ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Inchcape Shipping Services	)	ASBCA Nos. 57152, 57153, 57154
	)	57155, 57156, 57157
	)	57158, 57159, 57160
Under Contract Nos. N00244-97-D-5130	)	
N00244-01-D-0032	)	
N00244-05-D-0014	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT ON GOVERNMENT'S MOTIONS TO DISMISS IN PART FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

In these consolidated appeals appellant Inchcape Shipping Services (ISS) appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's (CO's) decisions denying its nine claims for unpaid invoices under its contracts with the United States Navy for ship husbanding and related services. Appellant's original complaints alleged that the Navy had not paid its invoices for goods supplied and services rendered under its contracts and delivery orders (DOs). Appellant filed an amended complaint, covering each appeal, which added "Count II-Alternative Basis for Recovery in Admiralty," incorporated the allegations in the original complaints, and added that appellant was invoking "the Board's admiralty jurisdiction" (amended compl. at 1, ¶ 3).

In a conference call, the Navy opposed the amended complaint on the alleged grounds that the Board lacks admiralty jurisdiction over "standard husbandry contracts" and that ISS did not submit any admiralty claims to the CO (*see* Bd. Memorandum Concerning Conference Calls and Rulings dtd. 19 May 2010). Thereafter, the Navy moved to strike the amended complaint for "lack of jurisdiction, failure to articulate a

recognizable cause of action, and [appellant's] failure to meet its burden of proof for its 'alternative basis for recovery in Admiralty'" (mot. at 1).[1] Appellant opposed the motions. For the reasons set forth below we deny them.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

The Contracts

Contract No. N00244-01-D-0032 (Contract No. 0032)

Effective 30 March 2001, ISS and the government, through the Navy's Fleet and Industrial Supply Center (FISC), entered into negotiated commercial items Contract No. 0032 with ISS, in the total base year amount of $6,511,008.16, for "Husbanding Services," to be ordered through DOs or task orders (ASBCA Nos. 57152-57160 consolidated (57152-57160), R4, tab 2 at 1-3, 9, 23, 52).[2] FISC exercised its two contract options, which together increased the total contract amount to $20,527,292. The contract's performance period was ultimately extended to 30 September 2004. (*Id.* at 9, 12, 99-101)

The contract contained the Federal Acquisition Regulation (FAR) 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (MAY 1999) clause, which provided in part as follows:

> (d) Disputes. This contract is subject to the [CDA]. Failure of the parties to this contract to reach agreement on any…claim…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.

(57152-57160, R4, tab 2 at 3) The incorporated Disputes clause provided in part:

> (a) This contract is subject to the [CDA].

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[1] The Navy also alleged that appellant's failure to comply with a Board order concerning jurisdictional briefing *et al.* justified striking the amended complaint. The Board rejected this contention by order of 25 August 2010.

[2] The pages of the government's consolidated Rule 4 file were not numbered consecutively. The Board has added consecutive page numbers for citation ease.

> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

The contract contained the FAR 52.216-21, REQUIREMENTS (OCT 1995) clause (57152-57160, R4, tab 2 at 10-11). The contract's Billing/Pricing Schedule set forth estimated quantities, unit prices and estimated total prices for various contract line item numbers (CLINs) and sub-CLINs for San Francisco port services (*id*. at 24-28). The services included items such as the following: (011) charter and hire services, including pilots, tugs and line handlers; (012) slip equipment, including cranes for slip equipment, brows, gangways, fenders/camels and oil booms; (013) dock/port/wharf fees, including husbanding agent fees; (014) utilities, such as sewage, water and trash; (015) communications, such as phones, pagers, and radios; (016) transportation, such as ground transportation vehicles and water taxis; (017) miscellaneous items, such as provisions, cargo drayage, forklifts, cranes for cargo and provisions, security guards and services for protocol and ceremony requirements (*id.*). The Schedule included similar services at Alaska ports (*id*. at 29-44), but it is not yet clear whether appellant performed services there.

The contract's Statement of Work (SOW), called for the contractor to provide "Husbanding Services" for the Navy, United States Coast Guard, and United States Military Sealift Command ships in the port of San Francisco and environs and stated that the contract was "also authorized for use by foreign vessels in the San Francisco Bay Area" (57152-57160, R4, tab 2 at 52). Paragraph A of the SOW covered "HUSBANDING SERVICES TO BE PROVIDED BY CONTRACTOR." Those services included "1. PRELIMINARY ARRANGEMENTS," requiring that:

> Upon receipt of notification by the [CO]/Ordering Officer [OO] of a forthcoming visit by a U.S. or authorized foreign vessel, the Contractor shall make all necessary preliminary arrangements with port authorities, other Government contractors and/or sub-contractors, and other commercial firms, as necessary, in order to provide the specific services required, and at the times requested. The contractor shall additionally arrange for any supplies and/or services ordered which are not separately priced under this Schedule, but which the contractor will be responsible for providing. All supplies and/or services ordered which are not priced in [the] Billing/Pricing Schedule, shall be negotiated at the time the order is issued and/or modified. Although notification of pending ship visits will normally be provided

> 3-10 days in advance of the ships' arrival, services may occasionally be required on an immediate and/or urgent basis.

