Ruppert

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Peter Vicari General Contractor, Inc.--Request for Reconsideration

File: B-236927.2

Date: April 25, 1990

A. Morgan Brian, Jr., Esq., for the protester.
George M. Ruppert, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Decision which held that agency reasonably found individual surety on bid bond unacceptable due to qualifying language in requested escrow agreement, and thus properly rejected bidder as nonresponsible, is affirmed on reconsideration where protester presents no evidence that original decision was based on error of law or fact.

DECISION

Peter Vicari General Contractor, Inc., requests reconsideration of our decision Peter Vicari Gen. Contractor, Inc., B-236927, Jan. 23, 1990, 69 Comp. Gen. ___, 90-1 CPD ¶ 92, in which we denied Vicari's protest against the rejection of its low bid under invitation for bids (IFB) No. GS-07P-89-HUC-0660, issued by the General Services Administration (GSA) for fire safety improvements at the United States Customs House, New Orleans, Louisiana.

We affirm the decision.

In its initial protest, Vicari challenged GSA's rejection of one of its individual sureties as unreasonable, arguing that GSA had not afforded it a sufficient opportunity to submit adequate documentation to establish the surety's acceptability. Specifically, Vicari argued that GSA improperly had rejected the surety's for failure to produce an acceptable escrow agreement. In our decision, we held that it was proper for the agency to reject the surety based on an escrow agreement GSA considered unacceptable due to qualifying language stating that the agreement would be

"governed by the laws of Louisiana in all respects, including matters of construction, validity and performance." The Hibernia Bank, the escrow agent, refused GSA's request that this provision be deleted, agreeing only to modify the clause to cover only potential disputes to which the bank was a party. We agreed with GSA that this modification was inadequate, since it remained uncertain whether the qualification would result in the government's rights (in the event of a default) being adjudicated differently than under federal law.

In its request for reconsideration, Vicari contends that GSA should have waived the escrow deficiency for the surety, since one acceptable surety remained, and there is no absolute requirement for two acceptable individual sureties. Vicari refers to Federal Acquisition Regulation (FAR) § 28.203(b) and (c) (FAC 84-53) in support of its position. Alternatively, Vicari argues that, even with the qualifying language in the escrow agreement, the government's rights were adequately protected in that litigation arising in connection with any dispute concerning the escrow agreement would have to be brought in a federal court which, it asserts, would apply Louisiana law in any case. Vicari concludes that, with or without the qualifying language, the choice of law result would have been the same. Vicari also contends that GSA waived any objection to the language by not questioning it until the last minute.

Vicari's arguments do not warrant reconsidering our decision. First, notwithstanding recent changes under FAR § 28.203(b) providing for acceptance of a single surety, FAR § 28.202-2, which was in effect at the time the IFB was issued, required that at least two individual sureties execute a bid guarantee and that the net worth of each individual equal or exceed the penal amount of the bond. See Labco Constr., Inc., B-232986 et al., Feb. 9, 1989, 89-1 CPD ¶ 135. The single surety requirement under FAR §§ 28.203(b) and (c) did not go into effect until February 26, 1990, after this procurement action, and thus did not require the agency to waive the escrow agreement defect and accept Vicari's bid guarantee with only a single adequate surety.

Second, as in our prior decision, we reject Vicari's position that the government's rights, in case of a dispute with the escrow agent, would not be affected by the qualifying language. Because the determination of which among a choice of more than one jurisdiction's laws applies to any cause of action is a judgment to be made by the courts, the choice of applicable law necessarily is subject

to some degree of uncertainty. Indeed, it is well-recognized that the choice of laws in the field of contracts is highly complex and confused; some courts consider contracts the area of greatest confusion. 16 Am. Jur. 2d, Conflict of Laws § 74 (1970). It is the agency's position that federal law would govern disputes under the escrow agreement. While, given the above authority, it is not certain that federal law ultimately would be applied by a particular court in determining the government's rights under the agreement, neither is it certain that Louisiana law would apply. The qualifying language would require GSA automatically to forego application of federal law in favor of Louisiana law. Again, GSA was not required to do so. We note that, Vicari's position notwithstanding, the escrow agent (the Hibernia Bank) considers it sufficiently uncertain that Louisiana law would be applied that it refused to delete the qualifying language from the escrow agreement.

Finally, Vicari's contention that GSA afforded it insufficient opportunity to produce an acceptable escrow agreement is no more than a restatement of an argument we considered in our prior decision; we found on the record presented that GSA did give Vicari an adequate opportunity to submit an acceptable escrow agreement. Vicari has furnished no new facts supporting its position, and mere reiteration of a previously considered argument is not a basis for reconsidering a decision. Eagle Transfer, Inc.--Request for Recon., B-235348.2, Oct. 17, 1989, 89-2 CPD ¶ 360.

Our decision is affirmed.

for James F. Hinchman
General Counsel