



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Raymond Corporation--Reconsideration
File: B-251405.2
Date: August 26, 1993

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DIGEST

Protest that specifications are overly restrictive because they require side stance forklifts without permitting as an option the protester's fore and aft forklift is sustained on reconsideration where the record fails to show that the agency has a reasonable basis for this requirement.

DECISION

Raymond Corporation requests reconsideration of our decision, Raymond Corp., B-251405, Apr. 2, 1993, 93-1 CPD ¶ 290, denying Raymond's protest challenging the terms of invitation for bids (IFB) No. F19650-92-B-0038, issued by the Department of the Air Force for forklift trucks.

On reconsideration, we sustain the protest.

The IFB, issued on August 7, 1992, contemplated the award of a firm, fixed-price contract for two rider reach forklift trucks, Crown Model 35RRTL or equal; the forklifts are the type suitable for indoor use. Section C of the solicitation included the requirement for a side stance operator's compartment; since the controls are on the side of the forklift, the side stance compartment allows the operator

¹The original protest was filed on behalf of Raymond by a distributor of Raymond's forklifts. Raymond has elected to represent itself in this current challenge to the IFB. Raymond is entitled to file a request for reconsideration of the initial decision.

to stand sideways when operating the forklift and to turn his head from left to right to face the direction of travel.

In its original protest, Raymond argued that the requirement for a side stance operator compartment is unduly restrictive of competition because there are other types of forklifts, namely, fore and aft stance compartments, that can comply with the requirement that forklift operators face the direction of travel² and that will meet the agency's minimum needs. Specifically, Raymond asserted that its fore and aft stance forklift is designed so that the operator can face the direction of travel.

The Air Force asserted that health and safety risks associated with the operator twisting to face the rear of a fore and aft vehicle would result from the use of Raymond's vehicle. We initially denied Raymond's protest, concluding that the record--including Raymond's sales brochure which was submitted as a part of its comments on the agency report--did not support its claim that an operator of its fore and aft stance forklift does not have to twist his body--as is required in a conventional fore and aft forklift--because by simply "turning his body a full 180 [degrees]," the operator can drive his vehicle in reverse without any twisting.

The record established that unless the operator twists his torso while facing the rear of Raymond's truck, he would not be able to monitor the information on the vehicle's patented electronic vehicle system called intellidrive; the intellidrive display provides the operator with information on vehicle functions, including battery status, travel speed and load weight. We also believed that the multifunctional handle, which is located to the side in front of Raymond's forklift, does not allow the operator's hand to be held in its natural position or with maximum comfort and ease unless the operator stands sideways and, thus, twists his torso. Based on these conclusions, we stated that since the use of a side stance forklift avoids twisting and the lower back pain, discomfort, and misalignment of the spine that is associated with it, the agency could reasonably view side stance forklifts as the only type that meets its minimum needs. Thus, we denied the protest based on our conclusion that the requirement for side stance forklifts is not unduly

²This requirement is contained in the applicable regulations regarding the use of forklifts, specifically, Department of Defense (DOD) Regulation 4145.19-R-1, September 15, 1979, which was issued pursuant to DOD Directive 4145.19, entitled "Storage and Warehousing Facilities and Services," August 13, 1975.

restrictive of competition. See Sunbelt Indus., Inc., B-246850, Mar. 31, 1992, 92-1 CPD ¶ 325.

In its reconsideration request, Raymond argues that our decision was based on the erroneous conclusion that its fore and aft forklift would not meet the agency's minimum needs from a health and safety standpoint. Raymond argues that our decision was based on an incorrect understanding of the difference between displays and controls in the vehicle, as well as the presumption that the control handle is not readily operable in either direction of travel unless the operator twists his torso when driving in a forks-trailing mode, that is, driving while facing the rear of the vehicle. Raymond also contends that the Air Force decision to exclude fore and aft vehicles from competing under the subject solicitation was improper because it was not based on any valid comparison of the brand name side stance forklift and its fore and aft forklift.

To obtain reversal or modification of a decision, the requesting party must convincingly show that our prior decision contains errors of fact or law or information not previously considered that warrant its reversal or modification. See 4 C.F.R. § 21.12(a) (1993); Varian Assocs., Inc.--Recon., B-236238.2, June 28, 1990, 90-1 CPD ¶ 595. Upon reconsideration, we agree that our decision contains errors of fact and, as a result, we incorrectly concluded that the specification requiring forklifts with side stance operator's compartments is not unduly restrictive of competition.

