UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: September 29, 2015

CBCA 3871, 3912

SAFE HAVEN ENTERPRISES, LLC,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Jason R. Mischel, Executive Vice President and General Counsel of Safe Haven Enterprises, LLC, New York, NY, counsel for Appellant.

Dennis J. Gallagher, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **SHERIDAN**, and **LESTER**.

LESTER, Board Judge.

By decision dated March 25, 2015, the Board denied – without prejudice – the motion of the Department of State (DOS or the Government) to dismiss these consolidated appeals as untimely filed, pending resolution of disputed jurisdictional facts. *See Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928.[1]

[1] Although, in our March 25, 2015, decision, we declined to dismiss these appeals as time-barred on the then-existing record, we granted a more limited jurisdictional motion, dismissing the appellant's request for punitive damages. *Safe Haven*, 15-1 BCA at 175,607. This decision does not affect our prior dismissal of appellant's punitive damages claims.

Subsequently, after soliciting the parties' views on resolving the factual disputes, the Board conducted a one-day hearing, limited to the jurisdictional issue, at which the parties presented testimony from two fact witnesses. The parties have also submitted additional documentary evidence about the jurisdictional facts that was not previously before the Board. After evaluating the witnesses' hearing testimony and all of the documentary evidence in the record, the Board finds that it possesses jurisdiction to entertain these appeals. Accordingly, we deny DOS's motion to dismiss.

Jurisdictional Findings of Fact

As we explained in our decision dated March 25, 2015, these appeals arise out of two task orders issued under contract number SALMEC-03-D-0035 (contract 0035), an indefinite delivery/indefinite quantity contract that DOS awarded to Safe Haven: (1) task order 0002, issued March 26, 2006, was for chiller replacement and other construction work at the United States Embassy in Georgetown, Guyana; and (2) task order 0003, issued August 24, 2006, was for environmental security construction work at the United States Embassies in Sanaa, Yemen, and Manama, Bahrain.

Following the one-day hearing on the jurisdictional issue, we make the following findings of fact:

1. On June 27, 2012, Safe Haven submitted a certified claim to the DOS contracting officer, seeking $1,827,211.80 allegedly due under various task orders issued pursuant to contract 0035, including a claim for $469,916.65 associated with the deobligation of funds for its work in Yemen and Bahrain under task order 0003 (Yemen/Bahrain deobligation claim). *See* Appeal File, Exhibit 34.[2] On September 18, 2012, the DOS contracting officer issued a decision denying that claim, with the necessary appeal language from 48 CFR 33.211(a)(4)(v) (2011). *See* Exhibit 35.

2. On July 25, 2012, Safe Haven submitted a letter, which the parties agree constituted a claim,[3] to the DOS contracting officer indicating that the Government had not

[2] All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

[3] As we explained in our March 25, 2015, decision, the appeal file does not contain a copy of Safe Haven's July 25, 2012, letter. Nevertheless, the Government has represented that the letter satisfies the requirements for a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Absent a challenge by the Government, we assume for purposes of this jurisdictional analysis that it meets those requirements.

paid a ten-percent retainer, totaling $68,339.65, for equipment that Safe Haven had purchased for its work at Georgetown, Guyana, under task order 0002 (the Georgetown retainer claim). On August 27, 2012, the contracting officer issued a decision denying that claim and included in his decision the appeal language required by 48 CFR 33.211(a)(4)(v). *See* Exhibit 10.

3. During the fall of 2012, the Department of State Office of Inspector General (OIG) was investigating the activities of Kathleen McGrade, who, although an employee of another Government contractor, was essentially serving the role of the DOS contracting officer's representative on Safe Haven's contracts. Ms. McGrade was indicted in early 2013 and was subsequently convicted of engaging in a fraudulent scheme to direct DOS contract work to a company in which she and/or her husband held a financial interest. By November 2012, both Safe Haven and the DOS contracting officer were aware of the OIG investigation involving Ms. McGrade, and Safe Haven's witness at the hearing, Alta Baker, indicated that the DOS contracting officer had informed her of his concern that Ms. McGrade's conduct may have prejudiced Safe Haven in some way.

4. Sometime before November 22, 2012, Safe Haven's then-counsel, Bradley Deutchman, received a phone call from the DOS contracting officer in which the contracting officer represented that he would like to arrange a meeting to discuss the "outstanding issues" relating to the Georgetown and Yemen/Bahrain task orders. Affirmation of Bradley S. Deutchman (Oct. 7, 2014) ¶¶ 2-3. The current record does not indicate what the contracting officer thought the "outstanding issues" were and does not clearly establish that the DOS contracting officer, at that time, was proposing to revisit or reconsider his prior decisions on the Georgetown retainer and Yemen/Bahrain deobligation claims or that he made any representations indicating that the "outstanding issues" included claims for which he had already issued final decisions.[4] Based upon the existing record, it is quite possible that the "outstanding issues" which the DOS contracting officer wanted to discuss related to whether Ms. McGrade's activities had affected Safe Haven in ways unrelated to the claims at issue here, as well as other outstanding equitable adjustment requests and contracting matters related to these task orders that the parties discussed at later times (including a roof

[4] Mr. Deutchman, who did not testify at the jurisdictional hearing, suggests in a written declaration that the "outstanding issues" relate to the two claims at issue here, but the declaration provides no supporting details. Further, Safe Haven has not provided any contemporaneous e-mail messages or documents supporting its position. We find the single declaratory statement too inconsequential to establish that the DOS contracting officer, in November 2012, was proposing to revisit his decisions on the Georgetown retainer and Yemen/Bahrain deobligation claims.

penetration repair issue in Bahrain and an inventory issue in Yemen). *See, e.g.*, Transcript at 35 (July 8, 2015).

5. On December 4, 2012, Mr. Deutchman sent an e-mail message to the DOS contracting officer and three other DOS employees, seeking to schedule a meeting on the "outstanding issues." In that e-mail message, Mr. Deutchman indicated that he wanted to add the Georgetown retainer claim and the Yemen/Bahrain deobligation claim to the "outstanding issues" for discussion, as follows:

> We have recently discussed with [the DOS contracting officer] the idea of having a meeting to discuss outstanding issues regarding Safe Haven Enterprises receiving final payment for past work. . . . *[W]e would like to take this chance to set part of the agenda for the meeting*. . . .
>
> *The issues we hope to discuss include the two deobligations that were made regarding Contract No. SALMEC-03-D-0035 (Yemen and Bahrain)*, and interest on certain payments. *Furthermore, we wish to discuss the payment of the retainer on Contract No. SALMEC-03-D-0035, Subcontract SHE-06-0002 (Georgetown, Guyana)*.
>
> . . . .
>
> [The DOS contracting officer] stated that the necessary parties would be available in early December to hold the meeting. Please provide us with available dates so that we can hopefully reach a resolution soon.

Appellant's July 1, 2015, Appeal File Supplement (AFS), Attachment 3 (emphasis added).

