from the Specialist requested that JEM’s President sign the document attached to the email and stated that [t]his contract has been renewed full term.” The President signed the document and returned it to the USPS that same day—erroneously thinking he had a signed contract extension. However, the contracting officer *never signed the extension documents*. Even though JEM alleged in its case that the USPS had extended the contract, the Court held otherwise.

The court pointed to four elements that are required in order to establish the existence of a binding contract with the United States: (1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States in contract. *Anderson v. United States*, 344 F 3d 1343, 1353 (Fed Cir. 2003). The court held that there was no offer from the United States, and the unsigned documents were merely intended as a preliminary negotiation of terms. The court likened the facts of this case to those in *Neehan v. United States*, 112 Fed. Cl. 325 (2013), *aff’d* 570 F. App’x 937 (Fed. Cir. 2014), where the government forwarded an extension of the contract to the plaintiff, which the plaintiff signed and returned to USPS, but which the contracting officer never signed. The court concluded that the USPS did not intend to conclude a bargain until it made a further manifestation of government intent—the signature of the contracting officer. The same thing applied in JEM’s case.

Finally, the court noted that only an agent with actual authority to bind the government could form a contract. The Specialist who sent the email was not a contracting officer, had no warrant, and thus had no authority to bind the United States. The court noted that it is the responsibility of those seeking to enter into a contract with the government to ascertain the authority of the person

taking the action. The contracting officer in this case was the only person with actual authority to bind the government to the extension.

JEM was out of luck, and the court held that no binding contract for extension of services had been formed.

TIPS: (1) Only a warranted contracting officer can sign a contract or exercise a contract option extending services, within the limits of the officer's warrant. You can easily ask for the details of a contracting officer's warrant. The FAR states that "information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel." FAR 1.602-1(a).

(2) Statements (including written statements) of a contract specialist or a contracting officer's representative who has no warrant do not commit the government to a contract or to an extension.

(3) If your contract ends without an extension, you should advise your contracting officer that you are immediately ceasing to provide services as of the ending date in your contract. This is especially true when there is a "sequestration" of funds, and contracting officers have no *new* money for a new fiscal year. If the contract is urgent, essential and important, contracting officers may seek to reprogram prior year funds by contacting the comptroller of their agency. Then they would need to apply the funds and issue a proper extension of your contract. Only then should you continue performance.