While our decision correctly indicated that an apparent weakness in a fore and aft vehicle like Raymond's stems from the operator's inability to monitor information on the vehicle's display while driving in a forks-trailing mode, we incorrectly assumed that this drawback is peculiar to fore and aft vehicles like Raymond's forklift. We were not aware until we conducted a hearing in connection with this reconsideration request that an operator of a side stance forklift likewise is precluded from viewing its display when he is facing the direction of travel. (Hearing Transcript (HT) 39). The record also shows, and the agency does not effectively refute, that the safe operation of either forklift does not require constant monitoring of the display when the operator is driving the vehicle, as opposed to maneuvering the forks, and is facing the direction of travel. (HT 37).

Given the similar inability to view the display while driving Raymond's forklift in the forks-trailing position and while facing away from the forks in a side stance forklift, the Air Force could not reasonably use the operator's inability to view the forklift displays to

exclude one forklift design and at the same time ignore the same alleged drawback in requiring another forklift design. See Bardex Corp., B-252208, June 14, 1993, 93-1 CPD § 461. Accordingly, the fact that the operator of a Raymond forklift is precluded from viewing the display when traveling in a forks-trailing position does not support the agency's exclusion of Raymond's fore and aft forklifts.

Raymond correctly asserts that we erred in concluding that the operator standing in a forks-trailing position in Raymond's forklift cannot operate the control handle in a natural position unless he twists his torso the entire time he is driving the vehicle. As discussed above, we based this conclusion on our interpretation of Raymond's descriptive literature which claimed, but did not actually show, an operator driving a vehicle in this way. However, a performance demonstration of Raymond's vehicle, conducted while Raymond's reconsideration request was pending at our Office, established with certainty--and the agency does not refute--that an operator of Raymond's fore and aft stance forklift does not have to twist his body while driving with the forks trailing. Simply stated, the record does not support the agency's decision to restrict the competition to side stance forklifts based on its belief that fore and aft forklifts require constant twisting on the part of the operator. Since the problems the agency associated with twisting are not present if twisting is not required the entire time the operator is driving with the forks trailing, the agency's exclusion of Raymond's fore and aft vehicle on this ground was not reasonable.

The Air Force argues that the requirement for side stance forklifts is proper because it was reasonably based on human safety considerations and was tailored to reflect the government's minimum needs. The agency maintains that it required side stance forklifts based on its past experience with fore and aft forklifts.

Although the agency claims that its decision was based on its past experience with fore and aft forklifts, the record does not establish that the agency's initial comparison of side stance and fore and aft forklifts included an analysis of Raymond's fore and aft forklift. To the contrary, agency representatives testified at the hearing that the agency for the first time analyzed Raymond's forklift after Raymond filed its request for reconsideration; for unexplained reasons, the agency's initial analysis of fore and aft forklifts was limited to conventional models where the operator sits facing the front of the vehicle. (Video Transcript (VT) 12:49:35).

The agency's failure to consider the specific design aspects of Raymond's forklift is significant because the crux of the agency's rationale for excluding fore and aft vehicles was its belief that twisting is inevitable when using a fore and aft forklift. As discussed above, constant twisting in the forks-trailing position is not necessary in Raymond's vehicle because the operator can turn his whole body around to face the direction of travel. We fail to see how the Air Force reasonably could decide to preclude the use of a particular vehicle without even considering features of the vehicle that were designed to eliminate the agency's concerns about health and safety. See Bardex Corp., supra; Raymond Corp. Schreck Indus., 56 Comp. Gen. 513 (1977), 77-1 CPD ¶ 257.

In its report submitted in response to Raymond's request for reconsideration, the agency advances additional reasons to support its decision to require side stance forklifts.³ For example, the agency states that the operator's arm is in an awkward position when operating the control handle in the forks-trailing mode. According to the agency, the operator must position his arm behind the midline of the body to operate the control handle; the Air Force states that such positioning causes strain and discomfort to the operator's shoulder and may lead to damage to his shoulder joint.⁴

The record does not support the agency's statement that the position of the operator's arm in a forks-trailing position in Raymond's vehicle will cause strain to the operator's shoulder that is significant enough to lead to damage to his joint. While the agency advances this argument to

³In its report, the agency also asserted that its decision to exclude Raymond's vehicle was based on such factors as the inability of operators with missing fingers or those that are left-handed to drive the forklift. The protester rebutted these arguments in its comments on the agency report and its hearing comments. The agency did not, in either of the hearings that were conducted after receipt of its agency report, address these issues; therefore, we deem them to be abandoned. See Heimann Sys. Co., B-230882, June 1, 1990, 90-1 CPD ¶ 520.

