In the Matter of:

**Disputes concerning the payment of prevailing wage rates and proposed debarment for labor standards violations by:**

**THOMAS AND SONS BUILDING CONTRACTORS, Inc., a corporation and JAMES H. THOMAS, individually and as a corporate officer**

**With respect to laborers and mechanics employed on Contract No. N62472-90-C-0410 for the Wilmington, Delaware Naval Reserve Center and Contract No. F36629-93-C-0007 for the Pittsburgh Air National Guard**

**ARB CASE NO. 98-164**

**ALJ CASE NO. 96-DBA-33**

**DATE: June 8, 2001**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**Appearances:**
*For the Petitioners:*
James H. Thomas, *President, Thomas and Sons Building Contractors, Inc., Lakehurst, New Jersey*

*For the Respondent:*
Carol Arnold, Esq., Paul H. Frieden, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

## ORDER DENYING RECONSIDERATION

In July 1998, a Labor Department Administrative Law Judge (ALJ) issued a decision finding that the Respondents in this enforcement action (Thomas and Sons Building Contractors, Inc., and its principal, James H. Thomas – collectively, "Thomas and Sons") had misclassified and underpaid workers on projects subject to the prevailing wage requirements of the Davis-Bacon Act, 40 U.S.C.A. §276a (West 1986). The ALJ recommended that they be debarred from further federal contracts. *Thomas and Sons Bldg. Contractors, Inc.*, ALJ No. 96-DBA-33 (July 30, 1998).

Thomas and Sons appealed the ALJ's decision to the Administrative Review Board (ARB). The appeal did not challenge the merits of the ALJ's liability finding, but instead contested the Labor Department's jurisdiction to prosecute the wage underpayment claim while the company was

pursuing a monetary claim against the contracting agencies. In a Final Decision and Order, we held that "because the question presented [in the wage underpayment prosecution] . . . arises out of the labor standards provisions of the contracts, it is not subject to the general contract disputes clause of the procurement contracts[,]" and therefore the ALJ and this Board properly had jurisdiction over the case. We denied the petition for review, affirmed the ALJ's earlier decision, and ordered that the Respondents' names be forwarded to the Comptroller General to be placed on the debarment list. *Thomas and Sons Bldg. Contractors, Inc.*, ARB No. 98-164, ALJ No. 96-DBA-33 (ARB Oct. 19, 1999) ("October 1999 D&O").

On April 3, 2000 – more than 5 months after the ARB's decision – Thomas and Sons submitted a request that we reconsider the October 1999 D&O. The argument advanced in the request for reconsideration varied only slightly from the position taken in the prior case, with Thomas and Sons asserting that the dispute was really a contract matter to be decided solely by the Armed Services Board of Contract Appeals (ASBCA) and not a labor standards matter to be decided by the Labor Department.

In response to the reconsideration request, we issued a Notice soliciting the views of the parties on the authority of the ARB to reconsider its decisions under the Davis-Bacon Act. We posed four questions:

1. Whether the ARB has the authority under the Davis-Bacon Act generally to reconsider one of its final decisions and particularly an enforcement action involving debarment (referencing *Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/112A, ALJ No. 86-ERA-23 (ARB Nov. 20, 1998) and *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3 (ARB Nov. 24, 1998))?

2. If the ARB has such authority, what time limits apply to the motion for reconsideration?

3. If the ARB has such authority, what is the scope of that authority in reviewing its final decisions?

4. If the ARB were to reconsider and reverse, does the ARB have the authority to direct that the Comptroller General remove Respondents' names from the list of ineligible bidders?

Notice, slip op. at 1- 2. Both parties have submitted responses to the Notice, although Thomas and Sons' brief primarily restates the claim that the matter is solely a contract dispute to be decided by the ASBCA and that the Labor Department lacks jurisdiction over the case.

In his brief, the Wage and Hour Administrator observes that neither the Davis-Bacon Act nor its implementing regulations explicitly provide for reconsideration of Board decisions, nor set a time limit for making a request for reconsideration. Administrator's Statement in Response to Request for Reconsideration at 1-6 (June 20, 2000). *See* 40 U.S.C.A. §276a; 29 C.F.R. Part 7 (2000). The Administrator notes, however, that the Board and its predecessors in the past have entertained

