

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of--)
)
Superior Maritime Services, Inc. and) ASBCA Nos. 58580, 58691
Pacific Maritime Freight, Inc. (d/b/a)
Pacific Tugboat Service) Co-Venture)
)
Under Contract No. 000000-00-0-0000)

APPEARANCE FOR THE APPELLANT:

Clinton D. Hubbard, Esq.
Law Offices of Clinton D. Hubbard
San Diego, CA

APPEARANCES FOR THE GOVERNMENT:

Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Taylor N. Ferrell, Esq.
Trial Attorney
M. Lee Kristeller Johnson, Esq.
Assistant Counsel
NAVSUP Fleet Logistics Center
San Diego, CA

Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Nancy J. Lewis, JA
CPT Michael E. Barnicle, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PEACOCK ON THE
GOVERNMENT'S MOTIONS TO DISMISS FOR LACK OF JURISDICTION

These appeals involve a claim by Superior Maritime Services, Inc. (SMS) and Pacific Maritime Freight, Inc. (d/b/a Pacific Tugboat Service) (Pacific Tug) a Co-Venture (SMS/Pacific Tug) seeking damages due to the alleged breach of a non-FAR based contract for transportation services. Both the Navy and Army disclaim any liability under the alleged "contract" and have individually moved to dismiss the appeals for lack of jurisdiction. The Navy argues that any "contract" was not with the Navy and not covered by the Contract Disputes Act (CDA). It further alleges that no Navy official involved with the alleged "contract" had contracting officer authority. According to the Navy, if there was any "contract" within the Board's jurisdiction, the Army should be the respondent agency. For its part, the Army contends that all critical actions associated with the formation of the alleged "contract" and its subsequent administration were

undertaken by the Navy in accordance with, and as provided for in, the Defense Transportation Regulations. Accordingly, the Army maintains that the Navy should be deemed the respondent agency. We grant the Army's motion to the extent indicated herein and deny the Navy's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 10 April 2012, the Army Military Surface Deployment and Distribution Command (Army SDDC), located at Scott Air Force Base (Scott AFB), Illinois, issued a solicitation/request for tender offers to transport freight and water from Naval Station San Diego, California, to San Clemente Island, California. The request for tender offers was entitled "Solicitation for Movement of DOD Freight" and assigned File No. 1LWX120361N-WEJ. (ASBCA No. 58691 R4¹, tab 3; Navy mot., Meyer decl. ¶ 5) Amendment No. 1 to the solicitation extended the closing date to 18 April 2012 (R4, tab 4).

2. The purpose of the solicitation was to obtain interim barge services during the time that the Navy's primary barge transportation service provider was scheduled to be in dry dock for maintenance and repairs (R4, tab 14). The solicitation provided that "[t]ender will remain in effect for a minimum of 90 days" (R4, tab 3 at 3).

3. Army SDDC issued the solicitation in response to a request by Terry Flannery, Storage and Distribution Manager and Transportation Officer (TO), NAVSUP Fleet Logistics Center San Diego (FLCSD) (R4, tabs 2, 17, Jackson decl. ¶¶ 2,4; Meyer decl. ¶¶ 3,5). TO Flannery has not been appointed a contracting officer under the Federal Acquisition Regulation (FAR) (Meyer decl. ¶ 4). TO Flannery "is authorized to work through [Army SDDC] in obtaining tender offers to be considered for meeting Navy requirements related to barge transportation services" (*id.* ¶ 5). TO Flannery's request to Army SDDC to issue the solicitation was within the scope of his duties as a Navy TO (*id.*).

4. The solicitation was not issued pursuant to the FAR, but as a Standing Route Order (SRO) procurement governed by the Defense Transportation Regulation (DTR) 4500.9-R, Part II, Cargo Movement (Jackson decl. ¶ 3).