6. In a responsive e-mail message later on December 4, 2012, the DOS contracting officer indicated that he would be able to meet with Mr. Deutchman in early 2013 "to discuss outstanding issues regarding" Safe Haven. AFS Attachment 3. In his e-mail message, the DOS contracting officer did not indicate that he disagreed with the agenda that Safe Haven's counsel had proposed or with Safe Haven's definition of the "outstanding issues." *See id.*

7. On February 1, 2013, the DOS contracting officer and his then-supervisor, James Thomas, met with Safe Haven's owner, Alta Baker; her husband, John Baker; and Safe Haven's then-attorney, Mr. Deutchman. Respondent's Answer ¶ 22; AFS Attachment 1. The parties discussed the issues underlying the Georgetown retainer and Yemen/Bahrain deobligation claims, even though those claims had been addressed in

contracting officer decisions, as well as a separate equitable adjustment request for roof penetration repair in Bahrain. *See* Transcript at 35-36, 41; Exhibit 41; AFS Attachments 1 & 2. Mr. Deutchman averred in a written declaration that, at this meeting, the DOS contracting officer and Mr. Thomas affirmatively stated that any deadline for filing an action to appeal the decisions in either the Civilian Board of Contract Appeals or the Court of Federal Claims was void because the contracting officer was reconsidering both decisions, Deutchman Affirmation ¶ 4, and Ms. Baker testified that, at the conclusion of the meeting, the DOS contracting officer specifically told her not to worry about appeal deadlines and that "[e]verything has stopped," "[e]verything is off the the table," because "[w]e're going to find out what happened here" through an audit. Transcript at 42. Although DOS strongly disputes these assertions, the parties agree that, at the very least, the DOS contracting officer, who (for medical reasons) was unavailable to testify or provide a declaration, stated that he would "take a look at it," meaning that he would review the allegations of error in the contracting officer decisions that Ms. Baker had raised. Transcript at 55, 58, 82 (Testimony of James Thomas); *see* Declaration of James Thomas (Oct. 29, 2014) ¶ 4.[5] Although Mr. Thomas indicated that the DOS contracting officer's statement was meant as a mere courtesy to Safe Haven in wrapping up the meeting, there is no dispute that Safe Haven interpreted the DOS contracting officer's statements to mean that DOS would conduct an audit of the claims about which he had previously issued decisions. *See* Transcript at 37 (Testimony of Alta Baker).

8. During the February 1, 2013, meeting, Mr. Deutchman asked the DOS contracting officer to issue a letter formally extending the deadlines for Safe Haven to appeal. AFS Attachments 1 & 2. After a couple of weeks had passed, the DOS contracting officer had not provided the letter. *Id.* Mr. Deutchman then contacted the contracting officer by telephone, and the contracting officer verbally indicated his intent to send the letter that day. *Id.* Nevertheless, by March 18, 2013, the DOS contracting officer had still not sent the letter, and Mr. Deutchman sent him an e-mail message requesting it, as follows:

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[5] In its answer to Safe Haven's complaint, DOS alleged that "Mr. Thomas recalls that [the DOS contracting officer], who was the cognizant contracting officer and who has since retired due to disability, agreed to consider withdrawing his decision if Appellant would present a written request stating the rationale therefor" – that is, that the DOS contracting officer made his agreement to reconsider conditional upon Safe Haven's submission of a written request – but that no such written request was ever made. Answer ¶ 22. Presumably, DOS is arguing that any agreement to reconsider was conditional upon a specific submission by Safe Haven – a condition that it did not fulfill. Neither the testimony that Mr. Thomas provided nor any other evidence in the record supports this statement. Accordingly, we disregard DOS's allegation.

> We spoke about a week and a half ago regarding the issues with Safe Haven Enterprises. In that conversation you reiterated that you would write a letter extending the deadlines for either appeals or court filing regarding the two final determinations you issued. To date we have not received the letter. Please advise as to the status.

Id. Attachment 4.

9. On March 25, 2013, having still received no letter, Mr. Deutchman and the DOS contracting officer had a telephone conference during which the contracting officer apologized for his delay and requested that, because of other commitments that were taking his time, Mr. Deutchman draft a letter for his review and signature. AFS Attachments 1 & 2. Mr. Deutchman did so, but the DOS contracting officer did not respond. *Id.*

10. Soon thereafter, the DOS contracting officer retired for medical reasons, which had caused him to be absent from the office for various periods of time over the preceding months, and Mr. Thomas became the cognizant contracting officer. Thomas Declaration ¶ 5; Transcript at 67 (Thomas testimony).

11. On April 8, 2013, Mr. Deutchman left a voicemail message for Mr. Thomas (later confirmed in an e-mail message) as a follow-up to the February 1, 2013, meeting. AFS Attachment 2. In his follow-up e-mail message, Mr. Deutchman again described the agreements reached at the February 1, 2013, meeting, including the DOS contracting officer's agreement to "perform an audit of the contracts for Yemen/Bahrain and Georgetown, Guyana," for the purpose of "provid[ing] guidance as to what money, if any, is owed to Safe Haven," and "to provide Safe Haven with a letter extending the deadlines contained in his two Final Decision letters relating to these two projects." *Id.* Mr. Deutchman complained that he had "not received any word as to the status of the audits" and, despite the weeks that had passed, "not received any such letter." *Id.* He asked to "know where things stand" with the audit and "when we can see the results," and he asked for "some insight as to why [the contracting officer] still has not provided Safe Haven with the promised letter extending the deadlines." *Id.*

12. Because of the press of business associated with taking over the retiring DOS contracting officer's responsibilities in addition to his own, Mr. Thomas did not respond to Mr. Deutchman's April 8, 2013, voicemail or e-mail messages. Transcript at 62 (Thomas testimony).

13. On April 24, 2013, following a telephone conversation in which Mr. Thomas requested a list of open action items identified in order of priority, Ms. Baker provided Mr.

Thomas with a list of the "different items left to be settled" following the parties' meeting on February 1, 2013. Exhibit 41 at 3. That list included the ten-percent retainer under the Georgetown, Guyana, task order, about which Ms. Baker asserted in her e-mail message the Government had agreed "there [would] be a full accounting." *Id.* It also included the Yemen/Bahrain deobligation of funds, for which (Ms. Baker asserted in the e-mail message) the Government had indicated during the February 1, 2013, meeting "[t]here was to be a full audit," as well as the Bahrain roof penetration repair issue and an inventory check in Yemen. *Id.* at 3-4. On May 6, 2013, having not heard back from Mr. Thomas following her April 24, 2013, e-mail message, Ms. Baker, again by e-mail message, asked Mr. Thomas for "some kind of response." *Id.* at 2.

14. In an e-mail message dated May 7, 2013, Mr. Thomas indicated that he had not responded because he was waiting for Safe Haven to provide him with a list of items for which it believed compensation was due, and he indicated that Safe Haven should submit that list, "be[ing] specific" about the compensation due "and stat[ing] all of the facts associated with each action." Exhibit 41 at 2.