(57152-57160, R4, tab 2 at 52-53)

The husbanding services also included "2. INITIAL BOARDING," which covered the contractor's duties upon boarding ships, and "3. GENERAL ASSISTANCE," under which the contractor was to assist with any official requirements of the ship associated with its port visit, as requested by the CO or OO on behalf of the ship's Commanding Officer, or designated representative (57152-57160, R4, tab 2 at 53-54). Under "4. ORDERING AND MONITORING/PROGRESSING," the contractor was to ensure "the timely filling of all ships' requirements" in accordance with the contract and particular DO; to "monitor the status of ships' orders to ensure timely and satisfactory performance;" and to be on call "at all times during the ship's visit to assist with any official requirements of the ship and/or to provide assistance to the ship regarding any problems encountered" (*id.* at 55). The SOW described additional husbanding services, concluding with "7. PRE-SAILING VISIT," providing for the contractor's visit to each ship prior to its departure date to present invoices and to relay any late information on pilot or tug schedule changes and any additional information applicable to the ship and its departure (*id*. at 56).

Paragraph B of the SOW specified "SERVICES TO BE ARRANGED BY CONTRACTOR," stating that they included "services (other than husbanding) which are the responsibility of the Contractor when expressly authorized under [a DO]" (57152-57160, R4, tab 2 at 56). These services included fresh provisions and other subsistence items; fresh potable water; laundry; trash removal; sewage removal; waste oil and aggregate water removal; pilots and pilot boats; line handlers; forklift and crane services; brows, platforms, separators, fenders, man-lifts, camels, etc.; cargo drayage; ground transportation; communication; fuel; quality assurance and control; and reporting requirements (*id*. at 56-67).

Contract No. N00244-05-D-0014 (Contract No. 0014)

Effective 22 November 2004, ISS and FISC entered into negotiated commercial items Contract No. 0014 in support of United States vessels visiting various non-government ports within the Continental United States, with pricing provided initially for ports at San Francisco, Oregon, Washington State and Alaska. The pricing contained in the contract was also authorized for use by foreign vessels visiting the ports covered upon the United States' official invitation. The contract, in the amount of $11,249,760, was described as a "requirements type" contract and contained the FAR 52.216-21, REQUIREMENTS (OCT 1995)—(ALTERNATE I) (APR 1984) clause. The contract called for services to be ordered through DOs or task orders for a 12-month base

period, plus two option years, which the government exercised, increasing the contract price to $34,273,553. The parties extended the performance period into 2010 through bilateral modifications. (57152-57160, R4, tab 1 at 1-2, 62, 75, 102, 109-10, 118, 122-23, 139) Again, the contract was subject to the CDA and it incorporated the Disputes clause (*id*. at 102).

The contract's Billing/Pricing Schedule contained the same sorts of husbandry services listed above for Contract No. 0032 (57152-57160, R4, tab 1 at 4-57). Utilities services—sewage, water, and trash—were grouped into "PIERSIDE" and "AT ANCHORAGE" (*id*. at 5-6). The contract sometimes described the services to be furnished by the contractor as "husbanding agent" services and sometimes as "husbanding services" (*e.g.*, *id*. at 3, 59, 65-66, 75, 78), however, the contract Schedule specified that the contract was for the provision of husbanding services, not a husbanding agency, and that the contractor would not be an agent of the Navy (*id.* at 75).

The SOW called for the contractor to provide "Husbanding Services and other supplies and services" and stated that "[a]s consideration for the performance and management of these services, the Contractor shall be paid the applicable daily husbanding fee" (57152-57160, R4, tab 1 at 78). Like Contract No. 0032, paragraph A of the SOW described "HUSBANDING SERVICES," including "1. PRELIMINARY ARRANGEMENTS"; "2. INITIAL BOARDING"; "3. ORDERING AND PROCESSSING" (calling for the contractor to monitor the delivery of supplies and rendering of services; to visit the ship at least once a day throughout its visit; to be on call at all times; and to take action to assist with supplies and services); "5. GENERAL ASSISTANCE"; "7. PRE-SAILING VISIT"; and other services (*id*. at 78-81, 84). Under "8. SUPPLIES AND SERVICES OTHER THAN HUSBANDING," the contractor was "responsible to procure, manage, and ensure timely delivery or performance of all supplies or services ordered under this contract, or procured by a ship or [CO] with the Contractor's assistance" (*id*. at 84).

The SOW continued with paragraph "B. TRASH REMOVAL" and subsequent paragraphs describing particular services, including: sewage removal; waste oil and aggregate water removal; furnishing fresh potable water; pilots, tugboats, line handlers, and berthing services; cargo lighterage; crane services; brows (gangways); cargo drayage; water taxi service; vehicle rental; bus services; forklift services; telephone service; fenders; force protection and cost reporting (57152-57160, R4, tab 1 at 85-101).

Contract N00244-97-D-5130 (Contract No. 5130)

In ASBCA No. 57160 (covering claim nine, below) appellant alleges that it performed ship husbandry and related services in 1999 under Contract No. 5130 awarded to it by FISC to support the Marine Corps Warfighting Laboratory (MCWL)-Urban

Warrior Advanced Warfighting Experiment (AWE) in San Francisco, California. The Navy does not dispute that the contract existed, but the CO asserted in his final decision denying ISS's claim that, due to the passage of time and contract completion and closeout, the contract had been destroyed under standard Navy procedures and was no longer in its files. (ASBCA No. 57160 (57160) R4, tabs 7, 9)[3]

The Rule 4 file nevertheless includes some DOs issued to ISS under Contract No. 5130 and modifications to DOs (*id*., tabs 1-5). The file contains three SOWs, reflecting that the AWE's focus was upon combat in cities and urban areas and experimentation with new concepts, tactics and technologies that would enable Marines to fight and win on the urban battlefield. AWE planning was to be from 1 December 1998 through the end of March 1999, with work to occur in the Monterey, Oakland and San Francisco Bay areas in California. (57160, R4, tab 1 at 2, tab 2 at 2, tab 5 at 2)

DO No. 0053, issued on 18 February 1999, as modified on 13 April 1999, covered work in the Monterey and San Francisco Bay areas. It included a husbanding agent fee and called for the provision of electrical power and phone lines for trailers and for a van at a Pier 35. (57160, R4, tab 2 at 1-2)

DO No. 0082, issued on 1 March 1999, provided for a husbanding agent fee and required that the contractor provide 116 vehicles in and around San Francisco, from 1 to 26 March 1999, during the AWE (57160, R4, tab 5 at 1-2).

DO No. 0084, issued on 1 March 1999, provided for a husbanding agent fee and covered emergency medical support work in the Monterey and Oakland areas at the old Oakland Naval Hospital, NAS Alameda Pier 3, and the Naval Post Graduate School in Monterey, from 14 March to 21 March 1999. The services included the provision of ambulances, paramedics and advanced life support equipment and supplies. (57160, R4, tab 1 at 1-2)

ISS's Claims and CO's Decisions

By letter dated 25 June 2009, Mike Mason, ISS's collections and accounts receivable manager, submitted what he described as a CDA claim on behalf of ISS in the amount of $30,455.72 for unpaid invoices for supplies and services to support two 80-foot Navy Seal Boats (Mark V) pursuant to 13 DOs under Contract Nos. 0032 and 0014. The claim included invoices and related material. ISS sought a final CO's

[3] The Navy has indicated that it plans to file a motion to dismiss various claims for failure to meet the CDA's six-year limitations period, 41 U.S.C. § 605(a), but it has not yet done so. While the Board is responsible for assuring itself of its jurisdiction, we refrain from reaching fact-based timeliness issues in this decision.

decision. Although the claim was under $100,000, Mr. Mason submitted a certification in proper CDA format, 41 U.S.C. § 605(c)(1). (App. supp. R4, tab 17)

By letter of 4 September 2009 to Mr. Mason, CO James Browley of FISC's Regional Contracts Department stated that, on 21 July 2009, the Navy had received the claims dated 25 June 2009. Mr. Browley identified himself as the cognizant CO, but he alleged, among other things, that the documents did not qualify as CDA claims because they had not been submitted by an officer or director authorized to bind ISS and thus had not been submitted by a contracting party. The CO also asserted that, while Mr. Mason had provided charts listing invoice dates, amounts, and ports of call, he had not established Navy liability by correlation to a contract clause, DO, or other written promise to pay by a CO. The CO confirmed that the original CO's Representative (COR) was deceased and stated that contracting staff unfamiliar with the DOs would be reviewing matters and required more information. He also stated that he would return ISS's documents and would not incorporate them into the Navy's official contract files. (ASBCA No. 57152 (57152), R4, tab 11)[4]

Thereafter ISS submitted nine claims to the CO and requested final decisions. All but the first claim, dated 26 October 2009, were dated 28 October 2009. All contained a CDA certification signed by ISS's chief financial officer, although, again, none of the claims exceeded $100,000. All contained copies of invoices said to have been submitted previously and other documentary support. (ASBCA Nos. 57152-57160, individual R4s, tabs 12, 10, 5, 5, 5, 5, 2, 4, and 7)[5]

(1) Claim One. ISS sought the $30,455.72 claimed in the 25 June 2009 submission under Contract Nos. 0032 and 0014. It contended that the DOs had been signed by the CO or by the deceased COR; in most cases, before the ships left port, the Navy Ship Supply Officer signed a form acknowledging receipt of the underlying services and supplies; in any event there was no dispute concerning their provision; ISS had met with the CO, the COR and other Navy and DFAS personnel in 2007 to review all of the invoices and had made periodic follow-ups, but the invoices remained pending and had been unpaid without cause since 2005 and 2006. (57152, R4, tab 12 (claim one at 1-4)) ISS similarly referred to the 2007 meetings and follow-ups in most of its claims, below.

(2) Claim Two. ISS sought payment in the amount of $11,403.72, for two unpaid invoices, in the respective amounts of $4,436 and $6,967.72, for ship husbandry services

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[4] Appellant contends that the 25 June 2009 submissions qualified as CDA claims, but we need not reach this question in deciding the government's current motion.

[5] The Navy did not include any claims in its Rule 4 files but, upon the Board's 2 April 2010 order, it subsequently submitted the October 2009 claims, which are deemed to be included in the Rule 4 files at the cited tabs.

provided in Los Angeles pursuant to DO Nos. 007 and 008, under Contract No. 0014, for the mine sweeping vessels USS Scout and Devastator. ISS contended that one DO had been signed by the CO and the other by the deceased COR; and the ship supply officer had acknowledged receipt of the services. (57153, R4, tab 10 (claim two at 1-3))[6]

(3) Claim Three. ISS claimed $12,325 for unpaid invoices for ship husbandry services provided for the USS Sea Shadow (IX-529) during a port call at Los Angeles, California, from 19 April 2001 to 23 April 2001. The claim appended a copy of DO No. 0004, issued on 17 April 2001 under Contract No. 0032.[7]

(4) Claim Four. ISS claimed $9,272.11 for unpaid invoices for ship husbandry services provided to the USS Zephyr (PC-8-Patrol Craft) during a port call at Alameda, California, from 15 April 2003 to 18 April 2003. The claim stated that the payments were due "under a government contract" and alleged that the ship clearly arrived at port and consumed the supplies and services from ISS, as documented in the claim attachments, but apparently did not provide a "government form document." (57155, R4, tab 5 (claim four at 1, 2)) ISS apparently did not append a DO to its claim, but the Navy included a copy of DO No. 0080, under contract No. 0032, in the Rule 4 file. The DO was for supplies and services for the USS Zephyr to be delivered from 15-18 April 2003. (57155, R4, tab 2)[8]

(5) Claim Five. ISS claimed $3,791.44 for unpaid invoices for ship husbandry and related services, particularly in connection with a land-based reception, provided to the USS Denver LPD-9 during a port call at Santa Barbara, California, between 4 March 2005 and 8 March 2005. The claim stated that the payments were due "under a government contract" and referred to Requisition No. R07183-5065-0478, which apparently was not appended to ISS's claim. (57156, R4, tab 5 (claim five at 1-2)) The Navy included in the Rule 4 file a copy of DO No. 0003, in the amount of $185,384.84, which had issued on 4 March 2005 under Contract No. 0014 and referred to Requisition

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[6] The government contends that claim two pertains to a different contract awarded to a different contractor (gov't supp. br. at 1), but the particular DOs referenced in the claim, which are in the Rule 4 file, were awarded to ISS under Contract No. 0014 (57153, R4, tabs 1, 2, 6, 8).

[7] The claim narrative referred to services during a port call at Alameda, California, from 15 April 2003 to 18 April 2003 (57154, R4, tab 5 (claim three at 2)), but this does not comport with the claim's caption or with the attached DO and invoices. Rather, this part of the narrative appears to refer to claim four.

[8] The Navy also included DO No. 0001, dated 11 April 2004, issued to "GP RESOURCES" under Contract or Purchase Order No. SP0600-03-D-0000, covering fuel deliveries to the USS Zephyr at Alameda on 15 and 17 April 2003, with Mr. Mason listed as one point of contact (57155, R4, tab 1).

No. R07183-5054-PS01, covering supplies and services for the USS Denver (LPD-9) at Santa Barbara from 4 to 8 March 2005 (57156, R4, tab 1). The Navy also included Amendments Nos. 01 and 02, dated 7 March 2005 and 14 March 2005, which referred to other requisition numbers, added and re-priced certain items, and together increased the DO's price to $191,163.34 (57156, R4, tabs 2-3).

(6) Claim Six. ISS claimed $3,850 for unpaid invoices for ship husbandry and transit services off the port of San Francisco to support the USNS Zeus, a Military Sealift Command cable laying ship. ISS specified Contract No. N00244-01-D-0003, DO No. 0122, in its claim caption, but it appended DO No. 0122, issued on 7 November 2003 in the amount of $3,850, under Contract No. 0032. (57156, R4, tab 3 (claim six at 1-3))

(7) Claim Seven. ISS claimed $14,948.86 for unpaid invoices for ship husbandry services provided to the USNS Henry J. Kaiser (T-AO187) on 12 August 2004 during a port call at Alameda, California. The claim stated that the payments were due "under a government contract" (57158, R4, tab 2 (claim seven at 1)), but it did not identify the contract and the Rule 4 file and appellant's supplemental Rule 4 file covering this claim do not include one. As with claim four, ISS alleged that the ship clearly arrived at port and consumed the supplies and services from ISS, as documented in the claim attachments, but that the ship apparently did not provide a "government form document" (claim seven at 2).

(8) Claim Eight. ISS claimed $21,763.61 for unpaid invoices for ship husbandry services provided on about 7 September 2004 under Contract No. 0032, DO No. 0136, issued on 25 August 2004 in the amount of $13,840, for one Navy Seal Vessel MK-V 971, for which the vessel officer had signed a receipt, and for additional hotel services not covered in the DO (57159, R4, tab 4 (claim eight at 1-2); *see also* tab 1 (DO No. 0136)).

(9) Claim Nine. ISS claimed $32,311.11 for unpaid invoices for ship husbandry and related services under Contract No. 5130 and DOs issued thereunder in 1999 to support the Marine Corps' Urban Warrior Advanced Warfighting Experiment (MCWL/AWE, above). ISS alleged that, for approximately three months, the Marine Corps used equipment provided by ISS both in support of on-shore operations (tenting, computers, furniture, hotel services and the like) and for related husbandry services for participating ships. ISS alleged that Marine Corps personnel had cooperated with it through 2004 in making payments but that the claimed amount remained unresolved. (57160, R4, tab 7 (claim nine at 1-2))

On 16 November 2009 the CO issued a "Contracting Officer Letter of Direction" seeking more information with respect to each of ISS's claims. On 17 November 2009 Mr. Mason supplied more information to the CO and, on 19 November 2009, the CO

requested information in a certain format. On 22 December 2009 and 12 January 2010 the CO issued decisions denying ISS's claims. (57152, R4, tabs 13-16, 57153, R4, tabs 11-13, 57154, R4, tabs 6-8, 57155, R4, tabs 6, 7, 9, 57156, R4, tabs 6-8, 57157, R4, tabs 4-7, 57158, R4, tabs 3, 4, 57159, R4, tabs 4-6, 57160, R4, tabs 8, 9). ISS's timely appeals ensued.

Appellant contends, and we accept for purposes of the Navy's motions, that its services included freight forwarding services, as reflected in the invoices in support of its claims (app. supp. br. at 7).

In its initial brief, appellant contended that "everything that was provided to the Navy was provided to Navy ships with the exception of Claim 9" (app. br. at 5). In supplemental briefing appellant contends, and we accept for purposes of the Navy's motions, that its invoices demonstrate that:

> In all of the cases giving rise to the Inchcape claim[s], the vessels were on a voyage, and came into port so that Inchcape could immediately provide supplies or services to the vessel so that it could continue on its voyage.

(App. supp. br. at 7-8)

Complaints and Amended Complaint

In its original nine complaints appellant sought the amounts it had claimed, above, and alleged in part:

> 6. Appellant delivered goods and services to the U.S. Navy pursuant to a contractual undertaking – these were ship husbandry services for U.S. Navy vessels.
>
> 7. Appellant sent invoices to the U.S. Navy for the services and supplies provided to the ship pursuant to a contract or [DO].
>
> 8. The U.S. Navy through apparent inadvertence has failed to pay Appellant the amount it is entitled to under the pertinent contract/[DO] and invoice at issue in this case.

(*See, e.g.*, 57152, Bd. corr., compl.)

In "Count II-Alternative Basis for Recovery in Admiralty" in its amended complaint, intended to cover all of the consolidated appeals, appellant alleged in part as follows:

> 3. [Appellant] invokes the Board's admiralty jurisdiction….
>
> 4. Appellant is entitled under admiralty law to be paid for the supplies and services it delivered to the U.S. Navy vessels and crews at issue, and that were taken and used by those vessels and their crews. These are maritime claims.
>
> 5. Appellant is entitled to be paid for the fair value of these supplies and services as reflected in the bills already provided to the U.S. Navy in its claims for payment, and receipts and invoices attached thereto.

(*See* 57152, Bd. corr., amended compl. at 1-2)

THE PARTIES' CONTENTIONS

The Navy principally alleges that the Board lacks jurisdiction to entertain appellant's admiralty allegations on the ground that it did not present them to the CO for decision. It also alleges that the cases appellant cites in support of the Board's admiralty jurisdiction are irrelevant in the context of these CDA appeals and it contends that, in any case, the contracts at issue are not maritime contracts subject to admiralty law; they involve land-based common agency services preliminary to voyages; and that appellant has failed to state a recognizable cause of action. We interpret the latter allegation to be one that appellant has failed to state a claim upon which relief can be granted.

Appellant responds that the admiralty count in its amended complaint is based upon the same operative facts as in its claims to the CO and merely asserts an alternative legal theory of recovery, which does not constitute a new CDA claim. Appellant contends that the Board has exercised general admiralty jurisdiction under maritime contracts for many years; the contracts at issue are "classic maritime contracts" (app. supp. br. at 8); and the types of supplies and services appellant supplied to ships under the contracts "are routinely allowable under general admiralty law as 'necessaries'" (opp'n at 10). Appellant further urges that, if there is any question concerning the nature of services and necessaries provided by it under its contracts with the Navy, factual inquiries should await a hearing.

DISCUSSION

I. Appellant's Admiralty Allegations Are Not New CDA Claims

We first examine whether appellant's admiralty allegations are tantamount to new claims that it did not present to the CO for decision because, if they are, we need not proceed further. The Board has CDA jurisdiction over disputes based upon claims that a contractor has first submitted to the CO for decision. 41 U.S.C. §§ 605(a), 606. We lack jurisdiction over claims raised for the first time in a complaint. Whether a claim before the Board is new or essentially the same as that presented to the CO depends upon whether the claims derive from common or related operative facts. *Versar, Inc*., ASBCA No. 56857, 10-1 BCA ¶ 34,437 at 169,957. The assertion of a new legal theory of recovery, when based upon the same operative facts as the original claim, does not constitute a new claim. *Dawkins General Contractors & Supply, Inc.*, ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844.

Here, under both its contract and admiralty theories of recovery, appellant seeks payment for goods and services delivered to government vessels, for which appellant alleges it invoiced the Navy. The operative facts are essentially the same. Thus, appellant's admiralty allegations are not new claims under the CDA.

II. The Board Has Jurisdiction To Consider Admiralty Matters

Appellant has described the contracts at issue as both maritime husbanding contracts and maritime necessities contracts, subject to admiralty law. Appellant correctly notes that the Board has long entertained appeals involving admiralty matters. For pre-CDA contract appeals in which the Board examined substantive areas of admiralty law, *see, e.g., Gulf Oil Corp.,* ASBCA No. 23908, 81-2 BCA ¶ 15,192, and *Amherst Steamship Corp*., ASBCA No. 3419, 59-2 BCA ¶ 2368.

The Board has continued to consider admiralty matters in appeals filed under the CDA. For example, in *Holly Corp*., ASBCA No. 23749, 79-2 BCA ¶ 14,008, which involved a contract for storage of government-owned aviation fuel, the contractor elected to appeal under the CDA from the CO's failure to render a decision on its claim that government ships had damaged its dock while engaged in contract-related business. The CO had contended that he lacked authority to settle admiralty claims against the government. In denying the government's motion to dismiss for lack of jurisdiction, the Board determined that the contractor's claim was cognizable under the CDA, its theories of relief were at least tenable, and the government's contention that the Board lacked jurisdiction to hear appeals involving admiralty matters was meritless. The Board stated:

> These [cited] cases, and others, reflect the consistent practice of this Board to fully consider cases of an admiralty nature on their merits as long as the contracts involved contained appropriate "disputes" language and otherwise provided for the relief sought.

Id. at 68,781. The Board concluded that the CDA's maritime contracts section, embodied at 41 U.S.C. § 603, which provides that appeals from Board decisions or suits in court arising out of maritime contracts are governed by statutes vesting jurisdiction in federal district courts, does not divest the Board of its original administrative jurisdiction. *Id*. at 68,781-82. *Accord Maersk Line, Ltd*., ASBCA No. 55391, 07-2 BCA ¶ 33,621 at 166,526 (involving commercial items contracts for procurement of maritime transportation services that contained CDA Disputes clause; Board notes CDA did not revoke its traditional exercise of maritime jurisdiction).

While it is clear that the Board can exercise its admiralty jurisdiction when appropriate, the "scope of admiralty jurisdiction extends only to contracts that are 'wholly maritime' in nature." *Marine Logistics, Inc. v. England*, 265 F.3d 1322, 1324 (Fed. Cir. 2001) (citation omitted) (transferring appeal from Board's decision in *Marine Logistics, Inc.*, ASBCA No. 50785, 00-2 BCA ¶ 30,943, which concerned maritime contract involving voyage charter, ramps, cranes, stevedore, and other services, to U.S. district court because, unlike the Board, the U.S. Court of Appeals for the Federal Circuit lacked maritime jurisdiction). Therefore, the question remains whether the husbanding contracts at issue are properly classified as maritime.

III. Whether The Contracts At Issue Are Maritime

Appellant bears the burden to establish subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988). In deciding a motion to dismiss for lack of subject matter jurisdiction, we presume that undisputed factual allegations are true and we construe them favorably to the non-movant. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Reynolds*, 846 F.2d at 747. However, if the movant, as here, denies or controverts the allegations of jurisdiction, in establishing the predicate jurisdictional facts we are not limited to the face of the pleadings. Rather, the facts underlying the disputed jurisdictional allegations are subject to our fact-finding and we may review extrinsic evidence, including testimony. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993); *Reynolds*, 846 F.2d at 747; *E.M. Scott & Associates*, ASBCA No. 45869, 94-3 BCA ¶ 27,059 at 134,837.

The parties agree that the contracts at issue are for ship husbanding and related services. They dispute whether the contracts are maritime and subject to admiralty law,

and thus to our admiralty jurisdiction. The Navy contends that the husbanding contracts are common agency contracts for land-based services preliminary to vessels' voyages and therefore are non-maritime. Appellant asserts that the contracts are for supplies and services vitally necessary to the continuation of ships' voyages in progress and are classically maritime.

Regarding the Navy's contention that its contracts with appellant were agency contracts and thus non-maritime, for many years authorities differed concerning the maritime nature of husbanding contracts, often citing or distinguishing the United States Supreme Court's decision in *Minturn v. Maynard*, 58 U.S. 477 (1855). In *Minturn*, the Court had affirmed a federal district court's dismissal of an admiralty action brought against the owners of a steamboat by their general agent or broker for monies due for supplies, repairs and other charges. The Court had concluded that the case involved only a demand for a balance of accounts between agent and principal, not a maritime contract.

We note that, in Contract No. 0014, despite some language describing appellant's services as those of a husbanding agent, the Navy expressly disclaimed that appellant was its agent. However, we need not contrast the circumstances here to those of *Minturn* because, in 1991, the Supreme Court expressly overruled *Minturn* in a unanimous decision, *Exxon Corp. v. Central Gulf Lines, Inc*., 500 U.S. 603 (1991). *Exxon Corp*. involved a marine fuel requirements contract under which the contractor would supply vessels at port directly with fuel or, acting as an agent, would arrange for local suppliers to provide fuel. In overruling *Minturn*, the Supreme Court instructed that rather than applying a rule that excluded all or certain agency contracts from the realm of admiralty, the jurisdictional inquiry should focus upon the subject matter of a contract and whether the services performed under it were maritime in nature. The Court concluded that the supply of fuel directly or through a third party both pertained to maritime commerce and that admiralty jurisdiction extended to both.

Regarding the Navy's allegation that appellant's services were land-based and thus not maritime, to ascertain whether a contract is maritime, we do not look to the place of performance, but only to the nature and character of the contract. *Norfolk Southern Railway v. James N. Kirby Pty, Ltd.*, 543 U.S. 14 (2004); *North Pacific S. S. Co.* v. *Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. 119, 125 (1919).

With respect to the Navy's disputed contention that appellant's supplies and services were preliminary to voyages, the time of performance appears to be at least as irrelevant as the location of performance to the question of whether a contract is maritime in nature. Indeed, the Supreme Court noted in *Exxon Corp*.:

> As noted, the District Court regarded the services performed by Exxon in the [third party] transaction as "preliminary" and

> characterized the rule excluding agency contracts from admiralty as "a subset" of the preliminary contract doctrine…This Court has never ruled on the validity of the preliminary contract doctrine, nor do we reach that question here. However, we emphasize that *Minturn* has been overruled and that courts should focus on the nature of the services performed by the agent in determining whether an agency contract is a maritime contract.

Exxon Corp., 500 U.S. at 613 n.7.

Even prior to *Exxon Corp*., certain courts had focused upon the services provided, rather than upon the fact that a contract involved a husbanding agent, in determining whether the services were maritime in nature and thus subject to admiralty jurisdiction. For example, in *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), the United States Court of Appeals for the Ninth Circuit affirmed a district court's grant of summary judgment in an admiralty proceeding to a steamship agency for the balance due for its services performed as husbanding agent for an oceangoing vessel which the appellant had under a time charter. The appellant had alleged lack of subject matter jurisdiction on the ground that the parties' agreement was not a maritime contract. Referencing affidavits, the Ninth Circuit identified the husbanding services in question as including:

> [A]rranging for and supervising dockage, pilotage, tug assisting, line handlings, cargo discharge, discharging of deep tanks, sounding of fuel tanks, cleaning of holds, providing supplies and handling operating details pertaining to the vessel's call in Baltimore, Maryland, to discharge a cargo of lumber. Incident to the furnishing of these traditional husbanding services there was repeated attendance on board the vessel by Hinkins.

Hinkins, 498 F.2d at 411-12. In concluding that admiralty jurisdiction was proper, the court held that the fact that appellee procured services and did not perform them, or all of them, directly was not dispositive. Rather:

> That their performance was its direct responsibility, that the services were clearly maritime and necessary for the continuing voyage, and that Hinkins was directly engaged in supervision, makes them maritime and the contract sued upon a maritime contract.

Id. at 412.

See also Umpqua Marine Ways, Inc. v. United States, 925 F.2d 409 (Fed. Cir. 1991), where the Federal Circuit granted the government's motion to transfer an appeal from the Board's decision in *Umpqua Marine Ways, Inc.*, ASBCA Nos. 27790, 29532, 89-3 BCA ¶ 22,099, to a federal district court on the ground that the appellant's contract to fabricate a diving system module and to convert a boat for the operation of the module was a maritime contract sounding in admiralty. Unlike in the current appeals, the government in *Umpqua* apparently argued that the diving module contract was similar to contracts for supplies, services, or facilities furnished to finished vessels, which it alleged involved necessaries furnished to a ship, rendering a contract maritime and subject to admiralty jurisdiction. *Id*. at 412, citing, *inter alia*, *Gerard Constr., Inc. v. Motor Vessel Virginia*, 480 F. Supp. 488, 490 (W.D. Pa. 1979), *aff'd*, 636 F.2d 1208 (3d Cir. 1980) (fuel and oil as necessaries).

Upon review of the work required under Contract Nos. 0032 and 0014, we conclude that those contracts were wholly maritime in nature and we deny the government's motion to dismiss for lack of jurisdiction with respect to claims one through six, and claim eight, which are based variously upon those contracts. With regard to claim seven and the unidentified contract it mentions, and to claim nine, which is based upon Contract No. 5130, we conclude that we require expansion of the record, to include fact-finding, before ruling on the government's motion.

IV. Whether Appellant Has An Admiralty Cause Of Action Is A Merits Determination

As the Board noted in *Holly Corp.*, 79-2 BCA ¶ 14,008 at 68,781, "[w]hether or not the complaint states a cause of action is not a question of jurisdiction but is to be decided on the merits after the Board has taken jurisdiction." In considering a motion to dismiss for failure to state a claim, we assume jurisdiction to decide whether appellant's allegations state a cause of action upon which we can grant relief as well as to determine issues of fact pertinent to the controversy. *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920, *recon. denied*, 03-1 BCA ¶ 32,130, *aff'd*, *Hai v. Brownlee*, 82 Fed. Appx. 226 (Fed. Cir. 2003). The Board recently summarized the criteria for our consideration of motions to dismiss for failure to state a claim:

> The government has moved to dismiss both for lack of jurisdiction, which would not be on the merits, and for failure to state a claim, which would be…. We are not to grant a dismissal for failure to state a claim unless it appears beyond doubt that appellant cannot prove any set of facts in support of its claim that would entitle it to relief; we are to accept all

> of the complaint's factual allegations as true; and we are to resolve all reasonable inferences in favor of appellant as the non-movant.

Colonna's Shipyard, Inc., ASBCA No. 56940, 10-2 BCA ¶ 34,494 at 170,139 (citations omitted).

We are not prepared to render a merits determination on appellant's admiralty cause of action at this point.

DECISION

We deny the government's motion to dismiss for lack of jurisdiction with respect to claims one through six, and claim eight, which are based upon maritime Contract Nos. 0032 and 0014; defer ruling upon its motion with regard to claim seven and the unidentified contract mentioned therein and to claim nine, which is based upon Contract No. 5130, to allow for jurisdictional fact-finding; and deny its motion to dismiss for failure to state a claim.

Dated: 14 October 2010

CHERYL L. SCOTT
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 Nos. 57152, 57153, 57154, 57155, 57156, 57157, 57158, 57159, 57160, Appeals of Inchcape Shipping Services, rendered in conformance with the Board's Charter.

Dated:

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