5. In procuring transportation services, Army SDDC provides "a transportation rate-quoting service" pursuant to DTR 4500.9-R, Part II, ch. 201 ¶ L.13.b. With regard to SRO procurements in particular, DTR 4500.9-R, Part II, ch. 201 ¶ N.3. provides:

- c. Long-Term Types. Special tenders are also known as Standing Route Order (SRO). A SRO is a request for tender with rates that remain in effect for a specific time

¹ References are to the Rule 4 filed in ASBCA No. 58691, unless noted to the Rule 4 filed in ASBCA No. 58580.

period for a particular route or shipment(s). Usually, a SRO involves a volume of traffic that moves in separate shipments over a period greater than 89 days but not to exceed 365 days.

- (1) The TO submits a [Volume Movement Request] and any other relevant information concerning the transportation and related services to [Army] SDDC. It is critical that the TO and SDDC work together to obtain the best rates and service.
- (2) After SDDC receives the request and all the necessary requirement information, it solicits all the qualified carriers that provide the required service to submit quotes.
- (3) Once bids are received, SDDC reviews and determines which are responsive and provides a list that ranks the responsive bids based on the best value evaluation to the TO.
- (4) The TO will compare rates provided by the carriers with the rates on file with [the Global Freight Management system] and make a price reasonableness and best value determination.
- (5) The TO selects a primary carrier and alternative carriers to offer future shipments based on their SRO quotes.
- (6) If the TO does not select the low-cost carrier as the primary carrier or the next low-cost carrier as the alternate, then the TO must document the reasons for the nonselection of the low-cost carriers and provide a copy of the reasons to SDDC.
- (7) The TO awards the traffic and creates the contract by issuing a [bill of lading]. [Emphasis added]

6. SMS and Pacific Tug were co-venturers for this project. Pacific Tug was located in San Diego and responsible for performing all transportation tasks. Pacific Tug was authorized to execute documents and act on SMS's behalf in its dealings with the Navy. (ASBCA No. 58580 (58580) compl. ¶¶ 1, 4)

7. On 17 April 2012, SMS and Pacific Tug jointly submitted a tender offer using the required "Carrier Worksheet for File Number: 1LWX120361N-WEJ." Appellant listed the carrier's name as "Superior Maritime Services, Inc./Pacific Tug." Mr. Dan Wittenberg signed the tender offer on behalf of SMS/Pacific Tug. The tender offer proposed to provide two "Water barges: Lumpsum \$40,000 per round trip basis minimum 20 roundtrip voyages over a period of 90 days" and one "Freight barge: Lumpsum \$42,000 per round trip basis minimum 12 roundtrip voyages," with additional hourly demurrage charges. The expiration date of the tender offer was 31 August 2013. The tender offer specifically identified and fully described the barges proposed to provide the transportation services. (58580 compl., ex. 3)

8. By email dated 19 April 2012, Mr. Wayne Jackson, a Traffic Management Specialist, Special Requirements Branch for Army SDDC, notified Mr. Wittenberg that the government could not guarantee a minimum number of roundtrip voyages. Mr. Wittenberg responded on 20 April 2012, removing the minimum quantity provisos. (R4, tab 5)

9. On 1 May 2012, TO Flannery emailed Mr. Jackson, with copies to CDR Jacqueline M. Meyer, TO Flannery's supervisor, and a Mr. Billy Mills at FLCSD. The subject line of the email read: "Selection for June Period and FY-13 Beginning in August 2012." The body of the email stated:

We recommend selecting Superior Marine for their offer of two 75,000 gallon water barges (to be towed as a single unit with a total capacity of 150,000 gallons) and their offer of a 6,300 square foot RORO deck barge commencing on June 18, 2012 for a period of approximately 90 days.

Beginning in August we would like to recommend the use of Superior Marine single barge water/RORO barge that can accommodate 400,000 gallons of potable water as well as 12,500 square feet of general deck cargo.

