ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Maersk Line, Ltd.	)	ASBCA No. 55391
	)	
Under Contract Nos. DAMT01-01-D-0163	)	
DAMT01-03-D-0124	)	

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APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
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OPINION BY ADMINISTRATIVE JUDGE TING
ON MOTION TO DISMISS

This appeal involves two contracts entered into by the government with Maersk Line, Ltd. (Maersk) for ocean transportation of military cargo. As a result of the failure of the contracting officer (CO) to issue a decision on numerous certified claims it submitted, Maersk appealed to this Board pursuant to 41 U.S.C. § 605(c)(5). The government moves to dismiss the appeal for lack of jurisdiction. Maersk opposes the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

Department of Defense (DoD) Contracting Framework for Transportation and Transportation-Related Services

1. In support of its mission, DoD moves cargo by land, sea and air. Its primary procuring agencies for transportation and transportation-related services are the United States Transportation Command (USTRANSCOM) and its components: the Surface Deployment and Distribution Command (SDDC) (Army), the Military Sealift Command (MSC) (Navy), and the Air Mobility Command (AMC) (Air Force). (App. opp'n, Boyanton[1] dep. at 69-70)

[1] Earl B. Boyanton, Jr. (Boyanton) is Assistant Deputy Under Secretary for Transportation Policy. He was designated by the government as the knowledgeable person to testify about DoD's transportation infrastructure and

2. At one time, MSC procured all ocean transportation services for DoD. At some point, the commercial liner service was transferred to the Military Traffic Management Command (MTMC), the predecessor command to SDDC. The "charter" ocean transportation services, however, remained with MSC. (*Id.* at 62)

3. The acquisition of transportation and transportation-related services may be accomplished by use of FAR-based contracts or by use of bills of lading, government bills of lading (GBLs) and other instruments such as tender agreements. Federal Acquisition Regulation (FAR) Part 47 provides procedures for "[a]cquiring transportation or transportation-related services by contract methods other than bills of lading." The FAR states that it "does not regulate the acquisition of transportation or transportation-related services when the bill of lading is the contract." 48 C.F.R. § 47.000(a)(2)(2006).

4. Cargo movement in DoD is governed by the Defense Transportation Regulation (DTR), Part II. DTR procedures apply to "the Army, Navy, Air Force, Marine Corps, Defense Logistics Agency (DLA), Defense Contract Management Agency (DCMA), Coast Guard, General Services Administration (GSA), United States Transportation Command (USTRANSCOM) and its Transportation Component Commands (TCCs), and other activities/Agencies using DTS." (Boyanton dep., ex. 4 at II-201-1, ¶ A.3)

5. According to the DTR, "DOD uses a number of different procurement instruments to purchase transportation and related services. These instruments include FAR contracts, Bill of Lading (BL), government transportation requests and similar transportation forms."[2] The decision as to which procurement method to use would be based on "the needs of the customers, duration of the requirement, value of the transportation services provided, and the cost of implementing the procurement process relative to the cost of services acquired."[3] (Boyanton dep., ex. 4 at II-201-21, ¶ 12)

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policy. His deposition was taken by Maersk counsel on 24 August 2006. (*See* gov't opp'n at 8)

[2] Government Transportation Request (GTR) means "Optional Form 1169, the Government document used to buy transportation services. The document normally obligates the Government to pay for the transportation services provided." 41 C.F.R. § 102-118.35 (2006).

[3] In opposition to the government's motion to dismiss, Maersk has submitted, along with Boyanton's deposition, the November 2004 edition of the DTR, Part II. At the Board's request for the DTR, Part II "in effect when the 2001 contract was entered into, as well as the DTR, Part II, in effect when the 2003 contract was entered into, if different," the government has furnished the December 2000, the

6. As reflected in the DTR, SDDC provides several types of transportation procurement support: (1) FAR Contracting Support; (2) Rate Quotes – Tenders; and (3) SDDC Negotiated Specials. (Boyanton dep., ex. 4 at II-201-23, 24)

7. The DTR provides that if a shipping activity desires a FAR transportation contract, it can request SDDC to establish a contract, and "SDDC will work with the shipping activity to establish the type of contract to support its needs" (Boyanton dep., ex. 4 at II-201-23, ¶ N.1.a). With respect to FAR-based transportation contracts, DTR instructs at ¶ N.1.b that "Protests and Disputes are governed by 48 CFR Part 33, Protests, Disputes, and Appeals" (*id* at II-201-24). The disputes and appeals procedures referred to are those provided in "[t]he Contract Disputes Act of 1978, as amended (41 U.S.C. 601-603)." 48 C.F.R. § 33.202 (2001).[4]