15. By e-mail message dated June 19, 2013, Ms. Baker stated that, through her prior April 24, 2013, e-mail message, she had already provided the "list" of action items which Mr. Thomas requested in his May 7, 2013, e-mail message, and she further described the action plan upon which she said the parties had agreed during their February 1, 2013, meeting. Exhibit 41 at 1. After explaining the reasons that she believed Safe Haven's claims to have merit, Ms. Baker indicated that she "look[ed] forward to hearing from you about what will be done to resolve the remaining issues." *Id.* at 2. Mr. Thomas did not respond to Ms. Baker's e-mail message. Transcript at 71 (Thomas testimony).

16. During this time, DOS was, in fact, reviewing its payment records relating to the Georgetown and Yemen/Bahrain task orders to determine whether there was any additional compensation owed to Safe Haven. Transcript at 64-65, 80-81 (Thomas testimony); Exhibit 41. Based upon that review, DOS concluded that Safe Haven was not owed any additional compensation. Transcript at 70 (Thomas testimony). There is nothing in the record indicating that DOS notified Safe Haven that it had concluded its review.

17. On March 21, 2014, at Safe Haven's request, Mr. Thomas and two other DOS representatives met with Safe Haven's owner, Ms. Baker, and Safe Haven's current counsel, Jason Mischel. Thomas Declaration ¶ 5; Exhibit 42. At that meeting, Ms. Baker stated that Safe Haven's reason for requesting the meeting was to discuss unresolved issues related to the matters underlying the Yemen/Bahrain deobligation and Georgetown retainer claims. Exhibit 42. Mr. Thomas informed Ms. Baker and Mr. Mischel that the time for appealing the contracting officer's decisions on those claims had long passed and that the contracting

officer's prior decisions were not being reconsidered. Thomas Declaration ¶ 5; Exhibit 42. Nevertheless, Mr. Thomas agreed to review DOS's records relating to an invoice under the Georgetown task order to determine whether DOS had already paid Safe Haven for the invoiced work, payment that Mr. Thomas subsequently determined DOS had made. Transcript at 82-83 (Thomas testimony).

18. On May 28, 2014 (617 days after the DOS contracting officer originally issued the contracting officer's final decision, but only sixty-eight days after the March 21, 2014, meeting), Safe Haven filed a notice of appeal with this Board on the Yemen/Bahrain deobligation claim (docketed as CBCA 3871).

19. On June 19, 2014 (661 days after the contracting officer's decision was issued, and ninety days after the March 21, 2014, meeting), Safe Haven filed a notice of appeal relating to the Georgetown retainer claim (docketed as CBCA 3912) in which it alleged that DOS had not yet paid Safe Haven the Georgetown retainer under task order 0002.

Discussion

I. The Time Limits for Appeal of a Contracting Officer's Decision

The Board's jurisdiction is derived from the CDA, 41 U.S.C. §§ 7101-7109 (2012). "[T]he strict limits of the CDA" constitute "jurisdictional prerequisites to any appeal." *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004).

As we explained in our March 25, 2015, decision, "[u]nder the CDA, the Board cannot assume jurisdiction over a contractor's request for monetary relief unless the contractor previously submitted to the agency's contracting officer, in writing, a claim seeking payment of a sum certain and requesting a final decision." *Safe Haven*, 15-1 BCA at 175,603 (citing 41 U.S.C. § 7103(a)(1), (2)). "A contractor, after receiving a written final decision from the contracting officer, may appeal that written decision to a board of contract appeals '[w]ithin ninety days from the date of receipt of [the] decision.'" *Id.* at 175,605 (quoting 41 U.S.C. § 7104(a)). "Alternatively, within twelve months from the date of the contractor's receipt of the contracting officer's final decision, a contractor may bring an action directly on the claim in the United States Court of Federal Claims." *Id.* (quoting 41 U.S.C. § 7104(b)).

"[B]ecause the authorization to make the filing is a waiver of the Government's sovereign immunity, failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits." *Safe Haven*, 15-1 BCA at 175,603 (citing *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997)). As we recognized in our

prior decision, the contracting officer here "issued his final decisions on the Georgetown retainer claim and the Yemen/Bahrain de-obligation of funds claim on August 27 and September 18, 2012, respectively," and "Safe Haven did not file an appeal of the disputes underlying either final decision until more than twenty months after those final decisions were issued." *Id.* Although Safe Haven's failure to appeal those final decisions within ninety days of their issuance would appear to preclude us from entertaining jurisdiction over them, Safe Haven has alleged facts, discussed below, that could vitiate the running of the statute of limitations and render these appeals timely.

II. The Effect of Reconsideration by the Contracting Officer on the Appeal Time

Despite the purported finality of a contracting officer's decision, "contracting officers plainly have the authority to reconsider their own decisions." *Safe Haven*, 15-1 BCA at 175,605 (citing *Riverside General Construction Co.*, IBCA 1603-7-82, 82-2 BCA ¶ 16,127, at 80,049); *see LRV Environmental, Inc.*, ASBCA 58727, et al., 15-1 BCA ¶ 36,042, at 176,038; *Space Age Engineering, Inc.*, ASBCA 26028, 82-1 BCA ¶ 15,766, at 78,033. That is because "[t]he power to reconsider is inherent in the power to decide." *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008). "[U]nless there is legislation to the contrary it is the inherent right of every tribunal to reconsider its own decisions within a short period after the making of the decision and before an appeal has been taken or other rights vested . . . ." *Vepco of Sarasota, Inc. v. United States*, 26 Cl. Ct. 639, 645 (1992) (quoting *Dayley v. United States*, 169 Ct. Cl. 305, 308 (1965)). Accordingly, contracting officers may reconsider a purportedly final decision "at any time prior to the expiration of the time period for filing an appeal, where no appeal is filed." *Northcoast Reinhabitation Group, Inc.*, AGBCA 81-174-2, 1981 AGBCA LEXIS 70, at *11 (July 20, 1981) (citing *American Bosch Arma Corp.*, ASBCA 10305, et al., 67-2 BCA ¶ 6564, at 30,461); *see Devi Plaza, LLC v. Department of Agriculture*, CBCA 1239, 09-1 BCA ¶ 34,033, at 168,338 (2008) (contracting officer can reconsider what was viewed as a final decision "as long as the events that give rise to the vitiation of the finality take place prior to the expiration of the appeal period"). *But see Schleicher Community Corrections Center, Inc.*, DOT BCA 3046, et al., 98-2 BCA ¶ 29,941, at 148,147-48 (once the time for appeal of the contracting officer's decision has expired, it is final, and the contracting officer no longer has authority to revisit it); *Space Age Engineering*, 82-1 BCA at 78,034 (same); *American Construction Co.*, GSBCA 1375, 65-1 BCA ¶ 4828, at 22,867-68 (same).