(R4, tab 7 at 1)

10. On 3 May 2012, Mr. Jackson emailed Mr. Wittenberg and forwarded TO Flannery's selection email stating, "Please see the attached 349 form report for your use. Also, please see the below e-mail from Mr. Terry Flannery selecting your company for the water movement from FISC San Diego, CA to San Clemente Island, CA." The attached Carrier Notification Letter referenced Route Order No. 1LWX120361N-WEJ, provided a "REQ/AGENCY ID" of N00244, i.e. FLCSD, and indicated that it was

completed by Mr. Jackson. A copy of the email was sent to Ms. Dora Elias and Mr. Richard Cody. (R4, tab 7)

11. Thereafter, Mr. Wittenberg phoned TO Flannery seeking “unequivocal assurance” that the Navy intended to proceed because appellant “would be making very expensive modifications to the barges in reliance on the award” (app. opp’n to Navy mot., Wittenberg decl. ¶ 6).

12. In response to this inquiry, by email dated 9 May 2012 to Mr. Wittenberg (with copy to CDR Meyer, TO Flannery, and Mr. Mills), Mr. Gilverto Herrera, Warehouse/Deep Stock Supervisor, FISCSD–North Island Naval Air Station, San Diego, CA, stated:

Terry Flannery “awards” Superior Marine the interim contract for their offer of two 75,000 gallon water barges (to be towed as a single unit with a total capacity of 150,000 gallons) and their offer of a 6,300 square foot RORO deck barge commencing on June 18, 2012 for a period of approximately 90 days. You can definitely move forward with the June period. Prior inspection of water barges POC would be Mr. Billy Mills....

(Wittenberg decl., ex. B; R4, tab 9 at 2-3) Relying on Mr. Herrera’s email, appellant continued to make modifications to its barges in anticipation of performance (Wittenberg decl. ¶ 7).

13. On 17 May 2012, appellant executed MTE Form 273 entitled “DEPARTMENT OF DEFENSE STANDARD TENDER OF FREIGHT SERVICES” for Route Order No. 1LWX120361N-WEJ (R4, tab 8 at 1 of 5). Mr. Wittenberg provided Mr. Jackson a copy of the signed tender agreement by email dated 17 May 2012. The tender agreement included the following clause:

35. ACCEPTANCE OF TENDER: This tender, when accepted by the Government by making any shipment or settlement under the terms hereof or otherwise, will constitute an agreement between the parties hereto as to the transportation service herein described. This tender is made with the understanding that this acceptance will not constitute a guarantee by the United States Government of any particular volume of the traffic herein described. The issuance and consummation of the Government Bill of Lading, and the provision therein, shall constitute the Government’s contractual responsibilities for the proposed

movement. The Government shall not be charged for any service not performed. It is not intended and it should not be inferred that the Government will pay for any service not rendered.

No government official executed the tender agreement. (*Id.* at 2, 4 of 5)

14. By email dated 23 May 2012 to Mr. Herrera, with copy to CDR Meyer, TO Flannery, Mr. Mills and various SMS/Pacific Tug employees, Mr. Wittenberg stated, in pertinent part:

NAVSUP
Attn Terry Flannery

Ref San Clemente Island Water and RORO Barges

We understand from Wayne Jackson at [Army] SDDC...that instead of the 90 days (as stated below in the award) that you only intend to use our two water barges and one RORO deck barge from June 18 through July 21 (a period of just 32 days – until your existing unit gets out of drydock).

As you are aware we have expended a good deal of time and money so far in preparing these barges for the intended service....

We absolutely have to know how many voyages of the two-barge water barge unit and the RORO deck barge unit you intend us to perform for the Government each week. Obviously (and as explained before) we need to amortize these unique costs (which are fairly major outlays of capital) over the now apparently 32 day contract.

(R4, tab 9 at 2)

15. TO Flannery responded to Mr. Wittenberg by email dated 24 May 2012, stating, in pertinent part:

I would like to apologize if any information has been construed regarding this solicitation.

....

