

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

29022

FILE: B-214040**DATE:** August 8, 1984**MATTER OF:** Perkin-Elmer**DIGEST:**

1. When a bid bond submitted on commercial form includes 90-day limit on time for government's filing claim, bond is defective and bid must be rejected as nonresponsive. Standard Form 24, usually used for bid bonds, imposes no limit on the time for filing a claim, and the government would have 6 years to do so under the general statute of limitations.
2. Use of a commercial form for a bid bond is not per se objectionable; sufficiency is judged by whether the form represents a significant departure from the rights and obligations of the parties set forth in Standard Form 24.
3. Defect in a bid bond may not be waived as a minor informality or corrected after bid opening, regardless of the bidder's intent and ability to perform. A bid bond is material, and where a bidder supplies a defective bond, the bid itself is defective and must be rejected as nonresponsive. Responsiveness must be established at time of opening and is not affected by a later offer to cure.
4. Lower price of a nonresponsive bid is irrelevant, since the possibility of savings to the government does not outweigh the importance of maintaining the integrity of the competitive system.
5. Fact that contracting agency took 4 months to respond to request for a report on protest, instead of the 25 days specified in GAO Bid Protest Procedures, does not currently provide a basis for sustaining a protest.

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Perkin-Elmer protests the rejection of its apparent low bid for maintenance of computer hardware at Elmendorf Air Force Base, Alaska, arguing that the Air Force improperly found its bid bond, on a commercial form rather than Standard Form 24, defective.

Because the terms of the commercial form would have significantly limited the government's right to demand payment under the bid bond, we deny the protest.

Invitation for bids No. F65501-83-B-0165, issued August 23, 1983, required a bid guarantee equal to 20 percent of the bid price and warned that failure to furnish it would render the bid nonresponsive. Perkin-Elmer, the record indicates, advised the Air Force before opening that it had obtained a bid bond from American Home Assurance Company, but did not have Standard Form 24, referenced in the invitation. The firm asked whether the surety's form would be acceptable. The Air Force responded that use of Standard Form 24 was not mandatory, so long as the bid guarantee was a "firm commitment . . . in accordance with Treasury Department regulations."

At opening on September 27, 1983, Perkin-Elmer's price was lower than that of the only other bidder, C3 Inc., for both the base year and the total of the base and 2 option years. The Air Force, however, determined that Perkin-Elmer's bid bond was defective because it contained the following clause:

"PROVIDED AND SUBJECT TO THE CONDITION PRECEDENT, that any suits at law or proceedings in equity brought or to be brought against the Surety to recover any claim hereunder must be instituted and service had upon the Surety within ninety (90) days after the acceptance of said bid of the Principal by the Obligee."

Perkin-Elmer's surety, by letter dated November 3, 1983, advised the Air Force that the limitation applied only to the time for filing of a claim under the bond and did not require that the claim be settled within 90 days. The Air Force, however, still believed that the bond was defective and so notified Perkin-Elmer. Despite a formal protest to it, the Air Force on December 15, 1983, proceeded to award C3 a contract estimated at more than \$63,000 for the period from January to September 1984.

In its protest to our Office, Perkin-Elmer argues that its use of a commercial form had the Air Force's advance approval; that its surety also is approved, since it is listed in Treasury Department Circular No. 570; that the discrepancy between the commercial form and Standard Form 24 is at most a minor informality that may be waived, since Perkin-Elmer has the intent and resources to satisfactorily fill Elmendorf's requirements; and that award to Perkin-Elmer on the basis of its low bid would be in the best interest of the government.

Perkin-Elmer also objects to the fact that the Air Force took approximately 4 months to provide our Office with a report on the protest, continuing its allegedly improper contractual relationship with C3 during this time.

Our Office in 1959 considered a fact situation almost identical to this in which a bidder for an Air Force contract had used a form furnished by a surety. That bid bond also would have required any suits at law or proceedings in equity to be filed within 90 days after acceptance of the bid. We stated that considering the size and complexity of the federal government and the fact that the suit would have to be brought by the Department of Justice, there were serious questions as to whether any action could be instituted within the time permitted. We also pointed out, as the Air Force did to Perkin-Elmer, that the surety should have had little difficulty in securing Standard Form 24. We held that the bond failed to meet a material requirement of the solicitation and that the bid therefore could not be regarded as responsive. 39 Comp. Gen. 83 (1959).

In 25 years, the size and complexity of the federal government have increased considerably. The law, however, has not changed. Nor do we believe that it should, since the bond submitted by Perkin-Elmer would not have afforded the government the same recourse as would have been available under Standard Form 24, which imposes no limit on the time for filing a claim. Under the latter, the government would have had 6 years--as specified in the general statute of limitations--to bring a claim against the surety if Perkin-Elmer had elected not to execute necessary contract documents and furnish performance and payment bonds. See 31 U.S.C. § 3712 (1982).

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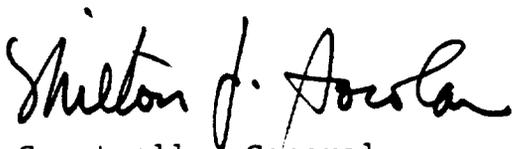
In short, Perkin-Elmer's use of a commercial form was not per se objectionable. The sufficiency of a bid bond is judged not on the form used, but on whether--as here--it represents a significant departure from the rights and obligations of the parties set forth in Standard Form 24. See B-178824, Aug. 16, 1973. Compare 51 Comp. Gen. 822 (1972) (annual bond applicable to supplies or services that bidder has on file with contracting agency may be used instead of payment and performance bonds, since both obligate surety to make payments in accord with bid guarantee provisions of invitation).

Further, the defect in Perkin-Elmer's bid bond could not have been waived as a minor informality or corrected after opening, regardless of the firm's intent and ability to perform. A bid bond is material, and where a bidder supplies a defective bond, the bid itself is defective and must be rejected as nonresponsive. Responsiveness must be established at the time of bid opening and is not affected by a later offer to cure. Emerald Electric, B-212460, Oct. 26, 1983, 83-2 CPD ¶ 505; Baucom Janitorial Service, Inc., B-206353, April 19, 1982, 82-1 CPD 356. (In this regard, we note that the surety's letter of November 3, 1983, was not an offer to cure, but a reiteration of the 90-day limit on the time for filing a claim under the bid bond).

In view of its nonresponsiveness, Perkin-Elmer's lower bid price is irrelevant. The possibility of savings to the government does not outweigh the importance of maintaining the integrity of the competitive system by rejecting a nonresponsive bid. Fraser-Volpe Corp., B-213910, Dec. 28, 1983, 84-1 CPD ¶ 35.

Finally, the fact that the Air Force took more than the 25 working days specified in our Bid Protest Procedures, 4 C.F.R. § 21.3(c) (1984), while not excusable, does not currently provide a basis for sustaining a protest. Electronic Data Systems Federal Corp., B-207311, March 16, 1983, 83-1 CPD ¶ 264.

The protest is denied.

for 
Comptroller General
of the United States