

**DOCUMENT RESUME**

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[Defective Specifications]. B-186545; B-187413. April 13, 1977.  
16 pp.

Decision re: Raymond Corp.; Schreck Industries; by Robert P. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services:  
Definition of Performance Requirements in Relation to Need  
of the Procuring Agency (1902).  
Contact: Office of the General Counsel: Procurement Law II.  
Budget Function: National Defense: Department of Defense -  
Procurement & Contracts (058).  
Organization Concerned: Clarklift-West; Department of the Air  
Force: Sacramento Air Logistics Center, McClellan APB, CA.  
Authority: 10 U.S.C 2304 (a) (2). B-187126 (1976). A.S.P.R.  
7-2003.11(b).

Two companies protested the award of a contract for 12 forklift trucks, contending that some of the specifications restricted competition and were impossible of performance. The provision which excluded particular design was without a reasonable basis. Listed salient characteristic of a brand-name item was unduly restrictive of competition. No further deliveries of the brand-name item should be accepted until the item's compliance with salient characteristic is established through actual demonstration. In the future, oral amendments to solicitations should be confirmed in writing. (Author/SC)

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DECISION



*Roger Lyles  
Rev. II*

THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20543

FILE: B-186545, B-187413

DATE: April 13, 1977

MATTER OF: Raymond Corporation  
Schreck Industries

DIGEST:

1. Specification provision which excluded particular design is without a reasonable basis where rationale for exclusion appears founded on erroneous concept of design.
2. Protester's contention that listed salient characteristic of brand-name item is unduly restrictive is sustained where even offeror of brand name item took exception to requirement.
3. In absence of empirical evidence that brand-name item has salient characteristic supposedly representing Air Force's minimum need, and in view of brand-name offeror's specific exception to that characteristic, GAO advises Air Force that no further deliveries of brand-name item should be accepted until item's compliance with salient characteristic is established through actual demonstration.
4. RFP contemplating "all-or-none" award for 12 items was later amended orally to provide for immediate award of basic quantity of 4 items with option for remaining 8. Award based on lowest price for basic plus option quantities was not objectionable where agency had advised offerors that option "would be" exercised and award was consistent with written RFP. However, GAO recommends that in future oral amendments to solicitations be confirmed in writing.

Raymond Corporation (Raymond) and Schreck Industries (Schreck) protest the award of a contract to Clarklift-West (Clark) for twelve forklift trucks under request for proposals (RFP) F04699-76-09129 issued by the Sacramento Air Logistics Center, McClellan Air Force Base, California.

Raymond contends that some of the specifications used by Sacramento were defective in that they unnecessarily restricted

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competition and were impossible of performance. We conclude below that one specification requirement has been shown not to have a reasonable basis. In addition, the brand-name offeror took exception to braking performance requirement which was said to be a salient characteristic of his product. In view thereof, we are advising the Secretary of the Air Force that as-yet undelivered trucks should not be delivered until it has been shown through actual demonstration that the brand-name item can meet the braking performance requirements of the solicitation.

At the conclusion of the negotiations, Sacramento orally amended the solicitation from one for a firm quantity of 12 trucks to one for a basic quantity of 4 with an option for an additional 8. Schreck, who was the low offeror for the basic quantity but not the entire quantity, objected to the evaluation of offers on the basis of the entire quantity. We have concluded that the Air Force adequately expressed its intent and that the evaluation was consistent with the unamended, written provisions of the RFP. However, we are recommending that in the future, oral amendments to solicitations be confirmed in writing.

#### Background

In 1975, Sacramento was using an aging fleet of electric forklift trucks which had been purchased to a military specification in the early 1960's. Because of a lack of spare parts, the trucks were being condemned as they broke down, severely impairing Sacramento's ability to perform its mission.

We understand that the usual method by which Sacramento could satisfy its needs was to have the trucks purchased for it by the Defense Logistics Agency's Defense Construction Supply Center (DCSC) at Columbus, Ohio. In the case of forklift trucks destined for the Air Force, DCSC uses the Warner Robins ALC Purchase Description WRNE 3930-328 (hereafter referred to as WRNE-PD).

The WRNE-PD resulted from a project initiated by the Air Force in September, 1969, for the purpose of evaluating narrow aisle forklift trucks and to collect data for the preparation of a specification for such a truck. After visits to several manufacturers and users for aid in determining which forklift would be most suitable for evaluation, the Air Force selected a Raymond Model 821. One of these trucks was obtained through a bailment agreement with the manufacturer, its operation was studied, and as noted in a subsequent Air Force report, use

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of the resulting WRNE-PD would "allow competitive procurement of narrow aisle forklifts having performance characteristics equal to the Raymond Model 821 truck which was tested at [Warner Robins]."

However, in the instant case Sacramento did not satisfy its needs through DCSC, which would have used the WRNE-PD. The record shows that prior to submitting its purchase request, the using activity reviewed the WRNE-PD and rejected it because:

1. it did not describe a truck intended for use outside on sloped ramps in inclement weather and for round trip distances in excess of 500 feet;

2. it required compliance with certain military specifications and standards excessive to Sacramento's needs, which could be satisfied by commercial standards;

3. it contained requirements for preproduction testing and for certain design features in excess of those required to fulfill Sacramento's minimum needs;

4. it contained other design requirements which were less than those dictated by Sacramento's minimum needs; and

5. it was silent as to certain features which Sacramento thought necessary for operator safety and to reduce maintenance down time.

The record also shows that as a result of its past experience, Sacramento was concerned about the future availability of spare parts for equipment built to a military specification in contrast to commercial, off-the-shelf machines.

Sacramento therefore requested and received permission to procure the forklift trucks on a "Brand Name or Equal" basis. Sacramento's position is that this method of procurement, which uses the Clark Model NP500-45 as the brand name item, will provide a commercial, off-the-shelf item meeting Sacramento's needs at lower cost and with faster delivery than trucks specially manufactured to the WRNE-PD. In view of the urgent need for these items, the procurement was negotiated under the "public exigency" authority of 10 U. S. C. § 2304(a)(2).

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### The Raymond Protest

Early in the negotiation process, Raymond began to point out to Sacramento those areas in which the "Brand Name or Equal" purchase description differed from the WRNE-PD. Raymond took the position that a number of salient characteristics of the Clark brand name item called out in the RFP were design features exclusive to Clark and were unnecessarily restrictive of competition. However, Raymond agreed to furnish these items except for the salient characteristic "Brakes on idler wheel assembly." As to this requirement, Raymond advised Sacramento:

"Your requested brakes on the idler wheel assembly are exclusive to Clark Equipment, and if you insist upon same, please consider this as a formal protest to this procurement. You are attempting to dictate the design of a truck! Establish a performance and test requirement as they have done in [the WRNE-PD], but let the manufacturer determine the design in order to meet a valid requirement. [The WRNE-PD] does not specify brakes on the idler wheel. \* \* \*"  
(Emphasis in original.)

An amendment to the RFP then effected some changes to the specifications and the delivery schedule. (More than one offeror objected to the original delivery schedule as being unreasonably short.) Permissible dimensions of the roller mast and wheels were changed and other design requirements were deleted from the specifications. However, Raymond declined to acknowledge amendment M001 and filed a protest with our Office.

Although two offers received in response to amendment M001 met the specifications, only one source could meet the delivery requirements. A second amendment, M002, was then issued which made significant changes to the wheel and braking requirements. Because of their criticality to this protest, some background information on these items is required.

The trucks at Sacramento must operate indoors and out, including upon exterior concrete ramps of a slope of 10 percent which at times are wet. (Early references by Sacramento to 10 degree ramps, which are steeper than 10 percent ramps, found in some of the material quoted below, were in error.) One concern of Sacramento's, which influenced the specifications

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for wheels and brakes, was to obtain the most effective system for safely stopping the vehicles on these ramps.

The electric narrow aisle reach trucks being procured are supplied in four- or six-wheel configurations. Two of the wheels are located beneath the rear of the main body of the truck which contains the batteries, motors, control mechanisms and the operator's compartment. One of the wheels, through which the motive power is applied, is the "drive" wheel; the other wheel is the "idler" wheel. In front of the operator is a collapsible mast which can be raised and lowered hydraulically. Attached to the mast are two forks upon which the load is placed. By means of a pantograph, the forks may be made to extend and retract. Extending from the front of the main body of the truck and lying outside the forks are two horizontal members called "outriggers." At the end of each outrigger may be a single "load" wheel or an assembly of two smaller load wheels.

In these trucks, braking is accomplished through one or both of the rear wheels - the drive and idler wheels - not through the forward load wheels. The design of the Clark brand name product incorporates brakes in both rear wheels: "dual wheel braking." Raymond's design incorporates a brake drum on the drive motor shaft. Therefore, braking on the Raymond product is accomplished solely through the drive wheel.

The RFP requirement for "brakes in the idler wheel assembly" was consistent with Clark's dual wheel braking system but was not a feature of the Raymond design. Amendment M002 deleted this requirement and provided that the idler wheel need not have a rubber tread if a one-wheel braking system was employed. Only if a dual-wheel system was used were both rear wheels to have a rubber tread, which provides more traction than the urethane tread commonly offered.

These changes to the RFP were favorable to the consideration of Raymond's product. However, Amendment M002 added the following "salient characteristics" with regard to braking:

"(2) Paragraph F.1., Brand Name Evaluation, delete that part of Item 0001, Brakes, which reads 'Brakes on idler wheel assembly' and substitute in lieu thereof the following characteristics:

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**"a. Regardless of the brake system design, the vehicle will be required to comply with the vehicle stopping criterion established in paragraph 410, ANSI Standard B56.1-1975.**

**"b. The vehicle braking system shall be capable of bringing the vehicle to a smooth, controlled, non-slueing stop within a distance of fifteen (15) feet on the 10° descending ramp from a full rated speed with zero load and with a maximum rated load on both dry and wet surfaces.**

**"c. In addition, because of the environment in which the vehicle must operate, the vehicle braking system must be capable of bringing the vehicle to a smooth controlled stop under all combinations of the following situations:**

- (1) Both forward and reverse direction of travel.**
- (2) Speeds up to maximum rated.**
- (3) Level surfaces.**
- (4) 10° ramps (downward direction).**
- (5) Dry or wet surface.**
- (6) Zero load and maximum rated load.**
- (7) Slueing shall not exceed 2° under all above test conditions.**

**"d. Performance under simulated emergency stop conditions will equal or exceed the above specifications for ramp and level operations.**

**"e. The vehicle braking system must continue to provide braking in the event of power train failure."**

**There appears to be no question about the ability of Clark or Raymond equipment to comply with (2) a. above. However, paragraphs (2) b., c. and d. imposed additional braking requirements. Paragraph (2) e. could not be satisfied by Raymond's standard design which brakes on the power train.**

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Raymond acknowledged receipt of this amendment but advised Sacramento that "we will not withdraw our protest until you utilize [the WRNE-PD] \* \* \*. Your purchase description remains deficient and inadequate for this procurement." None of the other three offerors in acknowledging the amendment made any comment about the new braking requirements, a circumstance which the contracting officer admits caused her "concern".

At this time, Sacramento was directed by its superior command to use the WRNE-PD and a realistic delivery date of 60 days after award for the first four of the twelve units. However, Sacramento requested and received authorization to proceed with the procurement using its own brand-name-or-equal purchase description in view of the urgent need for the items and Sacramento's representation that the trucks had to negotiate 10 degree concrete slopes which at times would be wet. In granting Sacramento permission to use its own purchase description, the superior command noted:

"[The WRNE-PD] has been established for use in the procurement of narrow aisle fork lift trucks. It requires negotiation of ten percent grades on dry concrete. [Sacramento], however, sets forth a requirement for the negotiation of slopes having a 10 degree angle with the horizontal. Ten degrees represents a 17.63 percent grade. In addition, [Sacramento] specifies wet concrete. These two significantly more severe conditions establish the following: Equipment which meets the performance requirements of [the WRNE-PD] will not necessarily meet those of [Sacramento]. For this reason, use of the "brand name or equal" specification with a description of environmental conditions peculiar to [Sacramento] is the preferred approach and satisfactory for the purpose." (Emphasis added.)

It has since been conceded that Sacramento erred in stating it had 10 degree ramps, thus negating one of the two specific bases upon which Sacramento was permitted to use its own specification.

Sacramento then issued amendment M003 to the RFP. The amendment added the requirement that the manufacturer certify that its product met the specifications, extended the time for

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delivery and restated the braking requirements as follows (changes from the prior amendment are underscored):

"Brakes:

- "x. Foot actuated parking brake
- "y. Regardless of the brake system design, the vehicle will be required to comply with the vehicle stopping criterion established in paragraph 410, ANSI Standard B56.1-1975.
- "z. The vehicle braking system shall be capable of bringing the vehicle to a smooth controlled stop on 8%, +2%, -0%, descending ramps from a full rated speed with zero load and with maximum rated load on both wet and dry surfaces.
- "aa. In addition, because of the environment in which the vehicle must operate, the vehicle braking system must be capable of bringing the vehicle to a smooth controlled stop under all combinations of the following situations:
  - (1) Both forward and reverse direction of travel.
  - (2) Speeds up to maximum rated.
  - (3) Level surfaces.
  - (4) 8%, +2%, -0%, ramps (downward direction).
  - (5) Dry or wet surface.
  - (6) Zero load and maximum rated load.
- "bb. Performance under simulated emergency stop conditions will equal or exceed the above specifications for ramp and level operations.
- "cc. The vehicle braking system must continue to provide braking in the event of power train failure."

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Omitted from Amendment M003 were the prior requirements that the truck come to a "non-slueing" stop "within a distance of fifteen (15) feet" and that "slueing shall not exceed 2<sup>0</sup>" under all test conditions.

Raymond responded to Amendment M003 by reiterating its position that it would not withdraw its protest until Sacramento used the WRNE-PD specification. None of the other three offerors could meet the delivery schedule. One of those offerors (Yale) was determined to be outside the competitive range because of technical deficiencies in its proposal and its failure to meet the delivery schedule. Raymond was also determined to be outside the competitive range in view of its refusal to acknowledge Amendment M001 and its insistence in response to Amendments M002 and M003 that Sacramento adopt the WRNE-PD specification.

Amendments M004 and M005 were sent only to Clark and Schreck, who were deemed technically acceptable. These amendments extended the delivery schedule, made the offeror's compliance with the Government's required delivery schedule a prerequisite to consideration of the offeror's price, and made it clear that the braking requirement applied to "cement" ramps. Clark was awarded contracts for all twelve trucks despite the pendency of Raymond's protest and that of Schreck, which is discussed separately below.

Raymond has consistently taken the position that Sacramento should have used the WRNE-PD specification. In its report to this Office, the Air Force argues that Raymond has attempted to dictate to Sacramento specifications which do not meet that activity's needs. Yet, as we have related, in the midst of the procurement Sacramento was directed to use the WRNE-PD, and was relieved of that obligation on the basis of its representation that its trucks had to operate on 10 degree (over 17 percent), wet ramps. Less than two weeks thereafter, Sacramento issued Amendment M003 to the solicitation which described the ramps as "8%, +2%, -0%". (This would indicate that the ramps vary in steepness from 8 percent to 10 percent, but they have been generally characterized as "10 percent" ramps.)

There is no indication in the record that Sacramento advised its superior command that half of the factual basis upon which Sacramento was permitted to use its own specification was in error. This necessarily creates some question as to the validity of the decision to permit Sacramento to use its own specification,

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although the fact that the ramps were wet at times in itself might have led to the same conclusion.

The Sacramento specification contains an extensive list of salient characteristics of the Clark Model NP500-45 truck. Blanks were provided for bidders offering a "equal" item to identify the item and to describe its salient characteristics. Raymond has objected to a number of these characteristics on the basis that they have the effect of restricting competition to Clark equipment without representing an essential need of the agency. At the same time, Raymond offered to provide a number of these items at additional cost, or the agency has indicated that Raymond's comparable feature was acceptable to it. For this reason, we see no need to discuss Raymond's objections to several salient characteristics listed in the RFP.

The unresolved disputes in this case concern the salient characteristics related to braking. One of these is that the "vehicle braking system must continue to provide braking in the event of power train failure." The truck offered by Raymond does not meet this requirement. Sacramento presents this as a safety feature which was particularly important for a vehicle operating on ramps. The agency's views appear to have been reinforced by a visit made by two Sacramento employees to a nearby commercial organization where they observed Eaton, Raymond and Clark trucks in operation. Their report states in part:

"Mr. N --- [the forklift maintenance supervisor at the installation] stated that the Raymond lift used a pin to connect the drive motor to the drive axle. In the event of pin failure the Raymond lift has no braking capability which is a very unsafe feature. Mr. N --- stated that failure of the pin has been experienced, and that operation of the lift on ramps under loaded conditions would increase the probability of failure."

Raymond objects to the demonstration on the basis that the observers were shown 24 volt Raymond trucks delivered from 1961 through 1969, not Raymond's current 36 volt model, yet were shown relatively new Clark trucks. Raymond feels that it was placed at an unfair disadvantage because the disparity in the trucks observed was not made clear to the Sacramento employees. In addition, Raymond has shown that its drive motor is connected to the axle not by "a pin" but by two Woodruff keys. Raymond further states that "to the best of our knowledge,

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we have never had a power train failure in the over twenty years we have used this design."

We have long recognized the broad discretion offered procuring activities in drafting specifications reflective of their minimum needs, and will not disturb a procuring activity's determination of minimum needs unless it is clearly shown to be without a reasonable basis. See Tele-Dynamics Division of Ambac Industries, Inc., B-187126, December 17, 1976, 76-2 CPD 503. The only potential cause for a "drive train failure" identified by the Air Force is the possibility that "a pin" may break. Since Raymond has shown this to be an erroneous depiction of its unit's construction, we do not believe a reasonable basis has been shown for this restrictive requirement.

The RFP also set forth certain minimum braking performance standards. At their most severe, they require the truck to come to a "smooth controlled stop" when the brakes are applied to a vehicle traveling at its full rated speed carrying its maximum rated load on a 10 percent, wet, concrete ramp. The Air Force has stated that in requiring the vehicle to come to a "Smooth controlled stop" its "concern here is not primarily the stopping distance, but that the vehicle does not slew in such a manner that the load will be dumped [and] the vehicle overturned, thus causing injury to the operator or other personnel in an emergency stopping situation."

Raymond argues that the braking performance characteristics are unrealistic and cannot be met by the type of truck being procured by the Air Force:

"\* \* \* we know of no narrow aisle electric truck, regardless of the braking system employed, that could possibly comply with the brake requirements \* \* \*. If the brakes were applied on a Clark Model NP500-45, or any other truck of this type, when the truck was traveling at maximum speed (5.7 M. P. H.) with rated load (4,000 lbs.) down a 10% wet cement ramp, it would never come to a smooth, controlled stop. When the brakes were applied, the truck would go into an uncontrolled slide and eventually come to a stop. We doubt the initial application of the brakes would even slow the truck down. \* \* \*" (Emphasis in original.)

After a conference on this protest at which the braking requirements were extensively discussed, we asked the following questions of the Air Force and received the answers shown:

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**Question:** "What engineering evidence does the Air Force have in its possession indicating that any commercial forklift truck of the kind in question can be brought to a smooth controlled forward stop on an 8%, +2%, -0%, descending ramp from its full rated speed with a maximum rated load on a wet surface?"

**Answer:** "Our primary engineering evidence has been the certificate of conformance (COC) provided by Clarklift-West, Inc. and Schreck's indication in negotiations that it was willing to provide a COC that its forklift would meet our requirement. These braking standards were originally imposed to permit Raymond to offer a proposal, and Raymond chose not to do so. Also see answer [to following question]."

**Question:** "What engineering evidence does the Air Force have in its possession indicating that the Clark Model NP500-45 has as one of its salient characteristics the ability to stop in the above described manner?"

**Answer:** "In our requirement, we were indicating our most severe possible combination of conditions to be encountered should the operator inadvertently exceed the established normal operating limits. The requirement does not describe normal operating limits established for the equipment, but the requirement was so defined to provide a maximum degree of safety. The Clark Model NP500-45 has been observed in daily use, and it has demonstrated excellent controllability during braking on ramps with no evidence of slewing. We have no indications that these forklifts would not continue to provide the same degree of control and braking necessary for operator safety if the forklifts were operated at our maximum stated conditions. One of the reasons that we believe that the Clark NP500-45 is able to stop in a controlled manner is its two brake system, although a one wheel braking system that performs as well would have been acceptable. Also, by applying the Clark NP500-45 braking capability of 15 percent drawbar drag to the ANSI Standard B 56.1 table for ramp calculations, it is indicated that it would come to a stop within

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20 feet on a 10 percent dry descending ramp. As a result of getting such satisfactory response on a dry ramp, it is the engineers' judgment that it would come to a smooth controlled stop on a wet ramp, although the exact stopping distance cannot be computed. It should be noted here that the exact stopping requirement does not state a distance in which the forklift is required to stop but only that the forklift will come to a smooth controlled stop on such grade and under such conditions. Clarklift-West has furnished a COC with each NP500-45 forklift delivered on our requirement. "

The essence of the Air Force position, therefore, is that it is primarily relying on the manufacturer's certification and on a prediction based upon performance on a dry ramp. It does not appear that the trucks have ever been actually tested at the most severe conditions required by the specifications. In none of the Clark technical literature with which we have been provided does the manufacturer claim it can achieve these braking requirements.

Perhaps the most compelling evidence that the braking requirements were unreasonable is that in its offer, Clark took exception to them. One of the "salient characteristics" listed in the RFP for the Clark Model NP500-45 was that it come to a "smooth controlled stop" on "8%, +2%, -0% descending ramps". On the line adjacent to this characteristic, intended for the use of those offering products "equal" to the Clark brand name item, Clarklift-West inserted "8%". Again, at the end of the listing of all the conditions under which this braking was to be achieved, Clarklift-West inserted "Maximum 8%".

We think these entries reasonably can be read in only one way: that Clarklift-West limited its guarantee of braking performance to ramps no steeper than 8 percent. This appears to have been the contemporaneous understanding of Sacramento, whose technical evaluators wrote "8% max" in the Clark column adjacent to the requirement for "8%, +2%, -0% wet/dry ramp". There is no indication that the 8 percent limitation was ever discussed with Clark and the limitation was eventually incorporated into Clark's contract.

As shown above, the "primary engineering evidence" upon which the Air Force has relied in concluding that these trucks can meet the braking requirements has been Clark's execution of a Certificate of Conformance, plus Schreck's indicated willingness

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to provide such a certificate. The certificate states, in pertinent part, that "All technical requirements of the contract are satisfied. Quality and performance are in accordance with the contract, the specifications, and any references and associated contractual drawings and documents." In view of the presence of "8%" and "Maximum 8%" in Clarklift-West's contract, Section F ("Description/Specifications"), there is a substantial doubt as to whether that firm has certified to anything more than that the truck meets the braking requirements on ramps of 3 percent or less.

It therefore appears that not only is there a lack of empirical data to show that the Clark item meets the braking performance requirements, but that offeror took specific exception to those requirements. As discussed below in connection with Schreck's protest, the contract awarded to Clarklift-West was for a basic quantity of four trucks with an option for eight trucks. We understand that the basic quantity and three of the option quantity have been delivered to the Air Force. Delivery of the remaining five trucks is expected to be made no later than April 30, 1977. By separate letter of today, we are advising the Secretary of the Air Force that the remaining five trucks should not be accepted until it has been shown through actual demonstration that the Clark NP500-45 truck can come to a "smooth, controlled stop" under the most severe combination of conditions set forth in the solicitation.

#### The Schreck Protest

Schreck's protest concerns the way in which the bids were evaluated. From the outset, this procurement has been for 12 trucks. As issued, the RFP required delivery of 6 trucks within 30 days and the remaining 6 within 60 days. As the result of offerors' complaints about the brevity of the delivery schedule and direction from higher headquarters, the delivery schedule was lengthened. The last formal amendment to the RFP required that 12 trucks be delivered in three groups of four at 60, 90 and 150 days after receipt of notice of award. Section D of the RFP, entitled "Evaluation Factors for Award", advised that "award will be made to the low aggregate offeror for all items [on an 'All or None' basis]".

Sacramento had not been permitted to proceed with an award pending disposition of Raymond's protest. At the same time, the need for the trucks became more urgent. A compromise was struck on August 31, 1976, when Sacramento was orally authorized to divide the requirement of 12 trucks into an award for 4 trucks with an option for 8.

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Telephonic negotiations were then held with Clarklift-West and Schreck: the new terms of award were given orally and no formal amendments to the RFP were issued. The record of negotiations kept by the contracting officer states in part that:

"As he [Mr. Campbell, Schreck's representative] was reasoning his delivery on the option quantity of 8, at the outset of negotiations, he expressed a delivery on the 8 to be: 4 ea in 112 days & 4 ea in 150 days.

"As discussions progressed Mr. Campbell asked the [contracting officer] about the probability of the exercise of the option and he was told that it would be. [The contracting officer's superior], who was also on the phone, interrupted the discussion to state to Mr. Campbell that 'It is an option, however.' He [Mr. Campbell] then changed the delivery on the 8 to be all within 112 days after award of the contract. \* \* \*"

In her report to our Office, the contracting officer further stated that in the negotiations "A firm quantity of 12 forklifts (immediate award of 4 units, option quantity of 8 units), delivery and the option, with the intent to award, were emphasized." (Emphasis in original.)

Offers were then received from Schreck and Clarklift-West. The low offeror varied with the quantity. Schreck was low by \$16.87 on the basic quantity of 4; Clarklift-West was low by \$3,891.61 for the entire quantity of 12. Bids were evaluated on the latter basis and the contract was awarded to Clarklift-West.

Schreck contends that it was never adequately advised that offers would be evaluated on the basis of price for the basic and option quantities: it states it thought the award would be made on the basis of price for the basic quantity alone. In this connection, Schreck notes that the Air Force failed to amend the RFP to add the "Evaluation of Options" clause set out in Armed Services Procurement Regulation (ASPR) § 7-2003.11(b). Schreck maintains that it might have been able to offer a more advantageous price had it realized the entire quantity of 12 would have been awarded.

The contracting officer acknowledges that the ASPR § 7-2003.11(b) clause should have been incorporated into the RFP. Nevertheless, it is her opinion that Schreck should have realized that the entire quantity of 12 trucks was to be procured. We agree.

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We do not believe that the oral negotiations with Schreck and Clarkliff-West can be considered in a vacuum apart from all that preceded them. The procurement began as one for 12 trucks and the increasingly urgent need for them was repeatedly stressed by the Air Force in its reports on the Raymond protest, upon which Schreck had commented. In response to Schreck's question as to the probability of the exercise of the option, Schreck was told that it "would be". We believe that the record as a whole supports the position that Schreck was adequately advised that all 12 trucks would be procured. In addition, we note that the award was consistent with the written, unamended Section D of the RFP providing for award on "all items" on an "All or None" basis. Although for these reasons Schreck's protest is denied, we are suggesting to the Air Force that in the future, oral amendments of solicitations should be confirmed in writing.

Deputy

  
Comptroller General  
of the United States