8. The DTR explains that "Rate/Quotes – Tenders" are "Non-FAR procurements under 40 U.S.C. 481 et seq." It further explains:

> Tenders are not contracts. They are a carrier's offer to provide services at the quoted rate. The contract is created after the TO [Transportation Officer] offers the movement and the carrier accepts the movement under a BL. These are generally best suited for simple procurements where best value is deemed the low cost responsive carrier. It is not suitable when a shipper needs a cost/price technical tradeoff analysis to determine the best value carrier.

The DTR defines "SDDC Negotiated Special" as "tenders for particular shipments, routes or requirements that SDDC specifically solicited the rates." (Boyanton dep., ex. 4 at II-201-24, ¶¶ 2, 3)

May 2003 and the November 2004 editions of the DTR, Part II. DTR, Part II, apparently went through some major revisions between 2003 and 2004. The versions prior to the 2004 version did not delineate the distinction between FAR-based and non-FAR-based transportation instruments as indicated in these findings. Nonetheless, the 2004 versions clearly shows that sometime prior to undertaking the 2004 revision, those involved in DoD's transportation understood there was a difference between the FAR-based and non-FAR-based methods of procuring transportation-related services.

[4] We have referred to the 2001 version of the FAR applicable to Contract 0163. The 2003 version of the FAR, applicable to Contract 0124 contains the same instruction.

9. Unlike the FAR-based contracts, the DTR instructs that payment disputes relating to tenders (Non-FAR procurements under 40 U.S.C. § 481 *et seq.*) and SDDC Negotiated Specials be handled in accordance with the following procedures:

> 5. Payment Disputes. (31 U.S.C. § 3726, 40 U.S.C. § 486, and 41 CFR Part 102-118[5]). The TO and/or SDDC will attempt to resolve all transportation disputes. If the TO or SDDC cannot resolve the dispute, they can forward all relevant documents to the General Services Administration, Federal Supply Services, Audit Division (FBA), 1800 F Street NW, Washington, DC 20405 for a determination IAW 41 CFR Part 102-118.315, What Must My Agency Do If The TSP Disputes The Findings And My Agency Cannot Resolve The Dispute.

(Boyanton dep., ex. 4 at II-201-26)

10. According to Boyanton, DoD agencies such as USTRANSCOM, SDDC, MSC and AMC "often use FAR-based transportation contracts that included a disputes clause" (Boyanton dep. at 88). He testified that, as of August 2006 when he gave his deposition, requiring FAR-based transportation contracts to be subjected to the CDA disputes process was still a requirement, and his office has issued no directives to remove the CDA Disputes clause from FAR-based transportation contracts. (*Id.* at 94-95) We find that DoD has not administratively interpreted the 1998 amendment to the Transportation Act (31 U.S.C. § 3726(c)(1), *infra*) to apply to FAR-based transportation contracts.

Nature of the Contracts in this Appeal

11. On 14 July 2001, MTMC entered into Contract No. DAMT01-01-D-0163 (Contract 0163) with Maersk. This 133-page contract was in the estimated amount of approximately $17 million and had a base performance period from 1 September 2001 through 31 August 2002. (R4, tab 1)

12. On 13 January 2003, MTMC entered into Contract No. DAMT01-03-D-0124 (Contract 0124) with Maersk. This 108-page contract had a base performance period from 1 March 2004 through 29 February 2004 with a one-year option. The contract as awarded was in the amount of $19.53 million. (R4, tab 2)

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[5] 41 C.F.R. Part 102-118 (2006), "TRANSPORTATION PAYMENT AND AUDIT" deals with, among other things, use of government billing documents such as GBLs, GTRs, quotations, tenders or contracts.

13. Maersk provides, among other services, ocean and intermodal transportation of containerized cargo to military shippers (compl., ¶ 1). Contracts 0163 and 0124 (collectively the "Contracts") required Maersk to provide "international cargo transportation services using ocean common or contract carriers offering regularly scheduled commercial liner service for requirements that may arise in any part of the world and involve ocean movement for the routes covered herein" (R4, tab 1 at 17 of 133, ¶ 2.1, tab 2 at 17 of 108, ¶ 2.1).

