UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO DISMISS DENIED: September 8, 2010

CBCA 1821

ROCKIES EXPRESS PIPELINE LLC,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

L. Poe Leggette and Osborne J. Dykes, III of Fulbright & Jaworski L.L.P., Denver, CO, counsel for Appellant.

Colleen M. Dulin, Office of the Regional Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **SOMERS**, **GOODMAN**, and **WALTERS**.

GOODMAN, Board Judge.

On December 4, 2009, the appellant, Rockies Express Pipeline LLC (appellant), filed a notice of appeal from the respondent, Department of the Interior, Minerals Management Service (MMS or respondent),[1] contracting officer's final decision dated November 30, 2009,

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[1] After the appeal was filed, the respondent changed the name of the entity to Bureau of Ocean Energy, Management, Review and Enforcement. The respondent now refers to the entity as the Bureau of Ocean Energy (BOE). In this decision, we refer to MMS/BOE as "the respondent."

that denied the appellant's claims for breach of a precedent agreement (PA), Appeal File, Exhibit 4, and a firm transportation service agreement (the REX West FTSA), Appeal File, Exhibit 6, between the appellant and the respondent.

The appellant filed its complaint with this Board alleging five claims.[2]

Claims 1 and 5 are for alleged breaches of the REX West FTSA. Claim 1 alleges the respondent has breached the REX West FTSA in refusing to pay at least $3,548,701.45, which is equal to the monthly reservation charges for April through June 2009 plus accrued interest charges. Claim 5 states that

> if . . . it should be determined that the Precedent Agreement is not a binding contract, then the REX West FTSA has not terminated and remains in force and effect for its full ten-year term, until April 19, 2017. [The respondent] has repudiated and breached the REX West FTSA and is liable to [the appellant] for the present value of all monthly reservations charges for its ten year terms, constituting the amount of at least $115,923,840.00, plus interest.

Claims 2, 3, and 4 are for alleged breaches of the PA. Claim 2 alleges the respondent breached the PA by failing to execute the REX East FTSA and to pay monthly reservation charges in the amount of at least $173,230,601.10 plus accruing interest. Claim 3 alleges the respondent breached the PA's implied duty of good faith and fair dealing. Claim 4 alleges the respondent breached the representation in clause 12 of the PA that the PA is a "legal, valid, binding and enforceable obligation of [the respondent]."

On March 30, 2010, pursuant to Board Rule 8(c)(1) (48 CFR 6101.8(c)(1) (2009)), the respondent filed a motion to dismiss claims 2, 3, and 4 of the complaint for lack of subject matter jurisdiction, on the basis that the PA is not a contract under the purview of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2006) (CDA).

On May 20, 2010 the respondent filed another motion to dismiss the entire appeal on the ground that the parties consented to exclusive jurisdiction over their disputes in the

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[2] The complaint contains a slight inconsistency. Paragraph 2 states that "[appellant] principally seeks judgement for two claims" and describes these two claims as breach of the REX West FTSA and the PA. However, the complaint then enumerates five "claims" with specificity which might ordinarily be denoted as "counts" in a complaint.

federal district court for the Southern District of New York by the inclusion of a clause in the PA entitled "Dispute Resolution."[3]

We deny both motions.

Background

The respondent states that its mission is to "manage the ocean energy and mineral resources on the Outer Continental Shelf and Federal and American Indian mineral revenues to enhance public and trust benefits, promote responsible use, and realize fair value." Respondent's Motion to Dismiss Claims 2, 3, and 4, at 1. To that end, the respondent is responsible for ensuring that all revenues from federal and American Indian mineral leases are "effectively, efficiently, and accurately collected, accounted for, and disbursed to recipients." Appeal File, Exhibit 43 at 5.

The Mineral Leasing Act of 1920, as amended, and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1353 et. seq., authorized the respondent to take a portion of the natural gas produced under federal leases as "royalty-in- kind" (RIK), as opposed to taking cash payment "in value" for these royalties. In connection with taking RIK, the respondent developed a RIK program to facilitate the competitive sale of this oil and gas on the open market. In order to facilitate these sales, the respondent had to procure transportation services to ship the oil or gas it received in-kind from the location where producers delivered royalty production to the respondent to a location where it could be sold.

The Department of the Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, 114 Stat. 922 (2000), authorized the respondent to use revenue that it generated from the RIK program to pay for services incidental to selling oil and gas. Specifically, the Act stated that the respondent may under the RIK pilot program use a portion of the revenues from RIK sales, without regard to fiscal year limitation, to pay for transportation to wholesale market centers or upstream pooling points, and to process or otherwise dispose of royalty production taken in kind.

