

# Anchors Aweigh! U.S. District Court Jurisdiction over Maritime Contract Disputes Act Claims

By HOWARD W. ROTH



Maritime government contracting is a multi-billion-dollar industry involving multiple government agencies.<sup>1</sup> Most contractors are familiar with the Federal Acquisition Regulation (FAR) 33.211 provision at the end of each contracting officer's (CO's) decision on a Contract Disputes Act (CDA) claim, but many do

not understand the right to appeal a CO's decision on a maritime contract claim to U.S. district court, under 41 U.S.C. § 7102(d):

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. . . . Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (*except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts*) within 12 months of the date you receive this decision.<sup>2</sup>

No lesser authority than the U.S. Constitution states that federal judicial power extends to "all cases of admiralty and maritime jurisdiction."<sup>3</sup> "These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise."<sup>4</sup>

In keeping with this authority, under the CDA, an action appealing a CO final decision on a maritime contract claim may be filed directly in federal district court within 12 months.<sup>5</sup> Under 41 U.S.C. § 7102(d), the jurisdictional hook for such district court jurisdiction over maritime contract CDA claims is the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 30901 *et seq.*

## Jurisdiction over Maritime Contracts under the Contract Disputes Act

The CDA's language establishes the alternative procedure for claims arising under maritime contracts,<sup>6</sup> such as contracts for the repair of vessels<sup>7</sup> or dredging. Section 7102(d) provides:

Appeals under section 7107(a) of this title and actions brought under sections 7104(b) and 7107(b) to (f) of this title, arising out of maritime contracts, are governed by chapter 309 or 311 of title 46 [SAA or Public Vessels Act (PVA)], as applicable, to the extent that those chapters are not inconsistent with this chapter.<sup>8</sup>

The effect of § 7102(d) is that contractors who are a party to a maritime contract may, after receiving a decision from the CO, (1) file an appeal at the board of contract appeals<sup>9</sup> within 90 days of receipt of the decision, or (2) file an "action" appealing the decision directly in federal district court<sup>10</sup> within 12 months. A CO's decision on a maritime government contract CDA claim cannot be appealed to the U.S. Court of Federal Claims (USCFC).<sup>11</sup> Therefore, no appeal right exists to the U.S. Court of Appeals for the Federal Circuit (CAFC).<sup>12</sup>

Rather, appeals of U.S. district court decisions on a direct action appealing a CO's decision must be filed with the cognizant U.S. court of appeals, e.g., the Fifth Circuit.<sup>13</sup> Appeals of the decisions of agency boards of contract appeals must be to the cognizant federal district court,<sup>14</sup> and appeals of district court appellate decisions are also to the cognizant U.S. court of appeals.<sup>15</sup>

As explained by the Ninth Circuit:

This provision [41 U.S.C. § 7102(d)] does not alter the requirement that contract claims be presented to a Contracting Officer in the first instance. Rather, it directs jurisdiction for CDA appeals away from the Claims Court and the Federal Circuit Court of Appeals, in favor of the historic admiralty jurisdiction of the federal district courts.<sup>16</sup>

This sets up the novel situation that a contractor who appeals a board decision concerning a maritime claim is afforded two opportunities to appeal from the trial forum: to the cognizant federal district court, and then to the cognizant U.S. court of appeals with jurisdiction over the district court. Finally, just like the USCFC, the U.S. district courts have the power to transfer and consolidate maritime contract appeals at the agency boards of contract appeals.<sup>17</sup>

The alternative federal district court forum for litigation

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of CDA maritime claims provides interesting considerations, including that a decision may be issued in a shorter period of time.<sup>18</sup> A local assistant U.S. attorney will generally be responsible for representing the government, rather than agency counsel, and federal district court judges do not have the same background in government contracts as the CDA requires for board administrative judges.<sup>19</sup> As opposed to the agency boards, which generally decide entitlement unless shown good cause to decide quantum, the district courts decide both entitlement and quantum on a direct action appealing a CO decision. District court judges therefore may approach both procedural and substantive government contract law in a much different manner than board or USCFC precedent indicates.<sup>20</sup>

Accordingly, U.S. district court admiralty jurisdiction affords maritime contractors with a unique choice of forum under the CDA.