Your request to submit a quote based on our requirements was just that--a request. It is not a contract nor is it a guarantee of freight. However, using our best value criteria, your organization presented a fair and reasonable quote that we would like to utilize during the downtime of our current service provider. As I am sure you are aware, this maintenance is not exact, as we have been told by the current service provider. As such, we are unable to provide a definitive time frame of this particular service as it could be anywhere from 30-90 days.

(R4, tab 9 at 1)

16. By email to Ms. Elias dated 8 June 2012, TO Flannery stated, "Please cancel solicitation 1LWX120361N-WEJ, San Clemente Island. This is due to scheduled dry dock date of the Marmac-12 being taken by the U.S. Coast Guard for an emergency ship repair." (R4, tab 10 at 1) Army SDDC then issued Amendment No. 2, dated 8 June 2012, which provided that "[t]his amends original transmission covering subject movement, as [p]er Terry Flannery NAVSUP FLC San Diego, CA is cancelling solicitation 1LWX120361N-WEJ" (R4, tab 11 at 3). The request by TO Flannery to Army SDDC's Ms. Elias to "cancel" was within the scope of his duties as TO (Meyer decl. ¶ 5).

17. On the same date, Mr. Richard Cody, Lead Traffic Management Specialist, [Army SDDC] G-9, Business Strategies – Negotiations at Scott AFB forwarded a copy of Amendment No. 2 to appellant stating, "Attached is email from Terry Flannery at NAVSUP FLC San Diego, CA canceling solicitation 1LWX120361N-WEJ" (R4, tab 11 at 1).

18. By letter dated 17 August 2012, addressed to both TO Flannery and Ms. Elias, appellant's counsel stated that SMS/Pacific Tug was preparing a claim seeking anticipatory profits and costs allegedly incurred in preparing to perform the terminated Route Order No. 1LWX120361N-WEJ. In this letter, appellant's counsel stated, "Please provide me with the point of contact for negotiations and further communications in this regard (if it will be persons other than yourselves)." (58580 R4, tab 1)

19. Army counsel contacted appellant's counsel by email of 21 August 2012, indicating that Navy counsel would similarly be assigned with respect to appellant's claim. In response to an inquiry by appellant's counsel, on 28 August 2012, Army counsel instructed appellant's counsel to "[p]lease just send any correspondence to me, and I will coordinate with the Navy as necessary." (App. opp'n to Navy mot., Hubbard decl. ¶¶ 6-7)

20. SMS/Pacific Tug submitted a certified claim to Army counsel, by letter dated 7 September 2012, for breach of “a 90-day requirements contract” in the amount of \$366,608, reflecting appellant’s anticipatory profits. Appellant specifically requested a contracting officer’s final decision on its claim. (58580 R4, tab 2)

21. Thereafter, Navy counsel became the primary contact for the government regarding appellant’s claim (Hubbard decl. ¶¶ 7-10). By letter dated 20 December 2012, appellant submitted a “**SUPPLEMENTAL QUANTUM SUMMARY**” to Navy counsel, which increased the amount sought by appellant to \$586,654 because its 7 September 2012 claim failed to include the costs incurred by Pacific Tug in anticipation of performance. Appellant’s 20 December 2012 letter included a Contract Disputes Act (CDA) certification. (58580 R4, tab 3)

22. On 7 March 2013, Navy counsel orally advised appellant that the Navy was denying its claim (Hubbard decl. ¶ 5; 58580 compl. ¶ 5). Appellant filed a notice of appeal by email on the same date. Appellant’s notice of appeal identified the Navy as the respondent and stated that it was appealing “the failure to provide monetary relief for breach of contract and unjustified termination.” The notice of appeal also noted that there was no written decision on its claim. The Board docketed the appeal as ASBCA No. 58580.

