wiley

NEWSLETTER

No Timeliness Safe Haven for Contractors in CBCA's *Safe Haven* Decision

December 2015

Government Contracts Issue Update

The decision to file an appeal with one of the Boards of Contracts Appeals often involves a difficult choice for contractors between enforcing their legal rights and maintaining their customer relationships, particularly with their contracting officer (CO). Once the notice of appeal is filed, any further decision on a claim is generally out of the CO's hands. It can be tempting, then, for contractors to keep communicating with their CO about the issues in the claim for as long in the process as possible, even after the CO has issued a final decision and the clock for filing the notice of appeal is running. That clock can be stopped if the CO "reconsiders" the final decision, but as the Civilian Board of Contract Appeals (CBCA or the Board) said in its recent decision, *Safe Haven Enterprises, LLC,* 2015 WL 5750006 (Sept. 29, 2015), "it is difficult to pinpoint precisely when the CO's review of a request transforms into a reconsideration process." Contractors, then, need to be aware, as emphasized in *Safe Haven*, that there are, at best, "murky" factual boundaries that define when a CO is undertaking a reconsideration that allows them to safely wait to file their appeal beyond the original time frame.

Two Contract Disputes Act (CDA) claims were at issue in *Safe Haven,* which arose from various task orders under a State Department Indefinite Delivery/Indefinite Quantity (ID/IQ) construction contract. The CO issued two final decisions, both of which included the required appeals language from FAR 33.211(a)(4)(v), noting the 90-day time limit to file an appeal with the Boards. Well within 90 days of the second claim (and likely within 90 days of the first), the CO reached out to Safe Haven's then-counsel to discuss undefined "outstanding issues" relating to those task orders. After a series of

Authors

Philip J. Davis
Senior Counsel
202.719.7044
pdavis@wiley.law

George E. Petel
Of Counsel
202.719.3759
gpetel@wiley.law

Practice Areas

Government Contracts

meetings, email exchanges, and telephone phone calls with the original CO and his successor, Safe Haven filed its notices of appeal with the CBCA 617 and 661 days after the final decisions, respectively, on a theory that these various communications signaled that the CO was reconsidering the final decisions, and thus vitiated the running of the appeals clock. After an extensive review of case law highlighting the virtually innumerable factual contexts in which reconsideration issues could arise, the CBCA agreed with that theory and denied the Government's motion to dismiss. Because of the critical practical implications for the contractor of a correct decision whether reconsideration has begun, the Board's decision merits careful consideration.

When Is the CO Actually "Reconsidering" the Final Decision?

COs may reconsider their decisions at any time until the appeal period ends. But, short of a statement in writing either withdrawing the decision or indicating it is under reconsideration, there are almost no magic words that a contractor can rely on to know for sure if the reconsideration process has begun so that it can safely delay filing an appeal. The test Boards apply in determining whether the CO started the reconsideration process is an objective one based on the reasonable person standard; it is not what the contractor subjectively thought. Instead, the Boards determine, based on an inquiry into all the facts surrounding the interaction between the CO and the contractor, whether a reasonable person would conclude that the CO was actually reconsidering the decision. The inquiry looks beyond just the words the CO uses, and into the substance of the CO's expressed intent.

The only way to be absolutely sure that the appeals clock has been stopped is if the CO affirmatively withdraws the final decision in writing. Likewise, if the CO states in writing that the final decision is being reconsidered, that has essentially the same effect. Although this may be the clearest means for the parties to be assured the final decision is under reconsideration, COs rarely issue such written statements. On the other hand, even if the CO tells the contractor that the appeal clock is still running, subsequent actions may still negate the decision's finality.

As *Safe Haven* discusses in detail, the Boards can determine that there was a reconsideration even absent a written statement of reconsideration. But, it is clear that a contractor's mere request for reconsideration without any response from or action by the CO will not satisfy the elements necessary to vitiate the final decision. It is in the middle ground between a clear written response and no response at all where the facts must be carefully analyzed to assess whether a reconsideration has begun, and where contractors struggle to decide whether to file and preserve their appeal. Noting that there is no guidance in the CDA or in the FAR identifying when a CO's actions are sufficient to constitute reconsideration, the CBCA in *Safe Haven* punted the creation of a bright-line rule to the FAR Council: "it seems impossible to identify a clear bright-line rule defining exactly when, in every situation, the [CO's] review of (or meeting following) a request for reconsideration of a purportedly 'final' decision will suspend an appeal deadline. . . . Without FAR guidance, the determination is 'driven by facts unique to each case and is necessarily ad hoc.'" Indeed, the CBCA in *Safe Haven* acknowledged that the Boards and the Court of Federal Claims have "struggled to define in a consistent manner exactly when a purportedly final decision is no longer 'final' for appeal purposes."