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[3] The respondent's contracting officer's final decision stated the appellant's appeal rights pursuant to the CDA. When the appeal file was submitted, the Board reviewed the PA and directed the parties to brief the significance of the Dispute Resolution clause. The respondent's motion to dismiss the entire appeal was the respondent's response to the Board's direction.

This law was further codified in 42 U.S.C. § 15902(b)(4) by the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). The provision states:

> Retention by the Secretary. The Secretary may, notwithstanding section 3302 of title 31, retain and use a portion of the revenues from the sale of oil and gas taken in-kind that otherwise would be deposited in miscellaneous receipts, without regard to fiscal year limitation, or may use oil or gas received as royalty taken in-kind (referred to in this paragraph as "royalty production") to pay the cost of -
> (A) transporting the royalty production;
> (B) processing the royalty production;
> (C) disposing of the royalty production; or
> (D) any combination of transporting, processing, and disposing of the royalty production.

In 2005, the respondent entered into discussions with the appellant regarding the reservation of space on a proposed interstate pipeline that the appellant planned to construct. The proposed pipeline would ultimately be 1679 miles long, stretching from west of Cheyenne, Wyoming, to Clarington, Ohio. If the respondent could transport to Ohio gas that was being produced in Wyoming, then it could sell its in-kind gas at a higher market price.

The appellant intended to open the pipeline in three stages. The first pipeline segment, called the Certificate 1 segment, was to transport gas from production areas west of Cheyenne, Wyoming, through the existing hub in Cheyenne, and eastward to Audrain County, Missouri (the "Audrain hub"). This segment is known as REX West. The second segment of pipeline, called the Certificate 2 segment, was to originate at the Audrain hub and terminate in Warren County, Ohio (the "Lebanon hub"). The third pipeline segment, called the Certificate 3 segment, would transport gas from the Lebanon hub to Monroe County, Ohio (the "Clarington hub"). The Certificate 2 and Certificate 3 segments were eventually combined and these segments are collectively known as REX East.

The appellant needed approval and authorization from the Federal Energy Regulatory Commission (FERC) to build the pipeline, and the appellant sought firm commitments from shippers to ship gas on the pipeline as each segment came available. Without sufficient commitments from shippers, the appellant could not support the viability of the project and could not proceed with obtaining the necessary governmental authorizations needed to construct the pipeline.

On February 6, 2006, the respondent entered into an arrangement with the appellant known to the parties as the "Precedent Agreement."[4]

The PA contained the following terms relevant to resolution of the respondent's motions to dismiss:

> This Precedent Agreement dated this 6th day of February, 2006 states an agreement between Rockies Express Pipeline LLC ("Transporter"), a Delaware limited liability company, and U.S. Minerals Management Service ("Shipper"). Each of Transporter and Shipper are sometimes referred to herein individually as a "Party" and collectively as the "Parties."
>
> WHEREAS, Transporter is developing plans to construct and/or acquire and operate certain facilities referred to as the Rockies Express Pipeline Project (the "Project") that will create long-haul, firm transportation takeaway capacity out of the natural gas supply areas located in the Rocky Mountain producing areas of Wyoming and Colorado.

Appeal File, Exhibit 4 at 1.

> WHEREAS, The commitment provided by Shipper via this Precedent Agreement and potentially other similar agreements will be used as support for the construction and operation of the Project; and . . .

Id. at 2.

> WHEREAS, this Precedent Agreement has been executed as evidence of the agreement between Transporter and Shipper that, upon satisfaction of the conditions precedent set forth below, the parties will enter into Firm Transportation Service Agreements (each a "FTSA") providing for firm interstate natural gas transportation service to be provided by Transporter for Shipper on the Project.

Id. at 3.

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[4] The foregoing facts are summarized from pages 1 through 4 of the respondent's motion to dismiss claims 2, 3, and 4.

> WHEREAS, Shipper is an agency of the federal government subject to specific statutory requirements governing its Royalty in Kind Program; . . .

Id.

> WHEREAS, Shipper and Transporter desire to provide, within reasonable interpretations of the statutory authorities and limitations, the MMS as custodian of federal natural gas resources reasonable access to transportation and other services necessary to implement the Congressionally authorized Royalty in Kind Program and said Shipper and Transporter do hereby agree to certain rate and termination provisions designed to permit Shipper to implement its statutory requirements as Shipper has reasonably determined to implement such requirements.

Id.

> NOW, THEREFORE, in consideration of the mutual covenants and agreement contained herein, and intending to be legally bound, Transporter and Shipper agree as follows: . . .
>
> 2. Services
>
> Transporter agrees . . . to provide Shipper, as conditioned herein, with firm transportation service as set forth on the attached Appendix A.[5] The construction and operation of these interstate facilities are subject to the jurisdiction of the FERC, and subject to FERC and other federal, state and local permits and approvals.

Id. at 4.

> 3. Special Provisions Related to MMS Status as a Government Agency

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[5] Appendix A contained two rate options - The Maximum Recourse Reservation Rate and a Negotiated Reservation Rate, with election pages for Certificate segments 1, 2 and 3. Also included was an illustrative matrix of Fuel Loss and Unaccounted For (FL&U) percentages applicable to each certificate with a final determination of the actual FL&U percentages to be determined by FERC. In addition to signing the PA, the contracting officer separately signed Appendix A.

> (a) Commencing with the date following the in-service date of facilities needed to deliver Shipper's gas to the Lebanon Hub, Transporter shall determine the hypothetical difference between the price at which Shipper could have sold its gas at the Receipt Points and the price at which Shipper could have sold its gas at the Delivery Points less transportation costs assuming a one hundred percent load factor (the "REX Basis/Transport Difference"). The Rex Basis/Transport Difference is agreed by the Parties to be an approximation of whether Shipper has been able to sell its RIK gas at fair market value within its legislative and statutory mandate. Shipper has the right to audit the calculation during normal business hours.
>
> The REX Basis/Transport Difference shall be calculated, as of the date twelve months following the in-service date of facilities needed to deliver Shipper's gas to the Lebanon Hub (the "First Calculation Date") and on each twelve month anniversary of the First Calculation Date thereafter, in accordance with the methodology and example set forth on Appendix C to establish an "Annual Bank Balance" and accumulated over time to establish a "Cumulative Bank Balance", as set forth on Appendix C. Transporter shall notify Shipper in writing within forty-five (45) days following the First Calculation Date and within forty-five (45) days following each twelve-month anniversary of the First Calculation Date thereafter, of the Cumulative Bank Balance as of such dates. Shipper shall have the right to terminate the FTSA with no liability resulting to Shipper in the event the Annual Bank Balance (first annual calculation) or the Cumulative Bank Balance is negative as of the First Calculation Date or on any of the twelve-month anniversaries of the First Calculation Date thereafter. Shipper shall have the right but not the obligation to terminate the FTSA in such event under this provision, which shall be exercisable by Shipper, in writing, within fifteen (15) business days after Shipper receives notification from Transporter that the Cumulative Bank Balance calculation yields a negative result and shall become effective on the first day of the month specified by Shipper. Shipper's failure to notify Transporter in writing of Shipper's exercise of a termination right under this provision within the time set forth above shall constitute waiver of such termination right for the applicable calculation period.

Id. at 4-5.

4. Rates

> Shipper acknowledges that it has made an election, as set forth on Appendix A; to either (i) pay the Maximum Recourse Reservation Rates for firm service under each FTSA or (ii) to pay Fixed Negotiated Reservation Rates for firm service under each FTSA.
>
> If Shipper shall have opted to pay a negotiated rate, as described on Appendix A,[6] such negotiated rate shall be applicable to service under each FTSA during the entire term of such FTSA, except as provided in Section 3 of this Precedent Agreement, as the same may be extended, regardless of any otherwise applicable maximum rate and shall be applicable at all primary and secondary points on the Project that are located in a zone covered by Shipper's primary transportation path(s); provided that the applicability of the negotiated rate assumes that receipts and deliveries under the FTSAs will be made at the prevailing operating pressures of the Project facilities and that the negotiated rate does not cover any non-conforming quality or pressure requirement at any receipt or delivery point.
>
> Regardless of which form of reservation rate Shipper shall have opted to pay, the Commodity Rate, calculated using straight fixed variable rate design, Lost and Unaccounted for Gas ("L&U"), ACA and any other additional authorized charges or surcharges will be applied pursuant to the FERC approved Gas Tariff applicable to the Project (the "Tariff"). Fuel shall be provided by Shipper in accordance with the zoned fuel matrix set forth in the Tariff, with an illustrative matrix set forth on Appendix A attached to this Precedent Agreement. The Commodity Rate, determined on the basis of a straight fixed variable rate design, is estimated to be $0.004 per Dth [decatherm] for each zone ($0.012 per Dth across the length of the system), subject to final determination by the FERC. Transporter will propose as part of the Tariff, subject to FERC approval, that Fuel and L&U shall be assessed in-kind and that Fuel and L&U will be adjusted through a tracking provision. . . .

Id. at 6.

> 5. Volume, Receipt and Delivery Points

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[6] The respondent elected the negotiated rate for the three certificate segments on the election pages of Appendix A.

> The contract Maximum Daily Quantity ("MDQ") and primary term are as elected by Shipper on the attached Appendix A (subject to the minimum term requirements set forth in Appendix A). The primary receipt point shall be the Cheyenne Hub (subject to being moved to points in the zone containing Meeker or Opal upon the combination of the Entrega Projects and the Project) and the primary delivery points shall be: (a) for Certificate 1 Segment: mutually agreeable Mid Continent/Midwest point(s); (b) for Certificate 2 Segment: mutually agreeable point(s) in the zone containing the Lebanon Hub; and (c) for Certificate 3 Segment: mutually agreeable point(s) in the zone containing the Clarington Hub. Shipper's election of Primary Receipt and Delivery Points are set forth on Appendix A. Secondary Receipt and Delivery Points will be made available pursuant to the Tariff.
>
> Transporter hereby agrees that it will construct a minimum of twenty five points of interconnection from among the points set forth on Appendix A or such other points as may be determined to have shipper demand during the Open Season. The selection and capacities of such points will be based on shipper demand as demonstrated by the results of the Open Season. Shipper may indicate on Appendix A up to twenty five points of interconnection (including Shipper's primary receipt and delivery points) to communicate Shipper's preferences.

Id. at 7.

> 6. Conditions Precedent
>
> Performance by Transporter of the duties and obligations assumed by it in this Precedent Agreement are expressly subject to the following conditions precedent:
>
> > (a) All appropriate and final governmental approvals and other applicable authorization must be obtained and maintained on terms acceptable to Transporter, including approval of construction, rates and terms and conditions of service; and
> >
> > (b) All rights-of-way and other surface rights required to site and maintain the pipeline facilities along the route described herein must be obtained on terms and conditions acceptable to Transporter; provided, however, that conditions (a) and (b) shall be deemed satisfied for each Certificate Segment of the Project

upon Transport's acceptance of the FERC Authorization for such Certificate Segment; and

(c) Sufficient firm capacity subscription must exist at acceptable rates, in Transporter's sole discretion, to proceed with the Project; provided, however, that this condition shall expire on February 28, 2006 if Transporter has not terminated this Precedent Agreement on or before such date; and

(d) Shipper shall have complied with all its material obligations hereunder and under any FTSA then in effect.

Id. at 8.

8. Shipper's Obligations

(a) Shipper agrees that it will execute a minimum of three Firm Transportation Service Agreements consistent with the form of Service Agreement as contained in Appendix B[7] hereto, as finally approved by FERC which, if Shipper shall have elected the Negotiated Reservation Rate Option, shall reflect the fixed nature of the reservation rate as described in Section 4, within five (5) business days after tender by Transporter. In light of the timing considerations associated with the Executive Committee of the U.S. Minerals Management Service, Transporter shall provide Shipper with ten (10) business days advance notice prior to tendering any FTSA for execution by Shipper. The FTSAs, at least one each for Certificate 1 Segment, Certificate 2 Segment and Certificate 3 Segment, will reflect the receipt points, delivery points, term(s), rate(s) and MDQ(s) described herein.

Id. at 9.

12. Representations

Each Party represents to each other as follows: . . .

(c) This Precedent Agreement has been duly executed and delivered by such Party. This Precedent Agreement constitutes the legal, valid, binding and

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[7] Appendix B contained the form and terms and conditions of the FTSA.

> enforceable obligation of such Party, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application relating to or affecting creditor's rights generally and by general equitable principles.

Id. at 13.