motions for reconsideration under the Davis-Bacon Act and its sister prevailing wage statute, the Service Contract Act, 41 U.S.C.A. §351 (West 1987), citing *Veterans Canteen Serv.*, ARB No. 97-044 (Feb. 28, 1997); *HLJ Management, Inc.*, BSCA No. 93-04 (June 30, 1994); *L.P. Cavett Co.*, Wage Appeals Board (WAB) No. 89-15 (July 20, 1993); *Executive Suite Servs.*, BSCA No. 92-26 (Apr. 28, 1993); *Ames Constr., Inc.*, WAB No. 91-02 (Feb. 23, 1993); *Cindy Monahan*, No. 87-SCA-2 (Dep. Sec'y Mar. 23, 1992); *Colonial Realty, Inc.*, WAB No. 87-37 (Sept. 20, 1989); and *Atco Constr., Inc.*, WAB No. 86-01 (Jan. 29, 1987). Referring to numerous court decisions,[1/] the Administrator states that administrative agencies have inherent authority to reconsider their decisions within a reasonable time. Administrator's Statement at 1-6. Thomas and Sons agrees, declaring that the ARB has inherent authority to reconsider and "alter, vacate, amend or dismiss any decision . . ." Appellant's Argument for the Complete Dismissal of Both Cases Including Full Return of All Monies Withheld at 1, July 15, 2000.

With respect to the time limit for filing a motion for reconsideration, the Administrator points to various court decisions suggesting that the time limit for filing a request for reconsideration should be short. The Administrator notes that the Deputy Secretary held in 1992 that a request for reconsideration under the Service Contract Act should be filed within 10 days of the original decision or judgment, relying on F.R.C.P. 59(e) (motions to amend or alter judgment in Federal district court must be filed no later than 10 days after entry of the judgment). *See Cindy Monahan* at 2. Rather than this 10-day limitation in the Federal trial court rules, the Administrator suggests that the ARB should be guided by the time limit for filing a petition for a panel rehearing in the Federal Rules of Appellate Procedure, in particular Rule 40(a)(1). That rule provides generally for a 14-day time limit for filing a petition for rehearing.[2/] *See* Administrator's Statement at 6-9.

Again relying on the Federal Rules of Appellate Procedure (Rule 40(a)(4)), the Administrator suggests that there are no limits to the scope of the Board's reconsideration. *Id.* at 9-10.

Finally, with regard to whether the ARB would have the authority to order the Comptroller General to remove Thomas and Sons from the debarment list in the event that the Board reconsidered and reversed its earlier decision, the Administrator notes that the Comptroller General

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[1/] Including *Belville Mining Co. v. United States*, 999 F.2d 989 (6th Cir. 1993); *Dun & Bradstreet v. United States Postal Serv.*, 946 F.2d 189 (2d Cir. 1991); *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989); *Dawson v. Merit Sys. Protection Bd.*, 712 F.2d 264 (7th Cir. 1983); *Trujillo v. General Elec. Co.*, 621 F.2d 1084 (10th Cir. 1980); *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977); *Ideal Basic Indus., Inc. v. Morton*, 542 F.2d 1364 (9th 1976); *Bookman v. United States*, 453 F.2d 1263 (Ct. Cl. 1972); and *Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union, AFL-CIO v. Excelsior Foundry Co.*, 56 F.3d 844 (7th Cir. 1995).

[2/] The time limitation for filing a rehearing petition under Rule 40(a)(1) is extended to 45 days in cases in which the United States is a party; however, the Administrator observes that, per the Advisory Committee notes to the Rule, the reason for the longer time period allowed in civil actions involving the United States is to provide the Solicitor General an opportunity to review the case. This rationale does not apply to administrative proceedings before this Board under the Davis-Bacon Act; thus, the Administrator recommends that the Board use the "default" 14-day time period.

alone is charged with placing persons on the debarment list, and neither the Secretary of Labor nor this Board has the authority to order that a person be removed from the list. However, the Administrator suggests that the Board "may recommend to the Comptroller General that a person be removed from the list if the Board, upon reconsideration, reverses a decision recommending debarment under the Davis-Bacon Act." *Id.* at 11 (emphasis supplied). The Administrator suggests that if the Board were to adopt the 14-day time limitation for requesting reconsideration,

> the Administrator *may well decide to refrain from transmitting* to the Comptroller General the names to be placed on a list of ineligible bidders within that time period or, if reconsideration is requested, until that process is complete.

*Id.*(emphasis added).