Citing a 1972 Court of Claims decision, *Roscoe-Ajax Construction Co. v. United States*, 458 F.2d 55 (Ct. Cl. 1972), the CBCA outlined the broad elements of an implied reconsideration: 1) an agreement by the CO to discuss the merits of an already decided claim; and 2) "action to revisit and reconsider the prior 'final' decision." In *Roscoe-Ajax*, the contractor presented the CO with a letter from its subcontractor requesting a meeting after the final decision to discuss the problem at issue in the claim. After the meeting, the Government conducted additional tests of the material at issue, and the CO subsequently informed the contractor that he would not modify the prior decision. The Court of Claims held that the combination of the agreement to meet and the additional test "served to keep the matter open and necessarily destroyed any finality the decision theretofore had." Roscoe-Ajax's appeal was thus timely filed within 90 days of the CO's subsequent statement that he would not change the decision.

Another scenario that illustrates how difficult these elements can be to assess is where the contractor submits a request for reconsideration (which, by itself, is insufficient), and the CO responds by denying the request. Here, the nuances of the CO's response may be dispositive. For example, if the CO makes clear that he is not engaging, has not engaged, and will not engage in any reevaluation or reconsideration—beyond merely reading the contractor's request for reconsideration regardless of the length or complexity of the request—the date of the original final decision marks the beginning of the appeals clock. But, if the CO does more, and if the contractor is made aware of these actions (two big "ifs"), the *Roscoe-Ajax* elements may be satisfied. In *Safe Haven*, the CBCA found that the contractor satisfied these elements with evidence that the CO indicated in the post-decision interactions that he would "take a look" at the allegations of error in the decisions raised by Safe Haven. A corollary example is where the CO, after receiving the request for reconsideration, requests additional information from the contractor. That request alone will not trigger the reconsideration process unless the contractor provides the requested response.

Even more frustrating for contractors, post-decision meetings between the contractor and the CO alone may not be enough to satisfy the objective test for reconsideration. The CBCA in *Safe Haven* discussed cases from other Boards where multiple post-decision meetings occurred between the CO and the contractor that nonetheless failed to "clearly constitute reconsideration of the [final] decision." In one case, the contractor's appeal failed to clearly differentiate pre- and post-decision meetings regarding the claim so as to illustrate the CO's willingness to reconsider. In another case, the CO told the contractor during the meeting that he would consider "new claims," but the contractor's new submission had no additional information, and thus the original final decision stood.

Does Reconsideration Just Pause the Appeals Clock or Reset It Entirely?

Upon issuance of a new final decision on reconsideration, the entire appeals clock starts to run again, that is, it runs from zero. The State Department in *Safe Haven* unsuccessfully argued that even where there is a bona fide reconsideration, the appeals clock is merely paused until the CO issues the reconsideration decision—*i.e.,* that 77 days had passed between the final decision and when the reconsideration process started, and thus Safe Haven only had 13 days after that new decision to file its appeal with the Board. This argument, the CBCA found, flies in the face of the Board's precedent, as well as the binding precedent from the *Roscoe-Ajax* case discussed above and the general federal court rules for reconsideration.

When Does the CO Lose the Authority to Reconsider a Final Decision?

Once the appeals clock expires, the parties' rights in the final decision vest, and the CO loses the authority to reconsider the final decision at that point. But when do the parties' rights vest? The ASBCA and some CBCA predecessor Boards have repeatedly found that once the 90-day appeals clock has run, any reconsideration by the CO would be untimely. Per the Board's *Safe Haven* decision, however, the CO's authority to reconsider a decision on a CDA claim expires only once the decision is no longer appealable in *any forum*. The CDA provides two appeal clocks: contractors have 90 days to file with the Boards, but have 12 months to file with the Court of Federal Claims. It would be inconsistent to treat the finality of the CO's decision differently depending on the contractor's choice of forum. Thus, at least before the CBCA under *Safe Haven*, the CO retains the authority to reconsider the final decision for the entire 12-month period.

Final Take

Although *Safe Haven* provides an excellent survey of the factual landscape contractors must consider when deciding whether the CO has undertaken a reconsideration and the appeal timeline has stopped, the decision makes clear that these determinations are necessarily fact specific. In short, the Board, based on *Safe Haven*, will look to some timely affirmative conduct by the CO—either express or implied—that indicates to the contractor, on an objective, reasonable person basis, a willingness to revisit the previously issued "final" decision. Because the Boards strictly interpret their timeliness requirements, contractors need to avoid making assumptions regarding reconsideration that are factually problematic and that could cause them to unwittingly miss appeal deadlines. If there is any uncertainty, contractors should seek confirmation in writing from the CO that a reconsideration has begun, thus rendering the decision not final. Failing such a clear written confirmation withdrawing the final decision, contractors should meet the initial deadline and get their appeals on file.