⁴While there was disagreement between the parties concerning whether Raymond would offer the vehicle that was available during the period when the initial protest was pending, or a new and improved model which will be available in September 1993, we do not think that a discussion of this issue is necessary in light of our determination that the older model meets the agency's needs. Indeed, the difference between the two models seems to be limited to the position of the control handle; it is 1 inch lower in the new model.

justify its exclusion of all fore and aft vehicles, the agency neither explains nor provides any evidence to establish with reasonable certainty that the alleged awkward positioning of the arm can cause the cited health problems. Rather, the record shows, and the agency does not effectively refute, that the chance of health risks to the operator in this position is relatively low in Raymond's vehicle because the strain, if any, is momentary. A site visit to the warehouse where the forklifts will be used revealed that the aisles in the warehouse are not long in terms of the distance that the operator will have to drive the vehicle. The record also establishes that the operator need only drive the vehicle half of the time, as opposed to continuously, in a forks-trailing position. Finally, the agency states that 24 employees will share the responsibility of driving the two vehicles. Given the infrequent and limited use of the vehicle for short distances, we have no basis to conclude that the operator will suffer from the cumulative strain that the protester argues is necessary to cause joint damage.

The Air Force contends that the torso twisting that it believes is necessary in order for the operator to check his load in a forks-trailing position, or when he is driving short distances less than 20 feet and decides not to turn his entire body around on the Raymond forklift, creates health risks to the operator. To support its assertion, the agency states that 40 percent of workers' compensation claims are the result of such soft tissue damage as back injuries. At the hearing, an agency official testified that the operator must frequently check his load because the textured floor at the warehouse may cause his load to shift. (VT 14:07:08). Another agency official testified that the side stance forklift is superior because the load travels in the operator's blind spot in the forks-trailing mode in Raymond's vehicle (VT 13:17:45-51); however, this same individual also conceded subsequently that the load in a side stance forklift is also in the operator's blind spot when the operator faces the direction opposite the forks. (VT 13:18:26).

The record does not support the agency's position with regard to either the amount of twisting that is necessary or the effect of the alleged twisting. First, the operator's compartment in both vehicles is elevated and, thus, the amount of twisting is limited due to the fact that the Raymond operator can turn and glance at the edges of his load using his peripheral vision; the side stance operator will also have to turn his head, twist his body, and glance to check the end of the load that is farthest away from him. On this record, there is no basis to conclude that the twisting associated with the side stance forklift is less than that required with Raymond's forklift.

While the agency states that back injuries account for 40 percent of workers' compensation claims, the agency-- although given ample time and opportunity--does not provide any evidence to show that it gave any consideration to how many of these claims are directly related to the type of torso twisting it believes will result from the use of Raymond's forklift. On the other hand, the protester asserts, and the agency does not refute, that the twisting that stems from load checking or driving short distances will not cause back injuries because the twisting involved is neither frequent nor extreme in either case. (HT 20). Contrary to the agency's position, the protester argues, and a site visit to the warehouse confirms, that the warehouse floor is not so textured that the load will in fact shift any more than it would under normal circumstances. The site visit also confirmed, as discussed above, that the distance in the aisles in the warehouse is not such that would require more twisting than is normally required in warehouses; rather, given the fact that the aisles are less than 70 feet long, the actual number of times an operator must check his load may be fewer than is typically required in warehouse settings. We therefore conclude that the agency has not justified its decision to exclude Raymond's forklift based on the health reasons it maintains are associated with torso twisting.

The Air Force contends that the side stance is preferable because the operator is perpendicular to the open rear and can shift his weight from side to side to avoid fatigue, or in the event of sudden stop, injury. According to the agency, the parallel position when operating Raymond's forklift with the forks trailing forces the operator to tense his pelvis, thighs, and calves, increasing fatigue. The agency also argues that if there is a sudden stop, an operator of Raymond's forklift would be likely to lose his balance and fall.