14. The Contracts are the result of what is referred to as commercial item procurements undertaken pursuant to FAR Part 12 (Mills dep. at 36-37[6]). FAR Part 12 "implements the Federal Government's preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) by establishing acquisition policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial items and components." FAR 12.000.

15. SDDC chose to use a FAR-based, commercial item contract known as Universal Services Contracts (USC) for the procurement of maritime transportation services required under the two contracts in this case (Mills dep. at 33-34). Both contracts are also of the Fixed-Price Economic Adjustment (FPEPA)/Indefinite-Delivery Indefinite-Quantity (IDIQ) type. (R4, tab 1 at 129 of 133, tab 2 at 102 of 108).

16. Contract 0163 included in full text FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 1999) (R4, tab 1 at 124 of 133). Contract 0124 likewise included in full text the February 2002 version of FAR 52.212-4 (R4, tab 2 at 99 of 108). FAR 52.212-4 is an involved clause, containing no less than 19 subparagraphs. Subparagraph (d), relating to disputes, provides:

> (d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. . . .

(R4, tab 1 at 124 of 133, tab 2 at 99 of 108)

[6] William Mills was Chief of the Intermodal Distribution Division, SDDC, at the time his deposition was taken. Prior to July 2005, he was "the contracting officer in that division." (Mills dep. at 5-6)

17. FAR 12.302, applicable to commercial item procurements, prohibits the tailoring of certain areas covered by FAR 52.212-4 such as the "Disputes" provision because they "implement statutory requirements." Thus, when the government chose to use a FAR-based type contract it was required to include, as a part of that contract, the Contract Disputes Act (CDA) disputes procedure specified in FAR 52.212-4 and FAR 52.233-1.

18. The Disputes clause at FAR 52.233-1 is prescribed by FAR 33.215. FAR 33.215 requires the CO to "insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.203(b) apply." FAR 33.203(b) excepts any contract with "(1) a foreign government or agency of that government," or "(2) an international organization or a subsidiary body of that organization, if the agency head determines that the application of the [Contract Disputes] Act to the contract would not be in the public interest." Neither Contract 0163 nor Contract 0124 is exempt from the Disputes clause at FAR 52.233-1, which provides, in part:

> (a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).
>
> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

19. At his deposition, the CO testified that FAR-based contracts and non-FAR-based contracts are two distinct types of procurement methods that can be used to procure similar transportation services, that all FAR-based contracts would have included the Disputes clause at FAR 52.233-1, and that it was his understanding that the CDA disputes process would be used because Contracts 0163 and 0124 specified that process (Mills dep. at 47, 50-51, 75).

20. Under the Contracts, Maersk typically furnishes the container in which the military shipper loads its cargo. Maersk then transports the loaded container and delivers it to the designated consignee. The consignee is responsible for unloading the cargo and returning the empty container to the carrier at the place of delivery. (Compl., ¶ 5) Under the Contracts, the government is entitled to a specified amount of free time. In the event the government does not return or otherwise delays return of the container, Maersk is entitled to certain detention charges for the container (compl., ¶ 6; R4, tab 1 at 29-30 of 133, tab 2 at 29-30 of 108).

21. The Contracts also include a provision for reefer maintenance charges when return of refrigerated containers is delayed beyond the allowable free time (R4, tab 1 at

30 of 133, tab 2 at 29-30 of 108). A reefer is a piece of machinery that requires maintenance to keep it in good working order. When electric power is unavailable, the contractor provides generator sets (gensets) to power the reefer. The purpose of reefer maintenance charges is to compensate the contractor for additional maintenance costs it will incur for delayed container returns. (Compl., ¶¶ 10, 11)

22. During the contract periods, SDDC submitted orders to Maersk for ocean and intermodal transportation of containerized refrigerated (reefer) cargo from various origin points to various destination points in Southwest Asia (SWA), including Kuwait, Iraq, Afghanistan and Pakistan, in support of Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF). Maersk alleges that the military detained tens of thousands of contractor-furnished dry and reefer containers beyond their free time at port terminals where electricity was available as well as at consignee's in-country facilities where electricity was not available. (Compl., ¶¶ 14, 15)

23. The Rule 4 file the government prepared contains numerous certified claims. By letter dated 7 March 2007, the Board asked Maersk counsel to identify the specific certified claim (or claims) underlying the appeal.

