

*Cooper*



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Advanced Seal Technology, Inc.

**File:** B-242496

**Date:** March 13, 1991

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James P. Rome, Esq., Rome & Associates Ltd., for the protester.

Terry E. Miller, Esq., and Joel R. Feidelman, Esq., Fried, Frank, Harris, Shriver & Jacobson, for John Crane, Inc., an interested party.

John P. Patkus, Esq., and Robert L. Mercadante, Esq., Defense Logistics Agency, for the agency.

Sabina K. Cooper, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest is dismissed as untimely where the protester filed its protest at the General Accounting Office more than 10 working days after the agency responded to the firm's agency-level protest informing the protester that its offer was technically unacceptable, which constituted initial adverse agency action regarding the protest.

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### DECISION

Advanced Seal Technology, Inc. (AST) protests the award of a contract to John Crane, Inc. under request for proposals (RFP) No. DLA500-89-R-0335, issued by the Defense Logistics Agency, Defense Industrial Supply Center (DISC), for a mechanical seal assembly used on centrifugal pumps in submarine seawater systems. AST principally argues that DISC's rejection of its alternate offer as technically unacceptable was unreasonable.

We dismiss the protest as untimely.

The RFP was issued on March 24, 1989, to procure 90 seal assemblies (National Stock Number (NSN) 5330-01-191-6240) described as "Seal Assembly, Shaft, Critical Pump Part, Only Approved Sources, Crane Packing Co. . . . P/N CF-SP-74775, Ingersoll-Rand Co. . . . P/N 3623429X3." The RFP included the standard "Products Offered" clause that permitted firms to offer alternate products that were either "identical to or physically, mechanically, electronically and functionally interchangeable with" the named product. The clause defined "exact product" as the identical product cited in the RFP's

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procurement identification description (PID), manufactured either by the manufacturer cited in the PID, or by a firm which manufactures the product for the manufacturer. An "alternate product" was defined as any other product even if manufactured in accordance with the drawings and specifications of the manufacturer listed in the PID.

Offerors of alternate products were advised that they were required to submit legible copies of all drawings, specifications or other data necessary to describe clearly the characteristics and features of the product being offered, as well as drawings and other data covering the design, materials, etc., of the exact product, to enable the government to determine whether the offeror's product is equal to the product cited in the PID. Offerors were cautioned that the failure to furnish the complete data necessary to establish acceptability of the product offered might preclude consideration of the offer.

DISC received four offers by the April 24 closing date. AST submitted an offer of an alternate product at a unit price of \$550. Crane was the second low offeror at \$903.50. AST's offer was accompanied by a letter stating that its alternate product was awaiting approval by the Naval Sea Systems Command (NAVSEA), the agency with engineering cognizance of this critical application item.

On May 25, DISC informed AST that NAVSEA had notified DISC that AST's offer was not being evaluated due to the firm's failure to show an approved inspection system. On May 30, AST responded that it had an inspection system in place and cited a recent pre-award survey that so indicated. Having not received an affirmative response from DISC, AST informed the agency that it intended to file an agency-level protest. DISC then contacted NAVSEA and was informed on August 21 that NAVSEA did not have a technical data package from AST for the item in question. AST filed its agency-level protest by letter of August 16, received by DISC on September 1, before award had been made, contending that an unexplained obstacle seemed to have arisen in the NAVSEA approval process.

DISC responded to AST on October 3, stating that it would contact NAVSEA to determine the reason that evaluation of AST's technical data package had been delayed. On November 16, DISC informed AST that it had not yet received a response from NAVSEA. Six months later, on May 3, 1990, NAVSEA informed DISC that AST's alternate offer was still under evaluation by NAVSEA with no expected date of completion. On August 15, NAVSEA finally informed DISC that AST's offer was technically unacceptable because AST's drawings contained numerous errors, incorrect material and configuration discrepancies. In addition, NAVSEA stated that

the design of AST's seal is not stable and that NAVSEA does not have a test fixture to handle the pressure required for the submarine application of the seal.

On November 8, 1990, DISC determined that it was in the government's best interest to award a contract to Crane since the supplies had become urgently required. Accordingly, DISC made award on November 29 and notified AST of its decision by postcard of December 10 and follow-up letter of December 13, stating that AST's offer was technically unacceptable. DISC also informed AST of the award by telephone on December 11. AST filed a protest in our Office on January 2, 1991, asserting that DISC's determination of technical unacceptability was unreasonable.

Although an aggrieved contractor is not required to protest first to a procuring agency before filing with our Office, where a contractor chooses to file initially with the procuring agency, our Bid Protest Regulations require that a subsequent protest to our Office be filed within 10 working days after the protester has knowledge (actual or constructive) of initial adverse agency action regarding the protest. 4 C.F.R. § 21.2(a)(3) (1990); Beckman Instruments, Inc.-- Recon., B-239293.2, June 22, 1990, 90-1 CPD ¶ 585. AST was notified by DISC of award of the contract to Crane by postcard of December 10, 1990, telephone call of December 11, and follow-up letter of December 13. AST did not file its protest in our Office until January 2, 1991, more than 10 working days after December 11, when it learned of initial adverse agency action on its protest.

Moreover, AST did not protest to our Office until more than 16 months after filing its initial agency protest on September 1, 1989. When a protest has been filed with the contracting agency, the protester is not permitted to delay filing a subsequent protest with our Office until it eventually receives a final decision on the merits from the agency. The protester may wait only a reasonable length of time for an agency's response before filing a protest here. We have held that when a protest is filed with an agency and more than 5 months elapses without any response, a subsequent protest to our Office is untimely because the protester did not diligently pursue the protest. East West Research, Inc., B-236515, Nov. 30, 1989, 89-2 CPD ¶ 510. Here, more than a year elapsed between the time AST filed its agency-level

protest and the time AST filed its protest here. Under these circumstances, AST's protest would be untimely in any event due to a lack of diligent pursuit.

The protest is dismissed.

*Christine S. Melody*  
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Assistant General Counsel