### Examples of Maritime Contract Suits and Appeals

Since the CDA's passage, a body of procedural and substantive case law has developed in federal district courts and U.S. appellate courts concerning actions appealing CO decisions on maritime CDA claims—from the earliest decision, *Woods Hole Oceanographic Institute*<sup>21</sup> in the District of Massachusetts (just months after the CDA was enacted), to a case decided in favor of the maritime contractor within the past year in the Eastern District of Virginia, *East Coast Repair*.<sup>22</sup>

There are U.S. district court decisions finding a proper CDA claim was submitted that follow well-established precedent from both the agency boards and the USCFC.<sup>23</sup> However, other decisions highlight the more independent interpretation that may be available in the 94 different U.S. district courts.

For example, in *Norfolk Shipbuilding*,<sup>24</sup> CDA claim requirements were analyzed. The court rejected the government's motion to dismiss for lack of subject matter jurisdiction based on the shipyard's alleged failure under the CDA to submit a claim for a sum certain as a matter of right. The court in *Norfolk Shipbuilding* found the CO's belief that a sum certain was submitted very relevant. The court stated that "if the contracting officer believed that a demand for a sum certain was made, this is strong evidence that it was made."<sup>25</sup> The court's holding on the issue is a more liberal interpretation of the CDA's definition of a sum certain than will be found at the boards of contract appeals.<sup>26</sup>

Other cases highlight dismissal for failure to comply with the CDA claim requirements.<sup>27</sup> For example, in *James J. Flanagan Shipping Corp.*,<sup>28</sup> the court found that Flanagan failed to establish that it complied with the jurisdictional prerequisites of the CDA prior to filing suit. Flanagan failed to submit a separate claim for an alleged settlement offer made by the army, even though it had submitted a request for a CO's decision on a claim prior to the settlement agreement for the same amount.

While the CDA dictates that an appeal of a board decision is to U.S. district court, even the government has

incorrectly appealed an Armed Services Board of Contract Appeals (ASBCA) decision to the CAFC.<sup>29</sup> An example of a successful appeal to U.S. district court from an ASBCA decision is *Red River Holdings*.<sup>30</sup> This appeal concerned the charter of a U.S. flag vessel for a commercial item contract of more than \$50 million and subsequent termination of the contract for the convenience of the government. The ASBCA denied the CDA claim, but on appeal, the District of Maryland reversed the board, agreeing with an interpretation of the commercial item termination for convenience clause much more helpful to the contractor and remanded the appeal to the board.

In *Lake Union Drydock*,<sup>31</sup> the contractor appealed to federal district court the CO decision denying its breach of contract claim for the repair and conversion of a National

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Oceanic and Atmospheric Administration research vessel. The court issued its decision on the merits within a few weeks of trial, highlighting the time to a decision in certain district courts in comparison to the agency boards of contract appeals.<sup>32</sup>

In *Bethlehem Steel Corp.*, the contractor appealed the district court's trial court decision to the Court of Appeals for the Fifth Circuit.<sup>33</sup> The Fifth Circuit found the CDA provision that permits appeals arising out of maritime contracts to be governed by the SAA does not exclude maritime contracts from the CDA's administrative requirements. The court stated, "Congress intended for the Contract Disputes Act to make an administrative dispute resolution procedure a prerequisite to federal admiralty jurisdiction over government contracts for ship repair under the Suits in Admiralty Act."<sup>34</sup> This is a key point in maritime contract CDA litigation: while the SAA provides the district court with jurisdiction over maritime contracts, the administrative provisions of the CDA control.

**Improper Filing at the U.S. Court of Federal Claims.** Many contractors incorrectly appeal CO final decisions on maritime claims to the USCFC.<sup>35</sup> In *L-3 Services*, for example, the government moved the USCFC to dismiss for lack of subject matter jurisdiction under 41 U.S.C. § 7102(d).<sup>36</sup> The USCFC found it did not have jurisdiction over L-3's maritime claims, but granted L-3's request to

transfer its complaint in lieu of dismissal and transferred the case to the U.S. District Court for the District of Massachusetts.