23. TO Flannery issued a “final administrative decision” dated 12 March 2013 on appellant’s breach claim. The final administrative decision was addressed to Army SDDC’s Mr. Wayne Jackson. In the final administrative decision, TO Flannery stated that he could not “find justification for payment of this claim” because:

Under DOD Directive 4500.09E, “Transportation and Traffic Management;” Defense Transportation Regulation Part II, Cargo Movement (DTR); and the Military Surface Deployment and Distribution Command Military Freight Traffic Unified Rules Publication-1 (MFTURP-1), the [Army SDDC] is the authority for issuing tender agreements for DOD.

The DTR includes provisions that require a Transportation Service Provider (TSP) who submits a bid in response to a solicitation to be “ready, willing, and able to perform the transportation as stated in the bid.” This language was also included in the solicitation issued for this requirement. The DTR also states that the Government’s liability for payment of services does not begin until an actual shipment is presented to the TSP for transport.

The final administrative decision indicated that appeal could be taken to HQ, SDDC, ATTN: G9, Quality Assurance at Scott AFB, Illinois, though because the decision was addressed to Mr. Jackson and not appellant, it is unclear who could initiate the referenced appeal. (R4, tab 14 at 2-3) Army SDDC's Ms. Elias provided appellant a copy of the final administrative decision by email of 14 March 2013, stating, "Please find attached the decision rendered by the Navy Transportation Officer for your claim" (*id.* at 1).

24. By motion dated 30 April 2013, the Navy moved to dismiss ASBCA No. 58580, arguing that TO Flannery was not a contracting officer within the meaning of the CDA (Navy mot. at 1-3). The Navy's motion further seemed to suggest that under this Board's decision in *A-1 Horton's Moving Service, Inc.*, ASBCA No. 57750, 12-1 BCA ¶ 35,004, *aff'd on recon.*, 12-2 BCA ¶ 35,124, appellant was required to submit its claim to Army SDDC and not the Navy TO (Navy mot. at 3-4).

25. By email dated 7 June 2013, appellant submitted a second notice of appeal, appealing the "denial of its claim for breach of contract and unjustified termination," which the Board docketed as ASBCA No. 58691. Appellant's second appeal notice identified the "Tender and acceptance under Route Order #: 1LWX120361N-WEJ" as the contract and identified Army SDDC as the respondent. The second appeal notice cited Ms. Elias's 14 March 2013 email and the attached 12 March 2013 final administrative decision as the decision from which its appeal was taken.

26. Appellant's second notice of appeal further stated that it was being filed "provisionally, in light of the Government's pending motion to dismiss [ASBCA No. 58580] for, in effect, lack of jurisdiction based on assertion that Appellant named the wrong agency [i.e., the Navy] as a party to the contract." According to appellant, the import of the Navy's motion was that no Navy contracting officer (CO) issued a CO's decision nor did a Navy CO have authority to issue such a decision. Consequently, SMS considered that the "implication of the [Navy's] argument is...the SDDC contracting officer establishes CDA jurisdiction." The second appeal notice noted appellant's disagreement with "the thrust of the [Navy's] argument because the two agencies were sole [sic] closely intertwined at each stage of this procurement, including the involvement of joint legal counsel on behalf the [sic] two agencies, that all technical requirements were met in [ASBCA No. 58580]." Accordingly, SMS/Pacific Tug stated that it filed the second appeal as a "technical precaution."

27. By letter dated 19 June 2013, the Army requested the Board to suspend proceedings in ASBCA No. 58691, for the purposes of judicial economy, pending resolution of the Navy's motion to dismiss ASBCA No. 58580 (58691 Bd. corr. file).

28. During a 15 October 2013 teleconference with all three parties, the Board denied the Army's request and directed the Army to file a brief regarding the Board's

jurisdiction addressing, in particular, the effect of the Board's decision in *A-1 Horton's Moving Service*.

