

OFFERS REMAIN OPEN EVEN IF “UNSUCCESSFUL”

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Box 12 of Standard Form 33, “Solicitation, Offer and Award” states that that the contractor agrees that if the agency accepts its offer within 60 calendar days, it will perform at the price offered. (The contractor may specify a different period for acceptance, but normally the 60 day period applies). Recently, the Court of Federal Claims considered the question of whether the offer was no longer in effect after the agency had sent an “unsuccessful offeror” letter to a contractor. *National Air Cargo Group, Inc. v. United States*, No. 16-362C, (Fed. Cl. August 19, 2016). The simple answer is that the agency may accept an offer and form a contract at any time during the period of acceptance, unless the contractor withdraws its offer.

National Air Cargo involved a multiple award contract by the U.S. Transportation Command for shipment of government cargo. National was one of the awardees, but challenged the award to United Air Lines, Inc. on several grounds—only one of which is relevant to this blog. Initially, the Transportation Command responded to United’s offer by sending a letter stating that United would “not receive an award.” At a later date (but within the bid acceptance period, which in this procurement was 180 days), the U.S. Transportation Command took corrective action on a protest, and made two more awards, one of which was to United. National asserted that the award was unlawful because United’s offer had expired when it received the letter that it would not receive an award.

The court rejected National’s assertion. The solicitation provided that the offerors agreed to hold their prices firm for 180 days from the date specified for receipt of offers—a provision similar to that in Federal Acquisition Regulation (FAR) 52.212-1(c), which normally specifies a 30 day acceptance period, but which was modified in this procurement. The solicitation stated that the government could accept an offer up until the offer’s specified expiration time, unless a written notice of withdrawal was received before award.

“By stating that offers would remain extant until withdrawn or 180 days had expired, the FAR and solicitation invoked the traditional “firm offer” rule by which an offeror would be held to his or her offer even if the offeree rejected it or made a counteroffer” (citing *Black’s Law Dictionary*). The Court also noted that National cited no authority for the idea that a contractor’s offer in a negotiated procurement is terminated by a rejection letter even when that contractor continues to hold out its offer, noting that “such a rule would make corrective action problematic in many post-award circumstances and thus cannot be accepted.”

The firm offer rules protects both the government and the contractor. The contractor may *always* withdraw its offer before receipt of an award. But the offer remains valid for a possible award right up to the expiration date. If there’s a bid protest, and another offeror is thrown out within the acceptance period, the offer remains valid, and becomes a live candidate for award, as long as it is an acceptable offer and is in line for award.