In *Thrustmaster of Texas*,<sup>37</sup> after filing in the USCFC, Thrustmaster agreed with the government that the USCFC lacked jurisdiction. The question for the court became whether to transfer rather than dismiss. The court found it was directed to transfer under 28 U.S.C. § 1631 “when three factors are present: the transferring court lacks jurisdiction; the transferee court would have had jurisdiction if the action had been properly filed; and when transferring is in the interest of justice.”<sup>38</sup> In this case, the court found all three factors to be present. Certainly, no contractor wants to find itself having to make this argument because it has appealed to the wrong forum.

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## ***A contractor may appeal a CO’s final decision on a maritime contract claim to both federal district court and an agency board of contract appeals.***

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**Time for Actions Directly on Claims in District Court Is 12 Months.** The CDA does not expressly state that the appeals period is 12 months for maritime claims because the section on maritime contracts was added to the CDA after the appeal period for the USCFC was specified.<sup>39</sup> The CDA provision concerning maritime contracts, 41 U.S.C. § 7102(d), cites to 41 U.S.C. § 7104(b), which articulates the procedure for action directly on a claim in the USCFC and U.S. district courts for nonmaritime actions.<sup>40</sup> Thus, the only time limit on proceeding in a court provided by § 7104 is 12 months, and that is the time limit applied by the district courts for maritime contract claims. Moreover, FAR 33.211 also stipulates a 12-month appeal period.

As stated by the Northern District of California, “[a]ppeals to the district courts must be made within twelve months of the date the contractor receives the officer’s final decision.”<sup>41</sup> That the period is 12 months has never been questioned in any decision, as a maritime government contract claim is “controlled by the Contract Disputes Act.”<sup>42</sup>

**SAA Two-Year Statute of Limitations Does Not Apply.** The CDA’s six-year statute of limitations, not the two-year statute of limitations found in the SAA, governs disputes involving contracts subject to the CDA. In *Dalton*,<sup>43</sup> the CAFC stated:

According to *Southwest Marine*, the Suits in Admiralty Act’s two-year statute of limitations accrued at the time the dispute arose and its purported running bars further action in this case. This contention, however, must be viewed in accordance with the principles of *Crown Coat*. Here, the parties were in negotiations for several years before a claim was submitted to the contracting officer. The contracting officer took additional time to render a decision. It is worth reiterating that the contracting officer sided with the secretary. Thus, the secretary could not have filed a civil action at that juncture. Thereafter, the case was pending at the ASBCA for over two years. If the court were to hold that the Suits in Admiralty Act’s two-year statute of limitations accrues at the time a dispute arises, a party receiving an adverse decision would almost always lose the opportunity to file a civil action while the case was wending its way through the required administrative process. Application of the limitations period in this manner would clearly be inconsistent with the Contract Disputes Act and its procedures allowing for and governing review of ASBCA decisions.<sup>44</sup>

The CAFC analysis is in keeping with the U.S. district court and court of appeals case law, which provides that the CDA controls a maritime government contract claim litigation.<sup>45</sup> Accordingly, the CDA’s six-year statute of limitations applies to maritime contract actions in federal court,<sup>46</sup> not the SAA’s two-year statute of limitations.

### **Conclusion**

The CDA’s maritime contract claims procedures allow a contractor to appeal a CO’s final decision on a maritime contract claim to federal district court, as well as to an agency board of contract appeals. Under the CDA, the USCFC has no jurisdiction over maritime contract claims and, therefore, there is no appellate review of such claims at the CAFC. Appeals of board decisions on the merits of maritime contract claims must be taken to the cognizant U.S. district court. Appeals of district court decisions, both as a trial court and as an appellate court, must be taken to the cognizant U.S. appeals court with jurisdiction over that U.S. district court.

This interesting “admiralty” CDA choice of forum may provide contractors with certain advantages, such as the time to a decision and diverse interpretation of government contract law and serves to tie CDA maritime claims directly to the U.S. Constitution and admiralty jurisdiction as it has “existed for ages.” 

### **Endnotes**

1. See DEP’T OF THE ARMY, CIVIL WORKS BUDGET OF THE U.S. ARMY CORPS OF ENGINEERS: FISCAL YEAR 2017, at 1 (2016), available at <http://tinyurl.com/mthvdwf>.

2. FAR 33.211 (emphasis added); see also 41 U.S.C. § 7104(b); L-3 Servs., Inc. v. United States, 104 Fed. Cl. 30 (2012).

3. U.S. CONST. art. III, § 2, cl. 1.

4. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 545–46 (1828).