24. Maersk's 28 March 2007 response explains that it filed its initial claim for detention and reefer maintenance charges on 30 July 2003 (R4, tab 5J). The letter states that from time to time, the government and Maersk would execute settlement modifications that would partially resolve certain outstanding detention and reefer maintenance claims. According to Maersk, its appeal involves only reefer maintenance charges (as opposed to the detention charges) that are included in specific claims accruing after 31 December 2004 because the government has paid the claimed reefer maintenance charges that accrued prior to 2005 under the various settlement modifications. (*Id.*)

25. Maersk's 28 March 2007 response states that "the specific certified claims underlying this appeal that are currently included in the Rule 4 file are found at tabs 13A, 14A, 15A, 15B, 16A, 17A, 18A, 19A, 20A, 22A, 22B, and 22C. These claims cover the period January 1, 2005 to December 31, 2005." Maersk states that it has submitted supplemental claims for the period 1 January 2006 to 31 December 2006. (*Id.*)

26. The CO did not issue a decision on Maersk's certified claims. Maersk submitted a notice of appeal dated 20 March 2006 based on the CO's failure to issue a decision on properly certified claims over $100,000 for unpaid reefer maintenance charges. As of 20 March 2006, the amount of Maersk's claims was $8,069,536.00 subject to supplemention. The Board docketed the appeal as ASBCA No. 55391 on 21 March 2006. Maersk's complaint, filed on 22 May 2006, seeks as relief "full payment of its submitted claims for reefer maintenance charges accruing from January 1, 2005

through March 31, 2006 in the amount of $9,178,932.11 plus interest under the Contract Disputes Act" (compl., ¶ 54).

27. Based on our review of DoD's established framework for procurement of transportation and transportation-related services and the record before us, we find that in the case of Contract 0163 and Contract 0124, SDDC deliberately chose FAR-based contracts for the ocean cargo transportation services it required. We find that the contracts do not in any way involve GBLs or any sort of tender-related transportation arrangements.

DECISION

Despite the fact that both Contract 0163 and Contract 0124 contained the CDA Disputes clause at FAR 52.212-4, the government moves to dismiss for lack of jurisdiction contending that Maersk's claims are "transportation claims," and as such "exclusive jurisdiction . . . lies with the Administrator of the General Services Administration pursuant to the Transportation Act at 31 U.S.C. 3726" (gov't mot. at 3). Maersk's opposition contends that its contracts with SDDC involved commercial-item procurement for ocean transportation under the FAR, and the government fails to distinguish between FAR-based contracts whose disputes are processed under the CDA and Interstate Commerce Act (ICA)-based transportation contracts such as GBLs and tenders whose disputes are processed under the Transportation Act, as amended (app. opp'n at 2).

In reply, the government asserts that the Travel and Transportation Reform Act of 1998 added 31 U.S.C. § 3726(c)(1) to the Transportation Act, and "[t]his Act does not limit its application to government bills of lading ('GBL'), tender of service agreements ('TOS') or to any other form or type of contract" (reply at 3). The government argues that *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357 (Fed. Cir. 2002), stands for the proposition that the form of a contract is not relevant in determining jurisdiction. It argues "[w]hat is important is the subject matter of the services being procured, [and] . . . because the Army is acquiring transportation services, the Transportation Act not the CDA applies to the dispute currently before the Board" (gov't reply at 7).

To understand the cases the government relies upon, a brief review of the underlying statutes and regulations underpinning those cases is useful. In 1940, major revisions were made to the structure of the Interstate Commerce Act (ICA). In addition to adopting the short title "Interstate Commerce Act," the Transportation Act of 1940 divided the ICA into three titles: Title I, Amendments to Existing Law; Title II, Regulation of Water Carriers in Interstate and Foreign Commerce; and Title III, Miscellaneous. Pub. L. No. 785, Sept. 18, 1940, ch. 722, 54 Stat. 898. Title III,

Miscellaneous, contains Part II, Rates on Government Traffic, §§ 321 and 322 (54 Stat. 954-955).

Under Section 321 of the Transportation Act of 1940 (codified as amended at 49 U.S.C. §§ 10721 and 13712), carriers may provide transportation services to the government at no charge or below their published tariff. 49 U.S.C. § 10721 provides that:

> A rail carrier providing transportation or service for the United States Government may transport property or individuals for the United States Government without charge or at a rate reduced from the applicable commercial rate. Section 3709 of the Revised Statutes (41 U.S.C. 5) does not apply when transportation for the United States Government can be obtained from a rail carrier lawfully operating in the area where the transportation would be provided.

