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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

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## **Decision**

**Matter of:** Networks Electronic Corporation

**File:** B-290666.3

**Date:** September 30, 2002

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Peter B. Jones, Esq., Jones & Donovan, for the protester.  
Sally A. Rule, Esq., New Hampshire Ball Bearings, the intervenor.  
John D. Inazu, Esq., Department of the Air Force, for the agency.  
Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest challenging agency's decision to conduct recompetition as corrective action taken in response to a General Accounting Office protest is denied; there is no basis to conclude that the only legally permissible option is for the agency to make a directed award to the protester where the agency had conducted discussions after receipt of final proposals with only one offeror. The agency's remedy consisting of disclosure of comparable information to both offerors, after which new final proposals will be received, is unobjectionable in view of the broad discretion afforded to agencies in fashioning corrective action.

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### **DECISION**

Networks Electronic Corporation (NEC) protests the corrective action taken by the Department of the Air Force consisting of the disclosure of comparable information to both offerors under solicitation No. FD2030-02-54711, and a request for new final proposals from both offerors, after which the Air Force will conduct a new evaluation and best value determination. The protester contends that, under the circumstances presented, the only remedy legally available to the Air Force is to make an award to NEC based on NEC's extant proposal.

We deny the protest.

This remedy was taken as corrective action by the Air Force after NEC had protested to our Office the Air Force's decision to make an award to New Hampshire Ball Bearings (NHBB). NEC's protest, as supplemented, questioned the propriety of the agency's determination that NHBB's proposal represented the best value, and in particular alleged that the Air Force had failed to recognize and evaluate the superior

delivery schedule offered under NEC's proposal. After the agency filed its report, it became apparent that the Air Force had conducted discussions with NHBB only, after the receipt of proposals. As a result, the Air Force decided to take corrective action in the form of issuing an amendment extending the due date for final proposals and requesting final proposals from both offerors, after receipt of which it will perform a new evaluation and make a new best value determination and, if necessary, terminate for convenience NHBB's contract and make a new award. The Air Force further determined that it would first disclose NEC's proposed pricing and delivery schedule in order to make equal information available to both offerors because NHBB's information in this regard had been disclosed, and that it would continue to stay contract performance during this recompetition. Based on this proposed corrective action, our Office dismissed NEC's protest.

NEC objects to this corrective action, arguing that "the only legally available and appropriate remedy or corrective action in this case is termination of NHBB's contract and award to NEC." Protester's Comments, July 19, 2002, at 1. NEC's argument is based on its contention that NHBB had submitted an ineligible proposal because it contained a nonconforming warranty clause, and that the subsequent interchange between the Air Force and NHBB amounted to an improper extension of the due date for proposals, thereby permitting NHBB to untimely modify its proposal in order to make it acceptable. In these circumstances, NEC contends that since its conforming, fully qualified and reasonably priced offer was received on time, the only remedy available to the Air Force was to award to NEC. Id. at 2-3. We disagree.

NEC's argument is that NHBB's timely received proposal was ineligible for award because the proposal contained a warranty clause which allegedly imposed certain impermissible restrictions and rendered the proposal unacceptable. This premise is factually misplaced; the warranty clause at issue was both added and subsequently modified by NHBB during the discussions that occurred after NHBB's proposal had been submitted, after the deadline for submission had passed. As the Air Force correctly points out, the record establishes that the NHBB proposal as timely submitted did not contain the allegedly offending warranty clause and thus was fully eligible for award. Agency Report, July 24, 2002, at 3 n.2. The deficiency which prompted the corrective action is related to the discussions which were conducted after the closing time for receipt of proposals, and the record does not provide any basis to conclude that NEC was the only offeror that timely submitted an acceptable proposal.