"While a board cannot extend the time for appeal, an appeal period can be tolled where one finds that a [contracting officer's] decision was not truly final but was being reconsidered." *Staff Inc.*, AGBCA 95-181-1, et al., 96-1 BCA ¶ 28,051, at 140,071 (1995). Accordingly, "if a [contracting officer's] decision is not truly 'final,' but being reconsidered, a 'failure to appeal from the decision within the prescribed period will not defeat . . . [a]

contractor's opportunity to be heard on the merits.'" *Devi Plaza, LLC*, 09-1 BCA at 168,337 (quoting *Sach Sinha & Associates*, ASBCA 46916, 95-1 BCA ¶ 27,499, at 137,041 (quoting *Johnson Controls, Inc.*, ASBCA 28340, 83-2 BCA ¶ 16,915, at 84,170)). "In that instance, the time for appeal begins to run with the contractor's receipt of the reconsideration." *Staff Inc.*, 96-1 BCA at 140,071; *see Summit Contractors v. United States*, 15 Cl. Ct. 806, 809 (1988) ("the contracting officer's decision upon reconsideration constitute[s] the 'final decision' for purposes of appeal pursuant to the" CDA).

III. What It Takes to Suspend the Time for Appeal

There is no guidance in either the CDA or the Federal Acquisition Regulation (FAR) to assist in identifying when a contracting officer's actions are sufficient to suspend or eliminate the time for appeal. In fact, neither the CDA nor the FAR even mentions the possibility of reconsideration of a previously issued contracting officer's decision, and neither discusses the effect of reconsideration on the accrual of the appeal deadline.

Nevertheless, reviewing the case law from the various boards of contract appeals, the Court of Federal Claims, and our appellate authority, there is no question that, if the contracting officer (before the time for the contractor to appeal has expired) expressly retracts a prior decision in writing,[6] the time clock for appealing that decision entirely disappears. The contracting officer's act of doing so eliminates the accrual of the time for appeal because there is no "final" decision from which the time for appeal can run. *Staff Inc.*, 96-1 BCA at 140,071. Such action is the clearest means of showing that a contracting officer's decision is withdrawn.

Yet, "[f]or there to be a reconsideration by the contracting officer, the contracting officer need not specifically withdraw the decision." *Nash Janitorial Service, Inc.*, GSBCA 7338, 88-2 BCA ¶ 20,809, at 105,186-87. As the Court of Claims, whose decisions constitute binding precedent upon us, made clear in *Roscoe-Ajax Construction Co. v. United States*, 458 F.2d 55 (Ct. Cl. 1972), a contracting officer's agreement to meet with a contractor to discuss the merits of the claim that is already the subject of a contracting officer's decision, coupled with action to revisit and reconsider the prior "final" decision, can serve to keep the matter that is the subject of the decision open, destroying the finality of the

[6] Contracting officers clearly have the authority formally to withdraw their decisions on contractors' claims, at least until the decisions become unappealable and the parties' rights in them vest. *See, e.g.*, *Lasmer Industries, Inc.*, ASBCA 56411, 09-1 BCA ¶ 34,115, at 168,688, *aff'd sub nom. Lasmer Industries, Inc. v. Gates*, 360 F. App'x 118 (Fed. Cir. 2010); *Security Services, Inc.*, GSBCA 11052, 92-1 BCA ¶ 24,704, at 123,302 (1991).

decision and therefore vitiating the deadline for appeal. In *Roscoe-Ajax*, after the contracting officer issued his decision, the contractor provided him with a copy of a letter from a subcontractor asking for "a meeting . . . at which the parties could discuss and consider the problem further," a request to which the contracting officer agreed. *Id.* at 61. Subsequently, the parties participated in meetings, and the Government conducted a test of the glass glazing at issue. Eventually, several months later, the contracting officer informed the contractor and subcontractor that he saw no reason to modify his prior decision. After the contractor subsequently appealed the contracting officer's decision, the Government argued that the appeal came too late because the appeal time continued to run throughout the period when the parties were meeting, but the Court of Claims rejected that argument:

> The contracting officer's decision of January 16, 1962, was not . . . "the final decision," for, obviously, the contracting officer's agreement shortly thereafter to meet with plaintiff and its subcontractor, and to reconsider the question, served to keep the matter open and necessarily destroyed any finality the decision theretofore had. As shown, further meetings were in fact held and a test conducted.

Id. at 63. Although *Roscoe-Ajax* involved a contracting officer decision that pre-dated the enactment of the CDA, several tribunals, including our predecessor boards, have held that its rationale applies equally to contracting officer decisions on CDA claims. *See, e.g.*, *M.G. Technology Corp.*, ASBCA 35249, 88-3 BCA ¶ 21,185, at 106,933; *Nash Janitorial Service*, 88-2 BCA at 105,186; *Jen-Beck Associates*, VABCA 1988, 85-2 BCA ¶ 18,086, at 90,789; *West Land Builders*, VABCA 1664, 83-1 BCA ¶ 16,235, at 80,666.

Following *Roscoe-Ajax*, the boards and the Court of Federal Claims have sometimes struggled to define in a consistent manner exactly when a purportedly final decision is no longer "final" for appeal purposes. There is a clear consensus in the various board and court decisions that a contractor's mere request that the contracting officer reconsider a decision, without any subsequent response from or action by the contracting officer, does not provide a sufficient basis for vitiating an appeal deadline. In *Horton Electric, Inc.*, ASBCA 35677, 88-2 BCA ¶ 20,608, the contractor argued that it was: within a month of the issuance of the contracting officer's decision in that case, the contractor wrote to the contracting officer seeking reconsideration and made several telephone calls to pursue that relief, actions to which the contractor asserted it was entitled to a response before having to appeal. On the advice of counsel, however, the contracting officer *never* provided *any* response – either verbal or written – and the contractor eventually appealed to the Armed Services Board of Contract Appeals (ASBCA) eleven months after the contracting officer had issued his original decision. The ASBCA dismissed the appeal as untimely, finding that the contracting

officer had done nothing to indicate that he was actually reconsidering his prior decision, which the board found was a necessary prerequisite to vitiating the need to appeal:

> In the present appeal, the contracting officer took no action which contributed to the delay of the appellant in filing an appeal with this Board. 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 reasonably have led appellant to believe that he would reconsider the decision.

Id. at 104,143; *see Cosmopolitan Manufacturing Co. v. United States*, 297 F.2d 546, 549 (Ct. Cl. 1962) (per curiam) ("The making of a request for reconsideration does not deprive the former decision of finality; it is the granting of the request that does so"); *Guardian Angels Medical Service Dogs, Inc. v. United States*, 120 Fed. Cl. 8, 10 (2015) ("simply submitting a request for reconsideration is insufficient to toll the statute of limitations"); *Staff Inc.*, 96-1 BCA at 140,071 ("[a] contractor is not entitled to an automatic extension simply because he requests reconsideration"); *Omni Abstract, Inc.*, ENG BCA 6254, 96-2 BCA ¶ 28,367, at 141,643 ("unilateral actions taken or assumptions made by the [contractor] will not invalidate [a decision's] finality").