Section 13712 is identical except the word "rail" does not precede each reference to the word "carrier." As described in the FAR, 49 U.S.C. § 13712 covers "motor carrier, water carrier [in noncontiguous domestic trade] freight forwarder, rail carrier." 48 C.F.R. § 47.104(a), (b) (2006).

Transportation under 49 U.S.C. §§ 10721 and 13712 is obtained through a rate tender process under which the government may use a commercial bill of lading, a GBL, or a tender agreement. 48 C.F.R. § 47.104-1 (2006) "**Government rate tender procedures**" provides, in part:

> (a) 49 U.S.C. 10721 and 13712 rates are published in Government rate tenders and apply to shipments moving for the account of the Government on –
>
> (1) Commercial bills of lading endorsed to show that total transportation charges are assignable to, and will be reimbursed by, the Government (see the clause at 52.247-1, Commercial Bill of Lading Notations); and
>
> (2) Government bills of lading.
>
> (b) Agencies may negotiate with carriers for additional or revised 49 U.S.C. 10721 and 13712 rates in appropriate situations. . . .

Section 322 of the Transportation Act (codified as most recently amended in 1998 at 31 U.S.C. § 3726) addresses audit, payment, and claims procedures for services provided under the Act. Specifically § 3726 provides:

> (a)(1) Each agency that receives a bill from a carrier or freight forwarder for transporting an individual or property for the United States Government shall verify its correctness (to include transportation rates, freight classifications, or proper combinations thereof), using prepayment audit, prior to payment in accordance with the requirements of this section and regulations prescribed by the Administrator of General Services.
>
> (2) The Administrator of General Services may exempt bills, a particular mode or modes of transportation, or an agency or subagency from a prepayment audit and verification and in lieu thereof require a postpayment audit, based on cost effectiveness, public interest, or other factors the Administrator considers appropriate.
>
> . . . .
>
> (b) The Administrator may conduct pre- or post-payment audits of transportation bills of any Federal agency. The number and types of bills audited shall be based on the Administrator's judgment.
>
> (c)(1) The Administrator shall adjudicate transportation claims which cannot be resolved by the agency procuring the transportation services, or the carrier or freight-forwarder presenting the bill.
>
> (2) A claim under this section shall be allowed only if it is received by the Administrator not later than 3 years (excluding time of war) after the later of the following dates:
>
> (A) The date of accrual of the claim.
>
> (B) The date payment for the transportation is made.
>
> (C) The date a refund for an overpayment for the transportation is made.

(D) The date a deduction under subsection (d) of this section is made.

Regulations and procedures governing the bill of lading, documentation, payment, and audit of transportation services acquired by the government are prescribed in 41 C.F.R. Part 102-118, "TRANSPORTATION PAYMENT AND AUDIT" (2006). For DoD shipments, corresponding guidance is in DoD 4500.9-R, DTR, Part II. 48 C.F.R. § 47.103-1 (2006).

As reflected in its legislative history, the 1998 amendment was designed to correct "unsuccessful" attempts by GSA to get federal agencies to voluntarily audit transportation charges before payment by mandating audit of transportation bills for accuracy prior to payment. S. Rep. No. 295, 105th Cong., 2d Sess. 1998, 1998 WL 538197 (Leg. Hist.). There is no indication that the amendment was intended to expand the shipment methods (*i.e.*, bills of lading and tender agreements) covered by 49 U.S.C. §§ 10721 and 13712 of the Transportation Act.

With these underlying statutes and regulations in mind, we examine the scope of the various court and board decisions that the parties have addressed in this appeal. We begin with *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014 (Fed. Cir. 1995). In *Sherwood Van Lines*, the contractor was a common carrier that provided transportation services to the Navy under the Transportation Act of 1940, and a GBL served as the contract between the parties. The issue in *Sherwood Van Lines* was whether the CDA applies to disputes arising from "the provision of transportation services" by common carriers pursuant to GBLs (*id.* at 1015-16). The Federal Circuit found that the transportation services were provided under the Transportation Act of 1940, as amended, 49 U.S.C. § 10721, and that Congress had set up a system for paying carriers for providing the services and a mechanism for resolving disputes under 31 U.S.C. § 3726. The Court found that the General Services Administration (GSA) had promulgated regulations to implement 31 U.S.C. § 3726 with a two-tiered review procedure at 41 C.F.R. Part 101-41. The Court concluded that "Congress did not intend the general provisions of the Contract Disputes Act to supplant the pre-existing system of administrative review specifically designed for transportation services subject to Section 3726" (*id.* at 1018). In reaching this decision, the Court limited its holding to "cases in which the government obtains transportation services from a common carrier pursuant to 49 U.S.C. § 10721 and in which the GBL constitutes the contract between the parties" (*id.* at 1020). The Court made clear that it did not address "cases in which transportation services are obtained through other means, such as contracts for continuing transportation