29. In response to the Board's Order, the Army filed a motion to dismiss ASBCA No. 58691, dated 15 November 2013, arguing that SMS lacks privity of contract with the Army and that appellant failed to submit a valid CDA claim to the Army. In particular, the Army argued that appellant lacks privity of contract with the Army because "the DTR solely authorizes the Navy Transportation Officer to enter into SRO procurements, the Navy took all definitive contracting actions, and the appellant's own statements indicate its contractual relationship with the Navy" (Army mot. at 11). Both appellant and the Navy responded to the Army's motion.

DECISION

These appeals involve SMS/Pacific Tug's claim seeking damages due to the alleged breach of a non-FAR based contract for transportation services. Transportation claims brought by a carrier under such contracts are generally governed by the Interstate Commerce Act (ICA), 31 U.S.C. § 3726 and 49 U.S.C. § 14705, and not by the CDA, 41 U.S.C. §§ 7101-7109. *See Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1366-69 (Fed. Cir. 2002). However, we noted in *A-1 Horton's Moving Service* that the ICA, by its own terms, applies narrowly to claims for transportation services provided and does not reflect a broader remedial scheme. 12-1 BCA ¶ 35,004 at 172,029. Accordingly, we held that the ICA does not deprive the Board of CDA jurisdiction over contract disputes, such as breach of contract claims that do not involve shipment-specific charges for transportation services provided. *Id.* at 172,030-31.

The Navy contends that *A-1 Horton's* does not support the Board's jurisdiction over ASBCA No. 58580 because, unlike in *A-1 Horton's*, appellant "does not allege the existence of an Army contract between SDDC and it" (Navy mot. at 4). The Navy argues that TO Flannery is not a CO as defined by the CDA (*id.* at 2-3). The Navy thus attempts to distinguish *A-1 Horton's* because appellant alleges that "it was awarded a Navy requirements contract through an email issued by a Navy warehouse supervisor" (*id.* at 4). The Navy's arguments imply that contractual authority is with Army SDDC and that no contract was entered into by a Navy official with contracting authority.

The Army similarly seeks to dismiss ASBCA No. 58691 due to lack of privity with appellant. The Army contends that Army SDDC "acted in an administrative role that did not include the authority to bind the government in SRO procurements," asserting that "all authority to enter into agreement, and issue final decisions, was vested with the Navy Transportation Officer" (Army mot. at 13-14). Thus, although both the Navy and the Army participated in the solicitation, selection, and cancellation of Route Order No. 1LWX120361N-WEJ, both agencies disavow contractual authority.

In addition to the general requirements for a binding contract (mutual intent to contract, offer and acceptance, and consideration), a contract with the United States requires “that the Government representative who entered or ratified the agreement had actual authority to bind the United States.” *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (citing *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990)). Our task, therefore, is to determine whether the Army or Navy officials involved had the authority to bind the government with respect to Route Order No. 1LWX120361N-WEJ.

The Route Order was solicited as an SRO procurement pursuant to Part II of the DTR. Under the DTR, an SRO procurement begins when a TO submits a request to Army SDDC. Army SDDC then solicits bids, reviews them for responsiveness, and provides a list of responsive bids to the TO along with a best value ranking. The TO, however, makes the price reasonableness and best value determinations and is tasked with selecting the carriers. The DTR further provides that the “TO awards the traffic and creates the contract.” (SOF ¶ 5) These procedures were followed here. TO Flannery, acting within the scope of his authority, requested the solicitation of the SRO (SOF ¶ 3). TO Flannery selected SMS as the carrier for the Route Order and “create[d] the contract” (SOF ¶ 5).² Therefore, TO Flannery had contracting authority with respect to the Route Order pursuant to the DTR.³

The Navy seeks to distinguish *A-1 Horton’s* because the contractor there alleged a contract with Army SDDC, submitted its claim to Army SDDC, and appealed from the deemed denial of its claim by an Army SDDC CO. The Navy’s argument is unpersuasive. The factual differences cited by the Navy are immaterial because our decision in *A-1 Horton’s* simply did not address the question of Army SDDC’s authority to bind the government. Moreover, the alleged contracts at issue there were governed by a different part of the DTR. *A-1 Horton’s*, 12-1 BCA ¶ 35,004 at 172,028.