However, if the contracting officer actually *responds* to the contractor's request, but then *denies* it, the issue of whether the appeal time is vitiated becomes murkier. Several tribunals have held that the original appeal deadline (running from the date of the original decision's issuance) will stand if the contracting officer responds with an affirmative refusal, indicating that he or she has not engaged and is not engaging in any reevaluation or reconsideration of the prior decision. *See, e.g.*, *Environmental Safety Consultants, Inc. v. United States*, 95 Fed. Cl. 77, 94 (2010); *Dawson Builders, Inc.*, ASBCA 53172, 01-2 BCA ¶ 31,618, at 156,215; *United International Investigative Services*, DOT BCA 3076, 00-1 BCA ¶ 30,598, at 151,103 (1999); *Meditech, Inc.*, VABCA 3812, 93-3 BCA ¶ 26,111, at 129,785. Nevertheless, if the contracting officer notifies the contractor that he "carefully reviewed and considered" the contractor's request for reconsideration before denying it, the original appeal period may be vitiated, and a new appeal deadline will run from the date of the reconsideration decision. *Herman Adams*, ASBCA 5321, et al., 59-2 BCA ¶ 2454, at 11,588; *see Martin Service Building Co.*, VACAB 418, 1962 VA BCA LEXIS 116, at *3 (Mar. 5, 1962) (where the contractor "requested reconsideration in response to which the Contracting Officer did in fact reconsider and affirm his decision . . . , [s]uch reconsideration tolls the running of the appeal period"). Yet, it has also been held that, if "the contracting officer made it clear that what he did was to read appellant's arguments and submittals" in response to a reconsideration request, determine that "the submittals and arguments revealed nothing which had not been available to him at the time of his original decision," and "then affirmed his original decision," the contracting officer's action "does *not* amount to a

reconsideration of the final decision." *Shimizu Kogyo Co.*, ASBCA 32279, 86-2 BCA ¶ 18,954, at 95,719 (emphasis added).[7] Similarly, in *Guardian Angels Medical Service Dogs*, the contracting officer was found "never actually [to have] reconsidered, or suspended the finality of, her decision" because, even though she apparently read the contractor's reconsideration request, she determined that she could not "reasonably evaluate or respond to [it] due to the lack of supporting documentation" and invited the contractor to submit further information – information that the contractor never submitted. 120 Fed. Cl. at 10. From these decisions, it is difficult to pinpoint precisely when the contracting officer's review of a request transforms into a reconsideration process.

Even where the contracting officer actually meets or agrees to meet with the contractor after issuance of a decision, it is sometimes not found to be enough to indicate a willingness to reconsider. In *Missile Systems, Inc.*, ASBCA 33013, 86-3 BCA ¶ 19,213, the contractor's "theory of timeliness derived from multiple contacts with the contracting officer and the contracting agencies after issuance of the final decision" through which, the contractor alleged, there was a "continuing exchange of information and statements that reviews would be made and additional facts considered," which, according to the contractor, "caused the contractor to conclude that the contracting officer's initial decision was not truly final." *Id.* at 97,180. The ASBCA rejected that argument, stating that the contractor had met repeatedly with the contracting officer before the final decision was issued and that it "offers no distinction between the discussions before and after the issuance of the final decision." *Id.* The board held that "[p]ost-decision communications between the contracting officer and the contractor do not impact the 90 day period [for appeal] unless they clearly constitute reconsideration of the decision," *id.* at 97,180-81, and it found that the communications and meetings between the parties after the contracting officer issued his decision did not meet that standard. *Id.*; *see Richard J. Wand*, AGBCA 84-117-3, 84-1 BCA ¶ 17,018, at 84,745-46 (finding that, even though the contracting officer had met with the contractor, "the [contracting officer] did not agree to reconsider her February 17 decision but merely agreed to consider any 'new' claim the Contractor wished to submit," and, because the new submission "contained nothing new," the appeal deadline arising out of the contracting officer's original decision was never vitiated).

In trying to harmonize the various decisions addressing suspension of the CDA appeal time, the dividing line between a contracting officer's mere review and rejection of a reconsideration request, on the one hand, and actual reconsideration prior to denial of the

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[7] The ASBCA has since questioned whether its decision in *Shimizu* is in accord with other of its decisions regarding the acts necessary to suspend the time for appealing a contracting officer's decision. *Sach Sinha & Associates*, 95-1 BCA at 137,042.

request, on the other, appears somewhat imprecise, and it seems virtually impossible to identify a clear bright-line rule defining exactly when, in every situation, the contracting officer's review of (or meeting following) a request for reconsideration of a purportedly "final" decision will suspend an appeal deadline. "The danger of an unintentional reconsideration" arises any time "the contractor wants to discuss further the merits of a final decision and the contracting officer grants the contractor a meeting or reviews its further submissions," given that "any act evincing an intent on the part of the contracting officer to reconsider the final decision will destroy its finality." Lt. Col. Michael J. Hoover, *Recognizing Contractors' Claims and Contracting Officers' Final Decisions*, 29 A.F. L. Rev. 85, 91 (1988). If the contracting officer, as a matter of courtesy, agrees to meet with a disappointed claimant after issuing a final decision, or even reviews a reconsideration request, it reduces the likelihood of a misunderstanding if the contracting officer expressly represents "that the appeal period set forth in the final decision continues to run." *Johnson Controls*, 83-2 BCA at 84,170. Yet, as seen from the decisions discussed above, the absence of such a representation from the contracting officer does not necessarily mean that an appeal deadline is automatically suspended, even if the contracting officer agrees to meet with the contractor. Further, even if the contracting officer tells the contractor that the appeal deadline continues to run, a tribunal could still view actions *subsequent* to that representation as eliminating a decision's finality, creating risk and confusion for both the contracting officer and the contractor.

Without FAR guidance, the determination of whether a contracting officer's actions in response to a reconsideration request are sufficient to suspend an appeal deadline is "driven by facts unique to each case and is necessarily ad hoc." *Omni Abstract*, 96-2 BCA at 141,643. To make that determination, the Board must look for some timely affirmative conduct *by the contracting officer himself* – either express or implied – that indicates to the contractor a willingness to revisit the previously issued "final" decision, "and it is the [contracting officer's] agreement to reconsider that triggers the extension." *Merritt Lumber Co.*, AGBCA 88-313-1, et al., 89-2 BCA ¶ 21,676, at 109,009-10.[8] The "test is not limited

[8] *See, e.g.*, *Royal International Builders Co.*, ASBCA 42637, 92-1 BCA ¶ 24,684, at 123,134 (finality vitiated where the contracting officer's actions "created sufficient uncertainty" that contractor "could reasonably believe that the initial decision was not final"); *Birken Manufacturing Co.*, ASBCA 36587, 89-2 BCA ¶ 21,581, at 108,669 (finality attached where contractor was not reasonably led to believe that decision was being reconsidered); *Johnson Controls*, 83-2 BCA at 84,170 (finality vitiated where contracting officer met with contractor to discuss decision and did not "make it very clear" that original appeal period "continues to run"); *Grunley-Walsh Construction Co.*, GSBCA 3132, 70-2 BCA ¶ 8399, at 39,052 (appeal deadline was not tolled because "[t]he record does not reveal that the

to the subjective state of the [contractor's] mind but is an objective one considering all the facts." *Jen-Beck Associates*, VABCA 1988, 85-2 BCA ¶ 18,086, at 90,790; *see Devi Plaza*, 09-1 BCA at 168,337 ("the issue to be resolved with respect to vitiation of 'finality' is whether the contractor presented evidence showing it reasonably or objectively could have concluded the [contracting officer's] decision was being reconsidered" (quoting *Sach Sinha & Associates*, 95-1 BCA at 137,042)). "An objective test invokes the reasonable person standard, not whether authorized representatives of [the contractor], interested as they were, subjectively thought the decision was being reconsidered." *Omni Abstract*, 96-2 BCA at 141,643.

IV. Whether, and When, the Contracting Officer Suspended The Appeal Deadline

Applying this objective "reasonable person" standard to the facts here, we cannot find that the contracting officer's exchanges with Safe Haven and its counsel in November 2012 were sufficient to justify a belief – from an objective standpoint – that the original appeal deadlines were somehow suspended. Although, in November 2012, Safe Haven and the contracting officer discussed having a meeting to discuss "outstanding issues," the parties' conversations about what those "outstanding issues" were at that point in time did not clearly point to the Georgetown retainer and Yemen/Bahrain deobligation claims. "It is the contractor's responsibility to come forward with 'evidence showing it reasonably or objectively could have concluded the [contracting officer's] decision was being reconsidered.'" *Syntak Industries, Inc.*, ASBCA 52630, 00-2 BCA ¶ 31,023, at 153,219-20 (quoting *Sach Sinha & Associates*, 95-1 BCA at 137,042). Safe Haven did not meet its burden to show that the November 2012 exchanges satisfy that standard.

Nevertheless, on December 4, 2012, Safe Haven's counsel informed the DOS contracting officer that Safe Haven wanted to include in the impending meeting a discussion of the merits of the Georgetown retainer and Yemen/Bahrain deobligation claims, and the contracting officer affirmatively agreed to the request. Further, during the subsequent February 1, 2013, meeting, the DOS contracting officer, at the very least, indicated that he would "take a look at" the merits of the two claims that were the subject of those decisions. It is clear that this type of post-decision representation is sufficient to justify the contractor's belief that the contracting officer is reconsidering his decisions. *See, e.g.*, *Zomord Co.*, ASBCA 59065, 14-1 BCA ¶ 35,626, at 174,483 (contracting officer indicated that "we are looking into this"); *First Nationwide Postal Holdings*, PSBCA 6331, et al., 10-2 BCA ¶ 34,609, at 170,583 (contracting officer said that he would "look into it and get back to

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Government at any time gave Appellant any indication that it was reconsidering the final decision").

you"). We need not resolve whether the DOS contracting officer affirmatively told Safe Haven at that meeting not to worry about the appeal deadlines, as Safe Haven alleges, because the DOS contracting officer's expressed agreement again to review those claims is enough to suspend the appeal deadlines – most likely by December 4, 2012, and, at the very latest, by February 1, 2013.

DOS argues that the DOS contracting officer's statements could not have affected the appeal deadlines because he never expressly stated that he would reconsider his prior decisions. Yet, a contracting officer can effectively reconsider, and vitiate the finality of, a prior decision without expressly saying that he is "reconsidering" or "revisiting" or "reopening" it. *See, e.g.*, *Guardian Angels*, 120 Fed. Cl. at 10 ("A request for reconsideration need not be so titled or even formally submitted."); *Metrotop Plaza Associates v. United States*, 82 Fed. Cl. 598, 601-02 (2008) ("Although defendant is correct in saying that plaintiff never formally labeled its contacts with the government as a request for 'reconsideration,' we do not find the absence of that term to be legally significant."); *Precision Tool & Engineering Corp.*, ASBCA 16652, 73-1 BCA ¶ 9878, at 46,183 ("It is true that neither party ever used the word 'reconsider.' But the use of this word is not a *sine qua non* before a determination can be validly made that an appellant did, in fact, reasonably conclude that a contracting officer was reconsidering his final decision."). We look to the *substance* of what the contracting officer agreed to do and whether, despite the words used, he effectively agreed to reconsider his decisions. Here, it is clear that he expressed that intent to Safe Haven, even if he did not use the word "reconsider," and that Safe Haven relied upon that representation.

DOS also seems to suggest that, even if there was some period of time during which the contracting officer was actually reevaluating the claims, Safe Haven acted unreasonably in waiting until mid-2014 to file its appeals because any period of agency reevaluation following the February 1, 2013, meeting was very short and ended long before Safe Haven actually filed its appeals. Yet, once the decisions were no longer "final," the appeal deadline was vitiated. For the appeal period to begin again, the contracting officer would have to issue a new "final" decision – that is, he either had to issue a new decision or had to deny reconsideration and effectively reinstate the prior decision. *See* 41 U.S.C. § 7104(a) (time for appeal does not commence until "the date of [the contractor's] receipt of a contracting officer's decision"); *Pathman Construction Co. v. United States*, 817 F.2d 1573, 1577 (Fed. Cir. 1987) ("'receipt' of the contracting officer's decision by the contractor is the critical event that starts the running of the limitations period"); *Summit Contractors*, 15 Cl. Ct. at 808 ("Only upon the decision on reconsideration did the action become final."). Perhaps Safe Haven should have suspected that things were not going well for it when the DOS contracting officer did not respond to repeated e-mail messages for several months, but there is no basis for requiring the contractor to guess whether the contracting officer has internally

stopped his reconsideration process. Once the finality of a contracting officer's decision is extinguished by reconsideration, the contracting officer must issue a "final" decision to start the appeal clock again.[9] *Summit Contractors*, 15 Cl. Ct. at 809.

For these reasons, we find that the DOS contracting officer effectively suspended the appeal deadlines for the two claims at issue – most probably on December 4, 2012, and, at the very latest, by February 1, 2013.