services over a period of time" (*id.* at 1020). In short, *Sherwood Van Lines* stands for the proposition that government transportation by spot movement is not subject to the CDA.[7]

Inter-Coastal, decided seven years later, involved three separate tender agreements for trucking services for three years. The parties' dispute related to whether the government owed "holdover" charges. 296 F.3d at 1359. The contractor acknowledged that it was providing transportation services pursuant to 49 U.S.C. §§ 10721 and 13712 (*id.* at 1360). While performing the tender agreements, the contractor had availed itself of the administrative dispute resolution procedures established by the Transportation Act at 31 U.S.C. § 3726 (*id.* at 1361). It later sued the government for breach of contract however, in the Court of Federal Claims. The government moved to dismiss for lack of jurisdiction arguing that the ICA – not the CDA – governed the parties' contracts. (*Id.* at 1362)

In upholding the decision of the Court of Federal Claims, the Federal Circuit stated that it agreed that "Congress intended to have the ICA govern all actions seeking the payment of money for the charges owed on contracts for transportation services between common carriers and the government" (*id.* at 1366). Addressing the specific statute involved in the case, 49 U.S.C. § 14705 (pertaining to the time limitation on civil actions by and against carriers), the Court opined:

> The statute draws no distinction between transportation services governed by a Government Bill of Lading on the one hand and a long-term contract on the other. It draws no distinction between a transportation-services contract requiring one delivery only, *e.g.*, a "spot movement," and one requiring all the deliveries an agency may need over an extended period of time.

Id. at 1366. The Court went on to address 31 U.S.C. § 3726, the administrative dispute framework set up by the Transportation Act, and relied upon by the government in its reply brief, and said that:

> It too makes no distinction based on the number of deliveries, the complexity of the transportation agreement, whether an agreement resulted from the procurement process or instead from a "spot movement," or whether a GBL or a tender

[7] A "spot movement" is a simple transaction whose financial value rarely exceeds $20,000. It is generally a one-time arrangement for movement of property within the continental United States. *See Tri-State Motor Transit Co. v. United States*, 39 Fed. Cl. 485, 486 (1997).

> agreement (or both) formed the parties' contract. In short, the unambiguous text of the ICA and its amendments, including the limitations period set forth therein, exclusively govern the jurisdictional time frame in which a common carrier must file a claim for charges against the government.

Id. at 1367.

Despite its broad language, *Inter-Coastal* merely extended the *Sherwood Van Lines* holding, *i.e.*, spot movement of property by a common carrier using a GBL to long-term (three-year) tender agreements. In both cases, the transportation services were provided pursuant to the Transportation Act of 1940. In both cases, payment disputes were specifically required by that Act to be processed under 31 U.S.C. § 3726 and its implementing regulations at 41 C.F.R. Part 101-41 (2006).

The government also argues that our decision in *AIT Worldwide Logistics, Inc.*, ASBCA No. 54763, 06-1 BCA ¶ 33,267 supports its position (*see* mot. at 7; reply at 8-9). In *AIT*, the contractor, Johnson Controls World Services was awarded a contract to perform public works and logistical functions at Fort Lee, Virginia. It appears that the case involved basically a non-transportation contract with a small transportation component. At the contractor's request, appellant AIT provided flatbed trucks to transport materials from Fort Lee to Jacksonville, Florida. After appellant dispatched its trucks to Fort Lee, it was told by the contractor that the Army would not process the necessary bills of lading because the trucks were not processed through the Global Freight Management system. Appellant AIT submitted a claim alleging that it had an implied-in-fact contract to ship supplies by truck to Jacksonville. We dismissed the appeal for lack of jurisdiction because "the ICA . . . governs appellant's right to seek payment" (*id.* at 164,860). The *AIT* holding turned in part on the fact that ICA/bills of lading were involved, and was thus controlled by *Inter-Coastal*.

