

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of PETER J. SCARPULLA,)
INC.)
) Docket No. MSBCA 1209
Under DGS Project No.)
T-493-782-020)

December 11, 1984

Motion to Vacate Opinion - Under the Maryland Administrative Procedure Act, the Board has no authority to vacate a final decision. However, if a timely motion for reconsideration is made, the Board has the inherent authority to reopen the record and reconsider a decision where it is shown that an error was committed due to fraud, surprise, mistake, or inadvertence.

Finality of Board Decision - A timely motion for reconsideration suspends the finality of the Board's decision until such time as the motion is ruled on.

MEMORANDUM OPINION AND ORDER
ON MOTION FOR RECONSIDERATION

On November 13, 1984, this Board issued an opinion sustaining Appellant's protest in the captioned appeal. The crux of the Board's opinion was that the Maryland Department of General Services' (DGS) procurement officer failed to demonstrate a reasonable basis for rejecting all bids received on the instant project and resoliciting the work. In so ruling, the Board found that the second solicitation issued by DGS called for bids based on specifications which substantially were the same as those included in the original procurement. "Under such circumstances, an auction atmosphere is created . . . wherein the new bids . . . constitute responses to the prior exposed bid prices rather than to any significant change in the salient characteristics of the services required." Opinion at p. 9. While lower bid prices properly were anticipated by the DGS procurement officer, his decision to rebid under these facts was considered contrary to public policy and hence unreasonable.

On December 7, 1984, DGS filed a motion for reconsideration. The motion was based on newly discovered evidence which allegedly demonstrates that one of Appellant's witnesses, Mr. Thomas Hastings, had a financial interest in the outcome of the protest appeal. Had this information properly been disclosed during relevant questioning at hearing, DGS contends that its subsequent cross-examination of Mr. Hastings and Mr. Boehm would have been altered, as would its closing argument to the Board. DGS now asks that the Board:

- A. Vacate the Opinion and strike all testimony on behalf of Scarpulla;
or
- B. Vacate the Opinion and re-open [sic] the record.

A prehearing conference was conducted on the motion on December 10, 1984. At this time, DGS stated that it intended to appeal the Board's November 13, 1984 opinion if unsuccessful on reconsideration. Concern was registered by DGS, however, that the 30 day appeal period would not be tolled by the filing of its motion for reconsideration. DGS contends that vacating the Board's opinion is the only procedure available to toll the appeal period.

In Johnson Controls, Inc., MSBCA 1155 (November 30, 1983) at p. 2, this Board concluded that a timely motion for reconsideration suspends the finality of a decision until such time as the motion is ruled on. Although the Board was unable to find a Maryland case directly on point,¹ the result seems to flow from existing Maryland case law.

The Board has inherent authority to reopen and reconsider a decision so long as it does so within a reasonable time and before an appeal is taken in the courts. Brandt v. Montgomery County Commission on Landload-Tenant Affairs, 39 Md. App. 147, 160-161 (1978); Johnson Controls, Inc., MSBCA 1155, November 30, 1983; Eagle International, Inc., MSBCA 1121, March 31, 1983. In the absence of a statute giving an administrative agency authority to reopen or reconsider a decision, Maryland common law rules require, as a prerequisite to reopening or reconsidering an administrative decision, a showing that an error has been caused by fraud, surprise, mistake or inadvertence. Zoning Appeals Board v. McKinney, 174 Md. 551, 564-566, 199 A. 540, 546-547 (1938). A mere change of mind by an agency, without any intervening change in conditions or other different factors, does not amount to fraud, surprise, mistake or inadvertence justifying a rehearing or reconsideration. Redding v. Bd. of County Comm's, 263 Md. 94, 111 (1971). Accordingly, reconsideration is authorized only when the final administrative decision is deemed erroneous due to one or more of the four factors set forth above.

Reconsideration of a decision is an action inconsistent with the notion that the administrative decision is final. If the Board indeed has the authority to reconsider an opinion under proper circumstances and chooses to do so, it seems clear that the finality of its administrative decision must be suspended until the process is complete. In this manner, the final administrative decision truly may be reflective of all relevant facts and a complete record can be made for judicial review by the courts.

Turning to the instant motion, DGS has presented a reasonable basis to reopen the record for the limited purpose of recalling Mr. Hastings and Mr. Boehm. Appellant's counsel, in fact, does not object to this procedure. The witnesses in question, however, were called by Appellant to establish only that the specifications utilized in the second procurement substantially were the same as those used in the first procurement and did not increase the

¹Federal common law supports this finding. See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 541 (1970); Dayley v. United States, 169 Ct.Cl. 305, 309 (1965).

scope of work to be performed. Although DGS may be able to attack the credibility of the foregoing witnesses based on its newly discovered evidence, it still would have to establish, based on its procurement officer's testimony, that bids were rejected, in part, because the procurement officer intended to and did make substantial changes to the specifications. In other words, regardless of the credibility of Appellant's witnesses on this point, DGS had the burden of going forward with evidence showing that bids were rejected to permit substantive changes to be made to the scope of work and that the changes were made. If the record does not establish that a prima facie case has been made in this regard, the reopening of the record will not affect the Board's decision in this appeal.

In conclusion, we appreciate DGS' concern as to the timeliness of its intended appeal to the courts. We further recognize that our views as to the finality of an administrative opinion are in no way binding on the courts. Nevertheless, we find nothing in the law which permits us to vacate, modify or withdraw an opinion absent a reopening of the record on proper grounds and the receipt of new evidence. Since a basis for reopening the record here has been established, DGS' motion for reconsideration shall be granted to the extent previously indicated, i.e., for the purpose of recalling Messrs. Hastings and Boehm and rearguing the weight and significance of their testimony. A prehearing conference shall be conducted by telephone on Friday, December 15, 1984 at 10:00 a.m. should DGS elect to proceed in this forum on the motion as filed.