5. 41 U.S.C. § 7102(d); Sw. Marine, Inc. v. United States, 680 F. Supp. 327 (N.D. Cal. 1988).

6. “A ‘maritime contract’ for purposes of determining admiralty jurisdiction is one which concerns commerce of the sea, related to commerce or to navigation on navigable waters, or concerns maritime employment—one that has ‘reference to maritime transactions.’” CHARLES M. DAVIS, *MARITIME LAW DESKBOOK* 4 (2016). For a complete review of the definition of a maritime contract and discussion of court authority on what constitutes a maritime contract, see *id.* at 4–10.

7. *Sw. Marine, Inc. v. United States*, 43 F.3d 420 (9th Cir. 1994).

8. 41 U.S.C. § 7102(d).

9. *Id.* § 7104(a); *Holly Corp.*, ASBCA No. 23479, 79-2 BCA ¶ 14,008.

10. That district courts sitting in admiralty retain jurisdiction in cases involving CO decisions under CDA maritime contracts is not disputed. See *Marine Logistics, Inc. v. England*, 265 F.3d 1322 (Fed. Cir. 2001); *Thrustmaster of Tex., Inc. v. United States*, 59 Fed. Cl. 672 (2004); *Jo-Mar Corp. v. United States*, 15 Cl. Ct. 602 (1988); *Bos. Shipyard Corp. v. United States*, 9 Cl. Ct. 450 (1986); *Newport News Shipbuilding & Dry Dock Co. v. United States*, 7 Cl. Ct. 549 (1985); *Whitey’s Welding & Fabrication, Inc. v. United States*, 5 Cl. Ct. 284 (1984).

11. FAR 33.211.

12. *Dalton v. Sw. Marine, Inc.*, 120 F.3d 1249 (Fed. Cir. 1997).

13. See *Century Marine Inc. v. United States*, 153 F.3d 225 (5th Cir. 1998) (appeal of a government claim relating to the termination for default of a ship repair contract).

14. 41 U.S.C. § 7102(d); see also *Sw. Marine of S.F., Inc. v. United States*, 896 F.2d 532 (Fed. Cir. 1990); *Dalton v. Sw. Marine, Inc.*, 42 Cont. Cas. Fed. (CCH) ¶ 77,388 (S.D. Cal. 1998).

15. See, e.g., *Sw. Marine Inc. v. Danzig*, 217 F.3d 1128, 1132–35 (9th Cir. 2000).

16. *Sw. Marine, Inc. v. United States*, 43 F.3d 420, 424 (9th Cir. 1994); see also *Marine Logistics, Inc. v. England*, 265 F.3d 1322 (Fed. Cir. 2001) (recognizing that appeal arising out of maritime contract lies within the admiralty jurisdiction of the federal district court, rather than the Federal Circuit, and transferring appeal to the district court).

17. *Sw. Marine, Inc. v. United States*, 680 F. Supp. 327 (N.D. Cal. 1988).

18. *Lake Union Drydock, Inc. v. United States*, 2007 A.M.C. 2502 (W.D. Wash. 2007).

19. Agency board judges must have at least five years of public contract law experience. 41 U.S.C. § 7105.

20. *Red River Holdings, LLC v. United States*, 802 F. Supp. 2d 648 (D. Md. 2011) (treatment of commercial item termination for convenience clause); *Norfolk Shipbuilding & Drydock Corp. v. United States*, 1996 A.M.C. 1653 (E.D. Va. 1995) (CDA definition of a sum certain).

21. *Woods Hole Oceanographic Inst. v. United States*, No. 79-1514-MA (D. Mass. Dec. 19, 1980), *rev’d on other grounds*, 677 F.2d 149 (1st Cir. 1982).

22. *E. Coast Repair & Fabrication, LLC v. United States*, No. 2:14cv606, 2016 WL 4224961 (E.D. Va. Aug. 9, 2016). For another recent ship repair decision, see *Colonna’s Shipyard, Inc. v. United States*, No. 2:14cv331, 2015 WL 9008222 (E.D. Va. Dec. 14, 2015).

23. For examples of cases where no CDA jurisdictional problems were encountered by the maritime contractor, see *Misano di Navigazione, SpA. v. United States*, 968 F.2d 273 (2d Cir. 1992) (review of direct suit by Second Circuit); *Metal Trades, Inc. v. United States*, 810 F. Supp. 689 (D.S.C. 1992) (appeal of ASBCA decision to district court); *River & Offshore Servs. Co. v. United States*, 651 F. Supp. 276 (E.D. La. 1987); and *Brennan Corp. v. United States*, 641 F. Supp. 245 (D.D.C. 1986).

24. 1996 A.M.C. 1653.

25. *Id.*

26. See *Macro Z Techs.*, ASBCA No. 56711, 14-1 BCA ¶

35,712 (finding lack of sum certain even though neither the CO nor government counsel nor even the ASBCA, in two decisions, had questioned the sum certain).

27. See *Remolcadores De Malaga, S.A. v. United States*, 1992 A.M.C. 14 (E.D. La. 1990) (finding that waiver of sovereign immunity under the PVA and SAA is conditioned on compliance with the CDA); *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1489 (5th Cir. 1989) (holding that court lacked jurisdiction over contractor’s claim against government because contractor failed to comply with the CDA).

28. *James J. Flanagan Shipping Corp. v. Dep’t of the Army*, No. 1:10-cv-00718, 2011 WL 2149525 (E.D. Tex. May 27, 2011).

29. *Dalton v. Sw. Marine, Inc.*, 120 F.3d 1249 (Fed. Cir. 1997).

30. *Red River Holdings, LLC v. United States*, 802 F. Supp. 2d 648 (D. Md. 2011).

31. *Lake Union Drydock, Inc. v. United States*, 2007 A.M.C. 2502 (W.D. Wash. 2007).

32. See *Century Marine, Inc. v. United States*, 153 F.3d 225 (5th Cir. 1998).

33. *Bethlehem Steel Corp. v. Avondale Shipyards, Inc.*, 951 F.2d 92 (5th Cir. 1992).

34. *Id.* at 93.

35. See *L-3 Servs., Inc. v. United States*, 104 Fed. Cl. 30 (2012); *Thrustmaster of Tex., Inc. v. United States*, 59 Fed. Cl. 672 (2004).

36. *L-3 Servs.*, 104 Fed. Cl. at 33.

37. *Thrustmaster of Tex.*, 59 Fed. Cl. 672.

38. *Id.* at 674.

39. See *Sw. Marine, Inc. v. United States*, 680 F. Supp. 327 (N.D. Cal. 1988).

40. Section 7104(b) provides: (1) in lieu of appealing the decision of a CO under section 7103 to an agency board, a contractor may bring an action directly on the claim in the USCFC, notwithstanding any contract provision, regulation, or rule of law to the contrary; (2) in any case against the Tennessee Valley Authority, action may be brought directly in U.S. district court; and (3) any action under paragraph (1) or (2) shall be filed within 12 months from the receipt of the decision of the CO concerning the claim and shall proceed de novo in accordance with the rules of the appropriate court.

41. *Sw. Marine*, 680 F. Supp. at 328.

42. In *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1489 (5th Cir. 1989), the court in dismissing a maritime contract case for the total failure to submit a CDA claim stated, “General Dynamics’s claim is controlled by the Contract Disputes Act. Under the Act, a contracting party may bring an action directly on the contract claim against the United States after an adverse decision by a contracting officer concerning the claim” (citations omitted). See also *Woods Hole Oceanographic Inst. v. United States*, No. 79-1514-MA (D. Mass. Dec. 19, 1980), *rev’d on other grounds*, 677 F.2d 149 (1st Cir. 1982). In that case, decided soon after the enactment of the CDA, the contracting officer issued his decision on April 6, 1979, and the contractor filed an “admiralty” suit almost four months later, on August 1, 1979. The district court noted that it had jurisdiction under the CDA over the contractor’s claim.

43. *Dalton v. Sw. Marine, Inc.*, 120 F.3d 1249 (Fed. Cir. 1997).

44. *Id.* at 1252 (citing *Crown Coat Front Co. v. United States*, 386 U.S. 503, 514 (1967)).

45. See, e.g., *Bethlehem Steel Corp. v. Avondale Shipyards, Inc.*, 951 F.2d 92 (5th Cir. 1992).

46. See 41 U.S.C. § 7103(a)(4)(A).