The Navy further maintains that the Board lacks jurisdiction because TO Flannery was not a CO as defined by the CDA. The CDA requires that contractor claims “be submitted to *the contracting officer* for a decision.” 41 U.S.C. § 7103(a)(1) (emphasis added). This Board has jurisdiction “to decide any appeal from *a decision of a*

² Although he couched his selection as a recommendation, Army SDDC recognized the decision was TO Flannery’s (SOF ¶ 10).

³ We do not decide whether the remaining requirements for a contract are met. For the purposes of our jurisdiction, it is sufficient that appellant has made non-frivolous allegations that a contract with the government exists. *A-1 Horton’s*, 12-2 BCA ¶ 35,124 at 172,452 (citing *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011)). Whether appellant can ultimately prove such a contract goes to the merits of its claim. *Am. Gen. Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,640.

contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency.” 41 U.S.C. § 7105(e)(1)(A) (emphasis added). The Board’s jurisdiction also extends to the deemed denial of a contractor claim arising from the failure of a CO to issue a decision within time required. 41 U.S.C. § 7103(f)(5). The Navy argues that because TO Flannery has not been appointed as a CO via Standard Form 1402, as required by FAR 1.603-3(a), appellant has failed to satisfy the prerequisites to the Board’s CDA jurisdiction (Navy mot. at 1-3).⁴

The essential fallacy in the Navy’s argument is that it is premised on the incorrect assumption that disputes under the alleged contract are governed by the FAR. The alleged contract here is explicitly exempted from the FAR. FAR 47.000(a)(2). In *Merchant’s Moving & Storage, Inc.*, we rejected the government’s argument that the Board lacked jurisdiction over an offset action because it was not subject to a CO’s decision, stating that “in contracts not subject to FAR, there is no requirement that those Government employees with authority to take contractual actions have the title of ‘contracting officer.’” ASBCA No. 47370, 95-1 BCA ¶ 27,298 at 136,083, *abrogated on other grounds, Inter-Coastal Xpress*, 296 F.3d 1357. The CDA defines CO as:

The term “contracting officer”--

(A) means an individual who, by appointment in accordance with applicable regulations, has the authority to make and administer contracts and to make determinations and findings with respect to contracts; and

(B) includes an authorized representative of the contracting officer, acting within the limits of the representative's authority.

41 U.S.C. § 7101(6). As described above, TO Flannery meets the CDA definition of a CO. *See also Port Arthur Towing Co.*, ASBCA No. 37516, 89-3 BCA ¶ 22,004 at 110,630 (holding that an official with the authority to procure transportation services under prior transportation regulations met the CDA definition of a CO).

⁴ In response to the Army’s assertion that the authority to issue a final decision vested with the Navy TO, the Navy contends that the DTR “does not authorize Transportation Officers to make agency final decisions regarding any type of dispute,” citing DTR 4500.9-R, Part II, ch. 201 ¶ N.5. and ch. 212 ¶ C.9. (Navy resp. to Army mot. at 3-4). The cited provisions, however, govern payment disputes for transportation services provided. Such disputes are governed by the ICA, not the CDA. *Inter-Coastal Xpress*, 296 F.3d at 1366-69. Moreover, DTR 4500.9 R, Part II, ch. 201 ¶ N.5. itself cites to the ICA (31 U.S.C. § 3726) and its implementing regulations.

We conclude that the Navy is the appropriate contracting agency and respondent and we have jurisdiction to resolve these appeals under the CDA.

Dated: 9 June 2014



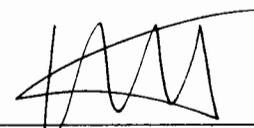
ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 58580, 58691, Appeals of Superior Maritime Services, Inc. and Pacific Maritime Freight, Inc. (d/b/a Pacific Tugboat Service) Co-Venture, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals