

EXTEND YOUR OFFER OR SUBMIT A PROTEST

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An offer on a government contract is normally subject to a specified offer (bid or proposal) acceptance period. Standard Form (“SF”) 33, Solicitation, Offer and Award, includes a block 12 which states that either a minimum offer acceptance period is specified in FAR 52.214-16 (which is included in the solicitation), or if not so included, then the acceptance period to maintain the offeror’s prices is 60 calendar days, unless the offeror inserts a different period in block 12. For commercial contracts using SF 1449, Solicitation-Contract Order for Commercial Items, the minimum offer acceptance period is 30 calendar days, unless a different period is specified in an addendum to the solicitation. This is provided for in FAR 52.212-1, which is incorporated by reference in the SF 1449.

The purpose of the acceptance period is to ensure firm prices until the date by which the Government expects to award the contract. But what happens when there is a delay in award, caused by any number of different reasons (sickness in the government team, unexpected problems, bid protests, etc.)? The government will ask offerors to extend their acceptance period, in order to maintain the offered prices while the offers are evaluated and a source selection decision is made.

What happens if an offeror refuses to extend its bid or proposal acceptance period when requested by the government? In *Western Star Hosp. Authority, Inc.*, B-414198.2, .3, June 7, 2017, the Government Accountability Office (“GAO”) makes it clear that the offeror must either extend its offer, submit a protest, or have its offer considered nonresponsive, and it will no longer be considered for award.

In *Western Star*, the Army was procuring emergency medical technician services, and requested that offerors extend their acceptance period because the agency took longer than expected to evaluate proposals. *Western Star* failed to extend its acceptance period, nor did it “get back to” the contracting officer (“CO”), as it stated it would by the date the Army CO requested that the offer be extended. The CO thereafter sent a rejection letter to *Western Star*, explaining that its proposal was no longer valid. *Western Star* protested to no avail.

The GAO explained that when an agency requests an extension, the bidder that desires to extend its bid must communicate its assent either by ensuring an express extension is received by the agency or through conduct from which the agency can infer the intention to extend the offer. (For example, an offeror that pursues an agency-level or GAO protest has provided evidence of its intent to extend its acceptance date and to be bound by the offer if the protest were sustained).

One day after the deadline for extending its offer, *Western Star* did provide an extension of its acceptance period, but the GAO held it was to no avail. Even though GAO recognizes that if a proposal has expired, an offeror may “revive” it by extending the acceptance period, *but only if doing so would not compromise the integrity of the competitive bidding system*. (This sometimes happens when an Agency doesn’t meet the bid acceptance period in the solicitation, and asks all offerors to revive their proposals by a date certain). The Army noted that before *Western Star*

notified the Army of its intent to revive, the Army had already commenced discussions with other offerors who had extended their offers. Allowing Western Star to revive its proposal would prejudice those other offerors. The GAO agreed with the Army, noting that all offerors must comply with the requested acceptance period in order to share the same business risks of leaving their bids or proposals open for acceptance by the government for the same amount of time. An offeror who specifies a shorter acceptance period would enjoy an unfair competitive advantage. Because Western Star refused to extend the acceptance period when other offerors did so on the date requested, Western Star's proposal could not be revived without compromising the integrity of the competitive bidding system.

Takeaway: If you are not willing to extend your offer when the government requests it, be prepared for the agency to drop your offer from consideration unless you protest the procurement immediately. Clearly, the best way is to extend your offer in writing as requested, unless you cannot hold your prices firm for the extension period.

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