V. Calculating the New Appeal Deadline Following Reconsideration

DOS suggests that a contracting officer's agreement to reconsider a decision does not completely vitiate the existing appeal deadline, but merely stops it in place from the date of the agreement to reconsider. Under that theory, rather than the appeal time clock starting at zero when the reconsideration decision is reached, the contracting officer's agreement to reconsider merely suspends the appeal deadline starting from the date that the agreement to reconsider was made. Accordingly, assuming that the time to appeal the contracting officer's September 18, 2013, decision on the Yemen/Bahrain deobligation claim was suspended by the contracting officer's e-mail message of December 4, 2013, seventy-seven days of Safe Haven's appeal time had passed before the reconsideration process began, leaving Safe Haven with only thirteen days to appeal after reconsideration was affirmatively denied. Applying that theory, because Safe Haven waited sixty-eight days to appeal after learning that reconsideration was denied, the Yemen/Bahrain deobligation appeal is untimely. Similarly, because more than ninety days passed before the DOS contracting officer effectively agreed to reopen the Georgetown retainer claim, Safe Haven's ability to appeal that claim to the Board had expired before the contracting officer ever agreed to reconsider

[9] The Court of Federal Claims has not held to the contrary. In *Arono, Inc. v. United States*, 49 Fed. Cl. 544 (2001), the court held that "it is the amount of time, if any, a contracting officer spends reviewing a plaintiff's request for reconsideration that suspends the finality of the decision regardless of whether that decision is ultimately reconsidered and reversed." *Id.* at 550; *see Comprehensive Community Health & Psychological Services, LLC v. United States*, 120 Fed. Cl. 447, 454 (2015) (citing *Arono* for same proposition). Although that sentence, taken in isolation, could be read to indicate that communication of the decision to the contractor is unnecessary to restart the appeal deadline, the court in *Arono* made clear, consistent with 41 U.S.C. § 7104, that the appeal time does not commence "until the disposition of the request for reconsideration," *Arono*, 49 Fed. Cl. at 549, meaning the contractor's receipt of the decision on reconsideration. *See Borough of Alpine v. United States*, 923 F.2d 170, 172 (Fed. Cir. 1991) (receipt of decision starts appeal time); *Pathman Construction*, 817 F.2d at 1577 (same).

the claim, although presumably it still could have pursued an appeal of the decision on that claim before the Court of Federal Claims.

That argument conflicts with the Court of Claims' decision in *Roscoe-Ajax*, in which the Court recognized that, if the contracting officer reconsiders his original decision before that decision becomes final and unappealable, it is the reconsideration decision that "finally" decides the claim:

> [T]he Board was mistaken in holding the 30-day period [the then-applicable appeal time] within which plaintiff was required to appeal commenced to run from such January 16, 1962 letter, and that such running was "tolled" by the February 15, 1962 letter, whereby the contracting officer agreed to reconsider the matter, until May 7, 1962, when he ended his reconsideration. . . . Under the circumstances described, . . . the contracting officer did not purport to decide the issue finally until his letter of May 7, 1962.

Roscoe-Ajax, 458 F.2d at 63. Accordingly, if the contracting officer reconsiders a decision, the appeal clock starts running, from zero, upon issuance of the "final" decision following a timely-requested reconsideration. *See Nash Janitorial Service*, 88-2 BCA at 105,187 (contracting officer's reconsideration of final decision "nullifie[s] the original appeal period"); *Time Contractors*, DOT CAB 1669, 85-3 BCA ¶ 18,271, at 91,718 (agreeing with a party's argument that "the decision of the Contracting Officer to reconsider a final decision tolls its finality and the issuance of a new decision starts a new appeal time"); *M.S.I. Corp.*, VACAB 503, 1964 VA BCA LEXIS 32, at *10 (Dec. 31, 1964) ("when a contracting officer," within the deadline for appeal, "grants a request for reconsideration, the time for appeal does not begin until the contractor is notified of the new decision").

This method of computation comports with the rule in federal courts, under which, if a party timely files a request for reconsideration of a court judgment, the time clock for appeal begins anew for all parties from the date of the court's reconsideration decision. *See, e.g.*, *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-46 (1974) ("Appellees' motion for reconsideration of October 3 suspended the finality of the judgment of September 28 until the District Court's denial of the motion on October 4 restored it. Time for appeal thus began to run from October 4."); *Kraft, Inc. v. United States*, 85 F.3d 602, 605 (Fed. Cir. 1996) (if timely motion to alter judgment is filed, the "appeal period begins to run anew from the date of entry of the court's order disposing of such motion"); *United States v. Rodriguez*, 892 F.2d 233, 235 (2d Cir. 1989) ("Once the district court denies the motion, the clock is reset to zero, and the full time for appeal 'begins to run anew from the date of the entry of the order disposing of the motion.'" (quoting 9 James W. Moore, Bernard J. Ward, & Jo D. Lucas, *Moore's Federal Practice* ¶ 204.17, at 4-137 (2d ed. 1989)); *Dayley*, 169 Ct. Cl. at

308 ("The general rule is that the period for appeal or review does not begin to run until the disposition of a timely request for reconsideration."); Fed. R. App. P. 4(a)(4)(A).

Here, the ninety-day clock for appealing to the Board did not start to run, at the earliest, until DOS's contracting officer, Mr. Thomas, for the first time made clear to Safe Haven on March 21, 2014, that DOS was no longer reconsidering the previously issued contracting officer's decisions. In essence, Mr. Thomas on that date constructively reinstated the previously issued final decisions. Safe Haven filed its appeals on both claims within ninety days of that date.[10]

VI. Whether the Contracting Officer's Agreement to Reconsider Was Timely

Lastly, we consider whether the contracting officer's agreement to reconsider came too late. By December 4, 2012, the ninety-day period for appealing its Georgetown retainer claim to the Board had expired. By February 1, 2013, when the parties met, that ninety-day deadline had expired with regard to both of Safe Haven's claims.

Once the time for appealing a contracting officer's decision has expired, that decision becomes final, and the contracting officer loses his authority to vitiate that finality:

> Our research has not disclosed any case arising under the Contract Disputes Act where an untimely request for reconsideration . . . has been deemed to vitiate the finality of an unappealed decision. Moreover, the applicable decisions make clear that, under the Act, a request for reconsideration of a contracting officer's decision implicitly must be made within the statutory appeal period to avoid finality.

