

RECONSIDERING A CONTRACTING OFFICER'S FINAL DECISION

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Readers are aware that in order to prosecute a successful appeal of a claim made to a Contracting Officer (“CO”), a contractor must file its appeal within 90 days of receipt of the CO’s final decision (“COFD”), pursuant to the Contract Disputes Act of 1978, 41 U.S.C. § 7104(a). There is an exception to this section, and that is where the CO’s action to reconsider his or her decision vitiates the finality of the original decision, and may make timely an appeal that is more than 90 days after receipt of the initial COFD. Although this may sometimes happen, frequently there is an insufficient showing of a CO’s reconsideration, as in *Woolpert, Inc.*, ASBCA No. 63515, March 7, 2024.

Woolpert had submitted a certified claim and request for COFD in July 2022, asking that the CO’s Contractor Performance Assessment Report System (“CPARS”) it received, be revised. Woolpert received a COFD on October 21, 2022 concerning the CPARS. Woolpert requested a reconsideration of the decision, and asked that the CO reconsider her decision. The CO granted the meeting, but never stated implicitly or explicitly that she would reconsider her decision. However she did write a followup letter stating that the agency was satisfied with the CPARS letter and the COFD remained final.

On January 20, 2023, 91 days after Woolpert received the COFD, Appellant filed its notice of appeal.

The Board first noted that the appeal was untimely filed more than 90 days after the contractor’s receipt of the COFD. Next, the Board considered whether the CO’s actions vitiating the finality of the COFD. The Board examined whether the contractor had presented evidence showing it had reasonably or objectively could have concluded that the CO’s decision was being reconsidered.

Here’s what the Board said, in concluding that it had no jurisdiction over this appeal because the appeal was untimely filed:

Based on our review of the record, including the video of the [parties’ meeting], the Board concludes that Woolpert did not have a reasonable basis to believe that the CO was reconsidering her final decision. Rather...Woolpert simply refused to accept “no” for an answer [record cite omitted]. At the meeting, the CO and another agency official informed Woolpert at least four times that the decision was final and that Woolpert could appeal the decision if it disagreed... The CO never stated that she would reconsider the decision and a Woolpert official acknowledged that the decision was final.

Takeaway. If you seek to have a CO vitiate a final decision ensure be sure you obtain a statement from the CO that she/he will reconsider the COFD. If you cannot get something explicit in writing (“I will reconsider”), then any appeal must be made within 90 Days of receipt of the COFD, or it will be late and the Board will lack jurisdiction.

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