



Office of the General Counsel

B-229522

November 13, 1987

The Honorable Edward M. Kennedy  
United States Senate

Dear Senator Kennedy:

This is in response to your referral of October 20, 1987, to our Office of a letter to you from Benthos Undersea Systems Technology, Inc., concerning a contract awarded by the Naval Coastal Systems Center, Panama City, Florida.

The procurement was for two remote-controlled underwater vehicles that could be controlled from a helicopter for the purpose of locating and identifying mines. The contract, No. N61331-87C-0040, was awarded on August 26, 1987, to Deep Ocean Engineering, Inc. Benthos, in conjunction with another firm, submitted an offer as the joint-venture Naval Systems International in response to the Navy's request for proposals.

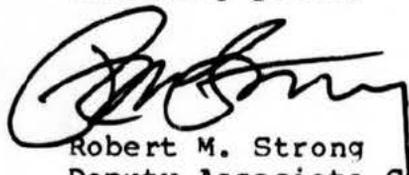
Benthos questions whether at its contract price Deep Ocean can deliver a system meeting specification requirements. Benthos asks for a review of the contract award and recommends that each offeror responding to the solicitation be required to demonstrate its ability to provide equipment meeting the solicitation's specifications.

We are unable to render a formal decision on the merits of this matter. Benthos' letter is a bid protest within the meaning of 31 U.S.C. § 3551(1) (Supp. III 1985) since it is a written objection by an interested party to the award of a contract by an executive agency for the procurement of property. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987), such a protest must be filed in our Office not later than 10 working days after the basis of the protest is known or should have been known to the protester. According to the Navy, notice of award was sent to Benthos on August 26, the same day as award of the contract. Benthos' letter to you, dated September 18, reached our Office on October 29, clearly outside the 10-day deadline even assuming that Benthos did not receive the notice of

award until several days after August 26. Benthos' protest is, therefore, untimely and not for consideration by our Office.

Furthermore, the merits of Benthos' argument concern Deep Ocean's ability to perform the contract, a matter of Deep Ocean's responsibility. A contracting officer necessarily must make an affirmative determination of an offeror's responsibility before awarding a contract. By awarding the contract to Deep Ocean on August 26, the Navy made such a determination. Responsibility determinations are inherently judgmental and contracting officers are provided wide discretion in the area. Our Office, therefore, will not review an affirmative determination of responsibility absent a showing of either fraud or bad faith on the part of contracting officials or that the solicitation contains definitive responsibility criteria that have not been applied. 4 C.F.R. § 21.3(f)(5) (1987). It does not appear that either exception would apply here. We would not review the contracting officer's determination on the basis of Benthos' correspondence even if it had been timely filed with our Office.

Sincerely yours,



Robert M. Strong  
Deputy Associate General Counsel