Contracts 0163 and 0124 were not entered into pursuant to the authority of the Transportation Act of 1940. We have found that SDDC structured these contracts as FAR-based contracts. Consequently, the government's arguments in support of dismissal for lack of jurisdiction on the bases of the statutes, regulations, and case law relating to the Transportation Act are unavailing.

The government has described the two contracts involved in this appeal as contracts for providing "international transportation services 'using ocean common or contract carriers offering regularly scheduled commercial liner service for requirements that may arise in any part of the world and involve ocean movement for the routes covered'" (mot. at 1-2). The CDA applies to any express or implied contracts entered into by an executive agency for the procurement of services. 41 U.S.C. § 602(a)(2). The

statute does not exclude "transportation" services. DoD is an executive agency, and since the contracts are for "services," any disputes arising out of these contracts are within our jurisdiction. This interpretation is totally consistent with how the Federal Circuit and how this Board have consistently and historically viewed our jurisdictional reach in connection with FAR-based transportation contracts.

That two contracts involved here are maritime contracts[8] -- a fact that the government has not disputed -- does not give us pause. The CDA provides that disputes arising out of maritime contracts are to be governed by the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, or the Public Vessels Act, 46 U.S.C. §§ 781-790, "to the extent that those chapters are not inconsistent with this chapter." 41 U.S.C. § 603. As stated in *Century Marine Inc. v. United States,* 153 F.3d 225, 229 n.4 (5th Cir. 1998):

> Under § 603 of the Contract Disputes Act, subject matter jurisdiction in appeals of administrative decisions involving federal maritime contracts vests in the federal district courts, rather than in the Court of Claims . . . or the Court of Appeals for the Federal Circuit. *Bethlehem Steel Corp. v. Avondale Shipyards, Inc.,* 951 F.2d 92, 93, 94 (5th Cir. 1992). Government maritime contracts are otherwise governed by the Contract Disputes Act. . . .

The Board has traditionally exercised maritime jurisdiction and has held that the CDA did not divest us of such jurisdiction. *Holly Corp.,* ASBCA No. 23749, 79-2 BCA ¶ 14,008. Moreover, the Board has routinely and traditionally exercised jurisdiction over disputes involving FAR-based contracts for transportation and transportation services, and the Federal Circuit has not questioned such jurisdiction. *See Sea-Land Service, Inc. v. Danzig,* 211 F.3d 1373 (Fed. Cir. 2000) (involving appeal from ASBCA decision on contract for shipment of military supplies to and from Middle East during the Gulf War); *Marine Logistics, Inc. v. England,* 265 F.3d 1322 (Fed. Cir. 2001) (involving appeal from ASBCA on contract for maritime transportation of Army equipment from Texas to Panama); *Petchem, Inc.,* ASBCA No. 53792, 05-1 BCA ¶ 32,870 (exercising CDA jurisdiction over FAR-based contract to provide and operate a Personnel Transfer Vessel); *Petchem, Inc.,* ASBCA Nos. 51687, 51688, 52362, 01-2 BCA ¶ 31,656 (exercising jurisdiction over dispute involving a Military Sealift Command indefinite delivery indefinite quantity contract for tug and tow services).

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[8] A contract to hire a vessel for the carriage of cargo is considered to be wholly maritime in nature. *Marine Logistics, Inc. v. England,* 265 F.3d 1322, 1324 (Fed. Cir. 2001); *Morewood v. Enequist,* 64 U.S. 491, 493-94 (1859) (contracts of affreightment are "maritime contracts.")

Since 31 U.S.C. § 3726 was, and continues to be, a part of the Transportation Act, and since that Act has no application to FAR-based transportation contracts, it follows that dispute resolution procedures set out in 31 U.S.C. § 3726 and its implementing regulations have no application to the two FAR-based contracts involved in this appeal.

Based on the foregoing reasons, we conclude that the CDA governs resolution of disputes relating to FAR-based transportation contracts, and 31 U.S.C. § 3726 governs resolution of claims relating to Transportation Act non-FAR-based contracts.

CONCLUSION

Because Contracts 0163 and 0124 are FAR-based contracts and not Transportation Act non-FAR-based contracts, we hold that the claims resolution procedures set forth in 31 U.S.C. § 3726 do not apply, and we have jurisdiction under the CDA.

The government's motion to dismiss for lack of jurisdiction is, therefore, denied.

Dated: 2 July 2007

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
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 No. 55391, Appeal of Maersk Line, Ltd., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals