Department of Commerce-Office of General Counsel

CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

Assistant General Counsel for Finance & Litigation

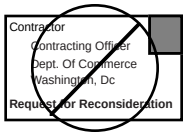
A LAWYER'S VIEW OF RECONSIDERATION

A Law Clerk's View of Reconsideration by Eric Lipman

Recently, there has been both discussion and concern over the holding of the General Services Board of Contract Appeals in *Nash Janitorial Service, Inc.*, GSBCA No. 7338; April 27, 1988. Below, we examine the Nash case, with the hopes of providing information and guidance to the Department's procurement officials.

The Facts:

Nash Janitorial Service was awarded a cost type contract to provide custodial services for Federal buildings in San Francisco. In May of 1981, an audit was conducted on the initial term of the contract, and concluded that the total amount billed by Nash exceeded allocable costs by $43,309.00. After corresponding with Nash, the contracting officer "decided" in December of 1982, that the government overpaid $32,430, or $10,879 less than the Auditor's figure.



In February of 1983, Nash responded that it was unable to decide whether the contracting officer's adjustment was acceptable, without the benefit of the Auditor's report. By May, a new contracting officer responded to this latest letter by forwarding a copy of the audit and informing Nash of the CO's willingness to reconsider the amount in dispute. In September, Nash notified the Government of its disagreement with the contracting officer's finding of the amount owed, and filed an appeal of the with the GSBCA on December 28, 1983.

Finding that the contracting officer's reconsideration of the earlier December 1982 ruling tolled the beginning of the 90 day period within which claims must be filed, the GSBCA held that Nash's December 1983 claim was timely.

Analysis:

Until this case, the GSBCA rule on filing of appeals had been one of strict adherence to the 90 day limitation set forth in the Contract Disputes Act. 41 U.S.C. §§ 601-13 (1982). Despite the fact that harsh consequences were often the result, the Board's hard line was necessitated by a concern over its jurisdiction. See, Bruce F. Mattson, GSBCA No. 7595-COM, 85-1 BCA ¶ 17,771 (1985); Cosmic Construction Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982) (Holding that the 90 day period was part of a statute which waived sovereign immunity, and therefore deserved a narrow construction).

More recently, the Federal Circuit has held that a taxpayer who appealed an IRS decision after the two year limitation period had lapsed, pending an IRS reconsideration of his case, had filed a timely appeal. *Heinz Haber v. United States*, 831 F.2d 1051 (Fed. Cir. 1987). *Haber* formed the basis for the GSBCA move away from a strict construction of the 90 day rule. Analogizing between the taxpayer who files late as a result of a second IRS review, and a contractor who files beyond the 90 day limit because of the contracting officer's reconsideration, the Board held that Nash's appeal was timely. Wrote Judge Suchanek for the GSBCA in Nash : "Thus, where there is a statutory appeal period waiving sovereign immunity and the Government reconsiders its original decision, as in the case before us, we believe that the Federal Circuit's analysis and holding in Heinz Haber are controlling."

The touchstone of both *Heinz x* and *Nash* was the appellant's reliance on the government's oral or written withdrawal of an earlier decision. In *Heinz Haber*, the taxpayer's conversations with IRS officials led him to believe that the government's earlier Notice of Disallowance had been withdrawn, and that he had been granted an extension to pursue the matter administratively. Similarly in *Nash*, "[t]he contracting officer, in response to the appellant's February letter, agreed to reconsider the decision, and so informed the appellant in May." *Nash*, supra, at 6. Thus, it seems clear that a "private" reconsideration of the Government's position, by the contracting officer, where the government has not represented its willingness to continue to review disputed matters, nor has the Contractor been given reason to rely on a continued reevaluation, would not toll the 90 day period.

This conclusion is borne out by another recent case, Horton Electric, Inc., ASBCA No. 35677; February 19, 1988. In Horton, the contracting officer refused to answer the contractor's calls and letters requesting reconsideration of its claims. Later, in response to Horton's argument that its reliance on the contracting officer's conduct had "destroyed the finality" of the CO's decision, the Board wrote:

> While it may have been rude of the contracting officer not to respond to appellant's letter or telephone calls, his mere failure in this regard *could not have reasonably led appellant to believe that he would reconsider the decision*. (Emphasis added).

As sad as it is to report, in light of Horton, it is better to be rude to a contractor seeking reconsideration of an adverse decision, than it is to respond politely, and unwittingly toll the 90 day limitation.

Recommendation

If contracting officials are unwilling to toll the 90 day limitation pending a new decision, they are advised to inform contractors that they "stand by the original decision" when asked to reconsider.

From the Editor: Eric Lipman has been a summer clerk in the Division. We all wish Eric well as he leaves this week to start his final year at George Washington University law school.

✍ Comments, criticisms, and suggestions for future topics are welcome. - Call Jerry Walz at FTS 377-1122