

DECISION



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

61107

FILE: B-185703

DATE: July 9, 1976

98319

MATTER OF: Penn Electric Motor Company, Inc.

DIGEST:

1. In negotiated procurement contracting officer was not placed on constructive notice of contractor's unilateral mistake, discovered after award by virtue of comparison with noncompetitive offer and was not therefore required to request verification of offer.
2. Contracting officer, who had no suspicion of specific mistake in an offer but requested verification advising offeror that its offer was "substantially lower" than offeror's previous award price, adequately discharged verification duty in view of limited information that may be disclosed in negotiated procurement.

Penn Electric Motor Company, Inc. (Penn), requests that our Office permit reformation of two contracts it held with the General Services Administration (GSA). Request for proposals (RFP) FPWP-B6-70463-N-4-17-74 (70463) was issued by GSA on April 17, 1974, for 24 sanders (pneumatic, disk, portable) (NSN 5130-00-596-1176). After telephone negotiation by the contracting officer, two offers were received:

<u>Offerors</u>	<u>Prices</u>
Aro Corporation	\$189.00 each
Penn Electric	122.18 each

The award of contract GS-00S-27534 was made to Penn on April 30, 1974, in the amount of \$2,932.32.

On July 11, 1974, GSA issued RFP FPWP-B6-71646-A-9-6-74 for the same tool for a quantity of 308 sanders. Although 401 possible suppliers were solicited, only the two offerors under the original solicitation responded as follows:

<u>Offerors</u>	<u>Prices</u>
Aro Corporation	\$196.00
Penn Electric	97.25

On September 20, 1974, the contracting officer contacted the General Manager of Penn by telephone and informed him that Penn's price was "substantially lower" than its previous price. She requested a verification of the \$97.25 per unit price and, according to the contract record of September 20, 1974, Penn's General Manager confirmed its offer. Consequently, Penn was awarded contract No. GS-00S-30192 in the amount of \$30,536.50.

On November 4, 1974, the GSA Testing Laboratory in Kansas City, Missouri, rejected the sanders submitted for tests because they did not meet air consumption requirements. On January 10, 1975, a second rejection was issued, indicating that the type of sander Penn submitted was, in fact, the wrong tool. Penn admitted that it had misinterpreted the specifications (OO-S-101b) and had therefore ordered from its supplier a different, and less costly, type of sander. Following discovery of its mistake, Penn requested that GSA permit reformation of the two contracts to reflect a per unit price of \$163.29. GSA denied the request and recommends that our Office not approve reformation of the contracts. The contracts in question have been completed.

The circumstances of this case present the issues of whether in the first solicitation the contracting officer had constructive notice of Penn's mistake and whether, in the second solicitation, the contracting officer adequately verified Penn's \$97.25 per unit price.

Our Office has consistently held that the responsibility for the preparation of a bid or offer rests with the bidder or offeror. Therefore, a bidder or offeror who makes a mistake in a bid or offer which has been accepted in good faith by the Government must bear the consequences of it unless the mistake was mutual or the contracting officer had either actual or constructive notice of the mistake prior to the award. 48 Comp. Gen. 672 (1969), and cases cited therein; General Time Corporation, B-180613, July 5, 1974, 74-2 CPD 9.

In regard to RFP -70463, the essence of Penn's argument is that the contracting officer was on constructive notice of the mistaken offer by virtue of the 55-percent variance between Aro's per unit price and Penn's. In support of this contention, Penn cites 53 Comp. Gen. 30 (1973) where it was held that "standing alone" a 70-percent variance between two bids was sufficient, in itself,

to place the contracting officer on constructive notice of a possible error. The "standing alone" analysis is inapplicable, however, in a situation where other indices provide a more reliable basis for comparison.

In the instant case, the procurement history of the sander confirms that prior to its decision in November 1972, not to grant discounts from its list prices, Aro was competitive. According to the table compiled by GSA (below), Aro received at least one-half of the awards made from November 1966 to November 1972.

PROCUREMENT HISTORY FOR (PNEUMATIC, DISK) SANDER
NSN 5130-00-596-1176

Entry	Date	Aro Bid	Range of Bids	Award Price	Award to Aro?	
1	11-66	\$129.50	\$ 53.90 to \$227.70	\$	Not Available	
2	9-67	102.50	99.25 to 214.62	102.50	Yes	
3	1-68	108.89	64.20 to 234.63		Not Available	
4	5-68	112.45	75.00 to 232.65	112.45	Yes	
5	9-68	135.00	72.50 to 254.72	72.50	No	
6	9-68	135.00	72.50 to 255.22		Not Available	
7	9-69	144.80	108.50 to 165.00	108.50	No	
8	11-70	117.70	117.70 to 226.76	117.70	Yes	
9	9-71	119.30	78.00 to 162.00	119.30	Yes	
10	11-72	126.34	91.77 to 204.68	126.34	Yes	
Penn (70463)	11	4-74	189.00	122.18 to 189.00	122.18	No
	12	8-74	176.40	Sole Bid	176.40	Yes
Penn (71646)	13	9-74	196.00	97.25 to 196.00	97.25	No
	14	9-74	196.00	Sole Bid	196.00	Yes
	15	12-74	214.80	116.00 to 277.20		No Award Made

PROCUREMENT HISTORY FOR (PNEUMATIC, DISK) SANDER
 NSN 5130-00-596-1176

Entry	Date	Aro Bid	Range of Bids	Award Price	Award to Aro?
16	3-75	196.00	74.98 to 196.00	74.98	No
17	4-75	206.50	75.23 to 206.50	75.23	No
18	7-75	295.00	75.23 to 295.00	75.23	No
19	7-75	Not Available		75.23	No
20	12-75	189.45	56.82 to 189.45	56.82	No

However, beginning with RFP -70463 and continuing, thereafter, Aro's bids and offers were no longer competitive; their only awards resulting from their status as sole bidders. In contrast, with the exception of sole bidders, Penn's offer of \$122.18 was within the range of previous awards (\$72.50 to \$126.34). It is clear that the pattern of bids and offers on this subject item constitutes strong evidence that Aro's pricing policy after November 1972 could not be employed as a reliable index of the validity of other bids and offers:

Moreover, the contracting officer relied, in part, on the then current General Services Administration Price Catalogue which listed the sander at \$124. Given the \$1.82 difference between Penn's price and the GSA catalogue price and the \$4.16 difference (\$10.46 after BLS Index adjustment) between Penn's price and the previous award, the contracting officer could not reasonably be expected to have had constructive notice of Penn's mistake.

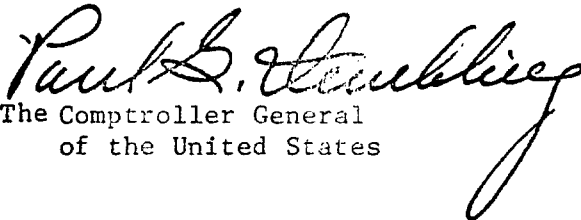
Penn also contends that the contracting officer was on constructive notice of possible error because it is a "distributor" rather than a "manufacturer" and as such could not have offered prices as low as it did. There is nothing in the record which would indicate that prior to the allegation of the mistake the contracting officer had any reason to be aware of the fact that Penn relied on prices quoted it by a supplier, or that those prices were in error. We also note, in this regard, that firm identified itself as a manufacturer under both solicitations.

In regard to contract GS-00S-30192, Penn argues that the contracting officer did not adequately discharge her duty to verify Penn's offer because she did not call attention to the substantial

difference between Penn's price and Aro's price. In view of the fact that Aro's offer did not provide a meaningful basis for comparison in the first solicitation, there is no reason to believe that the contracting officer assumed an obligation to use a similar offer as a standard in the second solicitation.

Because no specific mistake was suspected and because the only basis of the contracting officer's suspicion of a possible error was communicated to Penn, namely the \$24.93 difference between Penn's two prices, the contracting officer adequately discharged her duty to verify Penn's \$97.25 per unit price. Autoclave Engineers, Inc., B-182895, May 29, 1975, 75-1 CPD 325. In addition, section 1-3.805-1(b) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 153), which sets forth procedures to be followed with regard to disclosures of information during the preaward or preacceptance period, precludes the disclosure of any information to a potential supplier which alone or together with other information may afford him an advantage over others. In view of the FPR restrictions and the fact that no specific mistake was suspected or alleged prior to award, we conclude that the contracting officer's verification duty was discharged when she informed Penn that its second per unit price was "substantially lower" than its first. Moreover, there is no requirement that an offeror's verification must be obtained in writing. See Autoclave Engineers, Inc., supra.

We, therefore, conclude that binding contracts were consummated in both instances and that no legal basis exists for reformation of either of them.


For The Comptroller General
of the United States