The agency has not provided any evidence to support its claim either that the fore and aft forklift by design causes fatigue or that the likelihood of accidents increases because of the design of the vehicle. On the other hand, a witness testified at the hearing on behalf of the protester that leaning can be accomplished without difficulty in both designs and, as a result, there is no real distinction between the two designs in terms of operator fatigue. (HT 22-23). The protester's witness also rebutted the agency's claim that the operator is more likely to fall off the vehicle by explaining that since the vehicles can only reach 5 miles per hour, it is not likely that an operator will fall off of either vehicle, regardless

of the design; indeed, the expert testified that he had never heard of an instance where an operator had fallen off of any forklift. (HT 23). Given our opportunity to attend a performance demonstration of Raymond's forklift and to actually drive the vehicle, we do not believe that the agency can reasonably exclude the protester's vehicle on these bases. The compartments on both vehicles are similar and there is nothing in the record other than the agency's blanket assertions that the stance in one will actually cause more fatigue; indeed, the performance demonstration did not confirm this. The likelihood, if any, that an operator will fall out of the vehicle is not--contrary to the agency's suggestion--dependent on the operator's stance. If the operator is going to fall off, which this record does not establish, it is reasonable to assume that he will do so because of the speed of the vehicle rather than because of his stance.

The Air Force also argues that the position of the control handle while driving Raymond's forklift with the forks trailing can cause safety problems. According to the agency, the operator can inadvertently engage the control buttons on the multifunctional control handle because the handle is in the operator's blind spot. In response, the protester contends, and the agency does not refute, that the multifunctional control handle in the brand name forklift is also not visible when the operator is driving the vehicle and facing the direction opposite the forks. Given the similarity between the inability to view the handle in either vehicle and the agency's failure to explain why the inability is acceptable in one forklift and unacceptable in another, we do not believe that, based on this record, the agency can legitimately exclude Raymond's vehicle and overlook the exact same alleged safety drawback in the side stance vehicle. Further, the record does not establish that any apparent safety risks are caused by the operator's inability to see the control handle while driving either vehicle; unlike a situation where the operator must accomplish complicated tasks without the benefit of seeing the handle, the operator's task here is limited simply to pushing the handle forward and, if necessary, the operator may glance periodically to view the handle while driving either vehicle.

Finally, the Air Force contends that Raymond's fore and aft vehicle entails safety risks because, according to the agency, there is a continuity problem, stemming from the fact that the operator must switch his hands to steer and drive the vehicle depending on the direction the operator is facing; in the forks-trailing position, the operator's left hand is placed on the control handle to control the speed

and direction of travel and the right hand is placed on the steering handle. The agency asserts that the lack of continuity "provides for a greater likelihood of an accident because the chances of human error are increased."

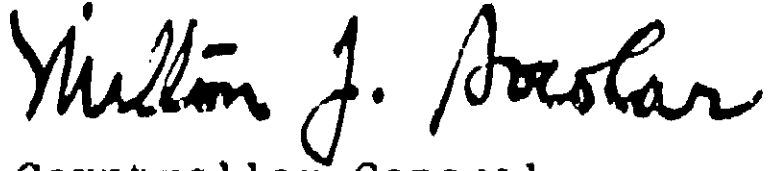
The protester, on the other hand, argues, and the agency does not refute, that adequate training--which is also required under the solicitation--will decrease the alleged confusion stemming from the control mechanisms that are peculiar to each forklift design; in the side stance, unlike Raymond's fore and aft forklift, the operator must push the control handle perpendicular to the direction of travel in order to go forward or backward. The agency does not explain why it believes that there is no continuity problem when the operator uses the control handle in this way.

The record does not support the agency's assertion that the chance of human error is increased when the operator switches hands to drive Raymond's vehicle in a different direction. The record establishes that it is not likely that the operator will confuse the functions of each handle simply because of the hand used to operate them; instead, it is reasonable to conclude that the operator will know--regardless of the fact that he must switch hands to operate the vehicle--which handle operates steering and which operates the direction of travel simply because of the difference in the way each handle feels. Further, it does not appear likely that the operator will confuse the handles and attempt to use them incorrectly given the fact that the movement of each handle is different from the other. The steering handle is located on top of the compartment and can be moved from left to right; whereas, the control handle can only be pushed forward or backward depending on the direction of travel and the direction in which the operator faces. Finally, the controls do not appear to be so complicated that an operator will have to become oriented with them prior to each use or each time he changes the direction of travel.

In sum, the record here shows that both vehicles, not only the type specified by the agency, can meet the agency's minimum needs in a safe, reliable, and efficient manner. The Air Force could not properly restrict the competition to side stance vehicles based on an initial comparison which considered only conventional fore and aft forklifts, and on speculation that the fore and aft design offered by the protester causes health and safety risks. Accordingly, we recommend that the solicitation be amended so as not to exclude fore and aft forklifts of the type offered by Raymond. We also find Raymond to be entitled to the costs of filing and pursuing the protest and reconsideration request, including attorney's fees. See 4 C.F.R. § 21.6(d). Raymond should submit its certified claim, detailing the

time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f).

The protest is sustained.

for 
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