Schleicher Community Corrections Center, 98-2 BCA at 148,148. That is because "rights vest when no appeal is taken within the proscribed time," *Maitland Brothers*, ASBCA 6607, 66-1 BCA ¶ 5416, at 25,428, and "[n]either the contracting officer nor the [agency] department head has authority to waive the vested right of the Government in such unappealed decision, as no officer or agent of the Government has authority to waive a vested right of the Government without consideration." *Id.*; *see Space Age Engineering*, 82-1 BCA at 78,034 ("Once the final decision has indeed become final and conclusive because

[10] Because Safe Haven appealed both decisions within ninety days of Mr. Thomas's verbal representation that he was not reconsidering the prior decisions, we need not consider whether a written, rather than verbal, decision on reconsideration is necessary to restart the appeal clock.

of no timely appeal the contracting officer has no authority to change it, for the rights of the parties have vested."); *R.M. Wells Co.*, VACAB 1248, 78-1 BCA ¶ 13,034, at 63,573 ("we find no authority . . . for the proposition that the Contracting Officer may overtly or implicitly extend the [appeal] period once it has expired"); *Dispatch Contractors*, IBCA 636-5-67, 67-2 BCA ¶ 6707, at 31,080 n.10 ("a Government employee does not have authority to waive a vested right of the Government without consideration").[11]

Yet, here, even though the contracting officer's suggestion that he would reevaluate his decisions came more than ninety days after issuance of at least one of the two contracting officer's decisions at issue, they came well before the one-year deadline for direct action in the Court of Federal Claims, meaning that the contracting officer's decisions were not truly final and unappealable before the reconsideration process began. The CDA provides contractors with two avenues of challenging a contracting officer's decision: the contractor can appeal to the appropriate board of contract appeals within ninety days from receipt of the decision or, alternatively, can file an action in the Court of Federal Claims within twelve months of receipt. *EHR Doctors, Inc. v. Social Security Administration*, CBCA 4117, 14-1 BCA ¶ 35,773, at 175,006 (citing 41 U.S.C. § 7104). As one of our predecessor boards recognized in *May Ship Repair Contracting Corp.*, DOT BCA 2521, 93-2 BCA ¶ 25,561 (1992), if the ninety-day deadline for appealing a contracting officer's decision to the Board has expired, the contracting officer still retains authority to withdraw or reconsider his "final" decision if time remains for the contractor to challenge the decision in federal court. *Id.* at 127,320. That is, until the last opportunity for challenging the decision expires, the decision "has not yet attained statutory finality." *Id.* Until that statutory finality is attained, the Government's right to finality has not vested, leaving the contracting officer free to reconsider or withdraw the "final" decision. Once the contracting officer effectively withdraws or reconsiders the original decision, it becomes of no effect, and any appeal deadline then starts to run anew from the date that any decisions following reconsideration are issued. *See Roscoe-Ajax*, 458 F.2d at 63.

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[11] Recently, the ASBCA in *LRV Environmental, Inc.*, ASBCA 58727, et al., 15-1 BCA ¶ 36,042, appears to have decided to the contrary, finding that a contracting officer implicitly agreed to reopen and reconsider a prior decision after it had become final and unappealable. *Id.* at 176,038 (finding that, in July 2010, the contracting officer implicitly reconsidered and reopened an October 2007 decision). Although the result there may conflict with earlier ASBCA decisions, *see, e.g.*, *Adventure Group*, ASBCA 45511, 93-3 BCA ¶ 25,967, at 129,135; *Space Age Engineering*, 82-1 BCA at 78,034, we need not attempt to reconcile those decisions because we are not bound by them.

It is true that, in the past, several boards of contract appeals have indicated, or at least suggested, that the contracting officer's agreement to reconsider is untimely and will not vitiate the time for appeal if it comes after the ninety-day deadline for appeal to the boards has run, even though it occurs before the one-year deadline for appeal to the Court of Federal Claims. *See, e.g.*, *Jacob Construction LLC v. Department of Veterans Affairs*, CBCA 2838, 12-2 BCA ¶ 35,140, at 172,509-10; *J. Leonard Spodek Nationwide Postal Management*, PSBCA 5285, 05-2 BCA ¶ 33,086, at 164,011; *Propulsion Controls Engineering*, ASBCA 53307, 01-2 BCA ¶ 31,494, at 155,508; *Adventure Group, Inc.*, ASBCA 45511, 93-3 BCA ¶ 25,967, at 129,135; *see also Midland Maintenance, Inc.*, ASBCA 44563, 93-2 BCA ¶ 25,618, at 127,520 (1992) ("it appears that the April and later meetings were held after the [ninety-day] appeal period had expired and the denial of the claim had become unappealable").[12] That position is inconsistent with 41 U.S.C. § 7104(a), which calls for one contracting officer's "final" decision on a single claim, *see also* 48 CFR 33.211 (2015), and, as previously discussed, the time for appeal runs from the date of that truly "final" decision. Any holding that the contracting officer's original decision becomes final for purposes of appeal to the boards of contract appeals after ninety days, but that the contracting officer could still reconsider and suspend the finality of the decision (and restart the appeal time anew) only as it applies to an action in the Court of Federal Claims would effectively create

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[12] Similarly, in *Schleicher Community Corrections Center, Inc.*, DOT CAB 3046, et al., 98-2 BCA ¶ 29,941, one of our predecessor boards indicated that an untimely request for reconsideration is "one submitted after the ninety-day appeal period expired." *Id.* at 148,148. Nevertheless, in that case, the board also noted that the one-year period for appealing the decision at issue there to the Court of Federal Claims had also expired before the request for reconsideration was made – in fact, the reconsideration request there came three years after the contracting officer's decision, *id.* at 148,147 – making it clear that the contracting officer's decision was truly final and unappealable to any forum by the time that the contractor sought reconsideration. *See id.* at 148,151 n.4. The board's statement about the ninety-day deadline there was unnecessary to the result.

In addition, in *Pixl Inc. v. Department of Agriculture*, CBCA 1203, 09-2 BCA ¶ 34,187, we held that the contractor's purported reconsideration request was untimely because it came after the ninety-day appeal period, *id.* at 168,984, but it is also clear that the contracting officer there never acted upon the alleged request for reconsideration. Because a mere request, without subsequent action by the contracting officer indicating his agreement to reconsider his prior decision, is insufficient to suspend the CDA appeal deadline, *see Horton Electric*, 88-2 BCA at 104,143, there could have been no tolling of the CDA appeal deadline in *Pixl*. Again, the discussion of the finality of the ninety-day appeal deadline there was unnecessary to the result.

two "final" decisions: one from which the time runs for appeal to the boards (the original decision), and a later one from which the time runs for filing an action in the Court of Federal Claims (the later reconsideration decision). There is no language in the CDA or the FAR that would support two different triggers for starting the appeal clock.

Given that we previously recognized that "the holdings of our predecessor boards [are] binding as precedent in this Board," *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,989, we believe it appropriate to follow the rationale of our predecessor board's 1992 decision in *May Ship Repair Contracting* here: that the contracting officer retains authority to reconsider a decision on a CDA claim until that decision is truly final and no longer appealable in any forum. Applying that rationale, the DOS contracting officer's agreement to reevaluate the Georgetown retainer and Yemen/Bahrain deobligation claims on December 4, 2012, or February 1, 2013, vitiated the finality of his prior decisions, and the appeal deadline would begin anew only when the truly "final" decision – the one denying reconsideration – was issued. That time for appeal, either to the boards or to the Court of Federal Claims, could not begin until the contracting officer conveyed that "final" decision.

The request for reconsideration, and the contracting officer's response indicating that he would reconsider, were timely.

Decision

For the foregoing reasons, we deny the Government's motion to dismiss Safe Haven's appeals as untimely.

HAROLD D. LESTER, JR.
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

PATRICIA J. SHERIDAN
Board Judge