The underlying solicitation to purchase certain connecting links from approved sources for Pratt & Whitney engines was issued under a justification and approval authorizing other than full and open competition. The solicitation provided for a fixed-price award on the basis of a best-value determination considering price, past performance and mission capability, with price equal in importance to the other two factors combined. Under mission capability, delivery was one of three listed subfactors, and the solicitation provided that proposals that did not meet the

government's delivery schedule would be ranked, with those that more nearly meet the schedule rated higher. The solicitation also provided that while discussions were not contemplated, the government reserved the right to hold discussions.

NHBB submitted a proposed price of \$2,384,910, while NEC's price was \$2,696,474. NHBB's proposal received a past performance confidence evaluation of very good, while NEC's proposal was evaluated as satisfactory. The agency evaluated the proposals as essentially equal under the mission capability factor, with both receiving evaluations of technically acceptable under each subfactor. With respect to the delivery schedule subfactor, the agency determined that neither offer met the government's delivery schedule, and that while NEC's proposal offered a smaller initial delivery slightly earlier than NHBB's larger initial delivery, NHBB's overall proposed delivery schedule would slightly better meet the agency needs because delivery would be at an overall faster rate; the net result was that the proposed delivery schedules were evaluated as substantially equal and acceptable. Accordingly, the Air Force determined to award to NHBB on the basis of its higher evaluation under past performance and its lower price, whereupon NEC filed its initial protest after receiving a debriefing.

The agency report, which provided an explanation and defense of the evaluation and source selection decision, also included certain e-mail and telefacsimile correspondence between agency personnel and NHBB personnel, with references to contemporaneous phone calls as well, which are dated and occurred after the amended May 1, 2002, closing date for proposal receipt. In this correspondence, NHBB is asked for and provides changes regarding the warranty clause and its delivery schedule. Our Office conducted a conference call with the parties concerning these documents, after which the agency determined to take the above-outlined corrective action.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Patriot Contract Servs. LLC et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 4. Where the agency has reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action, which may include the amendment of a solicitation and the request for and evaluation of another round of final proposals where the agency made the decision in good faith, without the intent to change a particular offeror's technical ranking or to avoid an award to a particular offeror. Federal Sec. Sys., Inc., B-281745.2, Apr. 29, 1999, 99-1 CPD ¶ 86 at 5.

In our view, the corrective action taken here by the Air Force is unobjectionable under the broad discretion afforded to contracting agencies in this regard. There is

no evidence of record which suggests that the corrective action was improper or that the agency acted in other than good faith.<sup>1</sup> As explained above, there is no legal basis to compel the Air Force to award to NEC here on the basis of its higher priced, lower technically rated extant proposal. Where, as here, an agency has improperly conducted discussions with only one offeror after receipt of proposals, reopening the competition and seeking another round of amended proposals is an appropriate way to remedy the underlying deficiency and permit offerors a fair opportunity to compete. International Res. Group, B-286683, Jan. 31, 2001, 2001 CPD ¶ 35. The disclosure of pricing and other information in another offeror's proposal, as here, is permissible because the possibility that the contract may not have been awarded based on a true determination of the most advantageous proposal has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirements for competition take priority over any possible constraints on auction techniques. Federal Sec. Sys., Inc., supra, at 4. Accordingly, the agency's corrective action of disclosure and placing the offerors on an even footing, and providing them with an equal opportunity to compete by submitting new proposals is unobjectionable here.

The protest is denied.

Anthony H. Gamboa  
General Counsel

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<sup>1</sup> NEC asserts that the agency's discussions with NHBB constitute favoritism and indelibly taint the procurement, rendering award to NEC as the only available remedy. Protester's Comments, July 30, 2002, at 3. Regardless of how this assertion is styled, NEC is actually alleging that the Air Force is biased in favor of NHBB. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of inference or supposition. Therefore, where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating a bias against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. Dynamic Aviation-Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166 at 4. The Air Force's conduct of discussions with NHBB after the receipt of proposals does not provide a basis to attribute prejudicial motives to the agency. Similarly, NEC's objection that the Air Force's delay of several weeks in imposing a stay after its protest was initially filed has given NHBB an unfair and impermissible advantage is unsupported, and does not provide a basis to require a directed award to NEC in these circumstances.