## DISCUSSION

The Board previously has analyzed in depth the circumstances under which it has authority to reconsider its decisions. *See Macktal v. Brown and Root, Inc.*, ARB Nos. 98-112/112A, ALJ No. 86-ERA-23, Order Granting Reconsideration (ARB Nov. 20, 1998). *See also Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3, Order Granting Reconsideration (ARB Nov. 24, 1998); *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 94-TSC-3/4, Order Granting Reconsideration (ARB May 16, 2000). In *Macktal*, a case under the Energy Reorganization Act, the Board observed that:

> Agency authority to reconsider may be inherent or statutory. Absent congressional intent to the contrary, agencies have inherent authority to reconsider their final adjudicative orders for error within a reasonable time.
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> Where Congress has enacted legislation delegating to an agency explicit statutory authority to reconsider its decisions, the agency must act within the parameters of that explicit authority. In these instances, an agency may not rely on an assertion of "inherent authority" to reconsider as a means to circumvent any strictures imposed by the express limitations of its statute.
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> The employee protection provision of the ERA is the basis of our jurisdiction over this case. The ERA is directed generally to the development and safe utilization of energy resources and places. Nothing in the statutory text of the employee protection provision or elsewhere in the ERA addresses the issue of reconsideration of final orders in the whistleblower protection cases within the Secretary of Labor's jurisdiction. Therefore, unless reconsideration by the Board would interfere with, delay or otherwise adversely affect accomplishment of the Act's safety purposes

and goals, the Board has inherent authority to reconsider a final ERA order.

*Macktal*, slip op. at 3-5 (citations and footnotes omitted). The Board observed in *Macktal* that the question of reconsideration authority can be answered only with specific reference to the particular statute(s) underlying the challenged decision.

The Davis-Bacon Act has no explicit grant of authority to reconsider; therefore, if the Board has authority to reconsider, it perforce must be based on an "inherent authority" theory. To determine whether the Board has such inherent authority in this debarment case, we would need to examine the statute underlying the decision to determine whether reconsideration would adversely affect its enforcement provisions or statutory purposes. Significantly, even if we were to conclude that we had reconsideration authority, any party seeking reconsideration by this Board would need to make the request within a reasonable period of time. *Macktal*, slip op. at 5.

Enforcement responsibilities under both the Davis-Bacon Act and its sister statute, the Service Contract Act, are divided between two different government agencies. Although the Secretary of Labor performs a variety of critical functions under both laws, each statute also assigns some responsibilities to the Comptroller General, particularly the publication of the list of debarred persons or firms.[3/] Without deciding the question, we note our concern whether this Board has authority to reconsider a decision in a debarment case once the name of the contractor that is to be debarred has been transmitted to the Comptroller General. It would be pointless for the Board to

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[3/]The debarment provisions of the two statutes are slightly different. Under the Davis-Bacon Act debarment section, 40 U.S.C.A. §276a-2(b),

> the Comptroller General of the United States is . . . authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list. . . .

The debarment provision of the Service Contract Act, 40 U.S.C.A. §354(a), provides that

> The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary [of Labor] have found to have violated this chapter.. . . [N]o contract of the United States shall be awarded to the persons or firms appearing on the list or to any firm, corporation, partnership or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons for firms.

reconsider a debarment order as part of an administrative proceeding if there were no administrative mechanism for reversing the debarment – yet even while the Administrator argues that the Board has authority to reconsider its debarment decision, the Administrator declares that the Board lacks the authority to order the Comptroller General to remove an erroneously-debarred contractor from the debarment list. Administrator's Statement at 11.[4/] And even when inviting this Board to adopt a 14-day time frame for entertaining reconsideration requests in debarment cases, the Administrator is entirely non-committal with regard to his own future actions, declaring only that if the Board adopts a period for reconsideration he "may well decide to refrain from transmitting to the Comptroller General the names of contractors to be debarred." *Id.* In our view, the *ad hoc* approach to modifying the debarment procedures advocated by the Administrator may create new and unintended problems for the parties and this Board, and we therefore decline to take this route.

We need not resolve this issue in this case in light of the facts before us, because even if we were to assume that the Board has authority to reconsider its decision in a debarment case it also would be necessary for a petitioner such as Thomas and Sons to make its reconsideration request within a reasonable time. In this case, Thomas and Sons filed their request for reconsideration more than five months after we issued our October 1999 D&O. No new evidence or changed circumstances have been cited by Thomas and Sons in support of their request, which essentially raises the same argument that was considered and squarely rejected by this Board in our prior decision. Moreover, no good cause has been shown for the delay. We therefore find that the request is untimely.

The request for reconsideration is **DENIED**.

**SO ORDERED.**

**PAUL GREENBERG**
Chair

**E. COOPER BROWN**
Member

**CYNTHIA L. ATTWOOD**
Member

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[4/] Of the eight DBA and SCA decisions cited by the Administrator in which the Board or its predecessors reconsidered an earlier decision, only two were cases in which a contractor had been debarred – *HLJ Management* and *Cindy Monahan* (both under the SCA). Five of the cases involved interpretive questions that were solely within the province of the Secretary of Labor, and therefore did not raise possible conflicts between the Board's authority and the responsibilities of other Federal officials such as the Comptroller General. It is entirely possible that the question of the Board's reconsideration authority under these non-debarment cases may follow a different analysis from the analysis used in debarment cases.