

Anne Perry



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** WesTest Engineering Corporation

**File:** B-242944

**Date:** April 10, 1991

James S. Lynds for the protester.  
Lois D. Hearn, Esq., for Orbit Advanced Technologies, Inc.,  
and Arthur Affa, Esq., for Test Systems Associates, Inc.,  
interested parties.  
David H. Doro, Esq., and Millard F. Pippin, Department of the  
Air Force, for the agency.  
Anne B. Perry, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

### DIGEST

Protest filed with the General Accounting Office more than 10 days after agency denied agency-level protest is untimely. Protester's continued pursuit of the matter with the contracting agency did not alter its responsibility to conform to timeliness requirement of Bid Protest Regulations.

### DECISION

WesTest Engineering Corporation protests the rejection of its proposal as technically unacceptable under request for technical proposals (RFTP) No. F42600-89-R-20210, step one of a two-step sealed bid procurement, issued by the Department of the Air Force for eight depot utility small testers and test program sets for the capability to repair circuit card assemblies for the F-16 fighter aircraft.

We dismiss the protest as untimely.

On December 3, 1990, WesTest received notification that its technical proposal was rated technically unacceptable. In an attachment to its notification letter, the Air Force listed the basis for WesTest's unacceptable rating. The following day WesTest submitted a letter to the contracting officer which stated that: "[we have reviewed the results of the subject technical evaluation and, after a careful analysis, find that we must protest the fact that our proposal was deemed UNACCEPTABLE." The protester was informed on January 3, 1991, by the contracting officer in a telephone

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conversation that the technical evaluators had reviewed WestTest's proposal again and that it was still unacceptable. WestTest then disputed this determination and sent a Freedom of Information Act (FOIA) request for the complete technical evaluation of its proposal. The protester received these documents on February 4, and protested this matter to the General Accounting Office on February 14.

Our Bid Protest Regulations provide that if an initial protest has been filed timely with the contracting agency, we will consider a subsequent protest to our Office if it is filed within 10 working days after the protester has acquired knowledge of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3) (1991). In this case, WestTest's December 4 letter to the contracting officer constituted a protest to the agency as it requested the contracting officer to reconsider its determination that WestTest's proposal was technically unacceptable. Lawrence Realty, B-243063, Mar. 5, 1991, 91-1 CPD ¶ \_\_\_\_.

Section 21.0(f) of our Regulations defines adverse agency action as "any action or inaction on the part of contracting agency which is prejudicial to the position taken in a protest filed with the agency," including a decision on the merits of a protest. The telephone conversation between WestTest and the Air Force on January 3 constituted initial adverse agency action as the contracting officer denied WestTest's protest. As a result, to be timely, WestTest's protest to our Office had to be filed within 10 working days after that date, January 17. Since WestTest's protest was not filed until February 14, it is untimely. The fact that the protester filed an FOIA request with the agency in the meantime does not change the untimeliness of the protest. The filing of a FOIA request does not toll our timeliness requirements where, as here, the protest is based on information known to the protester prior to the filing of the request. Hydro-Pure Sys. Co.--Recon., B-237362.2, Nov. 7, 1989, 89-2 CPD ¶ 444.

The protest is dismissed.



Paul Lieberman  
Assistant General Counsel