> 16. Dispute Resolution
>
> To the fullest extent allowed by law, any disputes, controversies or claims that arise between the Parties (the "Disputing Parties") relating to this Precedent Agreement (a "Dispute") shall be resolved by means of the following procedure:
>
> > (a) Notice of Dispute. Any Disputing Party shall give notice to the other Disputing Parties in writing that a Dispute has arisen ("Dispute Notice").
> >
> > (b) If the Disputing Parties have failed to resolve the Dispute within fifteen (15) business days after the Dispute Notice was given, the Disputing Parties shall seek to resolve the Dispute by negotiation. If the Disputing Parties are unable to resolve the Dispute through negotiation within thirty (30) business days after the Dispute Notice was given, then the Dispute may be finally resolved as follows:
> >
> > > i. Any disputes that arise between the Parties shall be brought in or removed to the United States District Court for the Southern District of New York. By execution and delivery of this Precedent Agreement, Shipper and Transporter irrevocably and unconditionally submit to the exclusive jurisdiction of such court and to the appellate courts therefrom and consent to service of process out of any of the aforementioned courts.
> > >
> > > ii. Transporter and Shipper agree that the provisions of subparagraph (a) above shall not

> apply to any controversy wherein the FERC has or exercises jurisdiction.

Id. at 14.

On April 24, 2007, the appellant and respondent entered into the REX West FTSA, which was effective on that date. The parties agree that the conditions precedent to entering into the REX East FTSA were fulfilled.[8] On May 16, 2008, the appellant provided to the respondent a draft FTSA for the REX East segment. Appeal File, Exhibit 7. The respondent states that "[s]ubsequent to receiving the draft REX East FTSAs, the [respondent] advised [the appellant] that it would not enter into the REX East FTSAs unless they contained applicable FAR [Federal Acquisition Regulation] clauses." Respondent's Motion to Dismiss Claims 2, 3, and 4 at 10 (citing generally Appeal File, Exhibits 9, 10, 12, and 53).

In response to the respondent's refusal to sign the REX East FTSA as provided, the appellant attempted to negotiate mutually acceptable revisions to the REX East FTSA. Almost six months of negotiating between the parties followed, but they were unable to agree to the terms of the FTSA.[9]

On December 11, 2008, the appellant notified the respondent that it was terminating the PA pursuant to its termination provisions. Appeal File, Exhibit 19. On December 15, 2008, the appellant filed a notice of termination with FERC in compliance with FERC regulations. Appeal File, Exhibit 20.

On June 30, 2009, the appellant submitted certified claims pursuant to the CDA. Appeal File, Exhibit 35. By final decision dated November 30, 2009 the contracting officer denied the claim. *Id.*, Exhibit 38.

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[8] The Board directed the parties to brief this factual issue. The parties concurred that the conditions precedent required for the REX East FTSA were fulfilled. Respondent's Responses to the Board's Questions of June 25, 2010, at 1-2; REX's Reply to Respondent's Responses to the Board's Questions of June 25, 2010, at 1.

[9] The parties' motions describe in detail the negotiations that took place prior to the appellant terminating the contract.

Discussion

Respondent has filed two motions to dismiss - to dismiss claims 2, 3, and 4 of the complaint arising from the PA and to dismiss the entire appeal. With regard to both motions, the appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Ron Anderson Construction, Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485, at 170,070 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *801 Market Street Holdings, L.P. v. General Services Administration*, CBCA 425, 08-1 BCA ¶ 33,853).

In assessing whether the Board has subject matter jurisdiction, the allegations of the complaint should be construed favorably to the pleader. *Ron Anderson* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *United Pacific Insurance Co. v. United States*, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006); *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989); *CACI, INC.-FEDERAL v. General Services Administration*, GSBCA 15588, 02-1 BCA ¶ 31,712, at 156,635 (2001)).

When a motion to dismiss for lack of subject matter jurisdiction challenges the truth of alleged jurisdictional facts, the Board may consider relevant evidence beyond the pleadings to resolve disputed facts. *Ron Anderson* (citing *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993); *B&M Cillessen Construction Co. v. Department of Health and Human Services*, CBCA 931, 08-1 BCA ¶ 33,753 (2007); *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685).

Respondent's Motion to Dismiss Claims 2, 3, and 4 of the Complaint

The Jurisdictional Issue and the Parties' Positions

The respondent has filed a motion to dismiss for lack of subject matter jurisdiction claims 2, 3, and 4 of the complaint that allege breach of the PA, asserting that the PA is not a contract within the purview of the CDA.

The jurisdiction of the Board arises from the CDA. The Board has the jurisdiction to "decide any appeal from a decision of a contracting officer . . . relative to a contract made by its agency." 41 U.S.C. § 607(d). The CDA applies to all express or implied contracts entered into by an executive agency for the procurement of property other than real property; the procurement of services; the procurement of construction, alteration, repair or maintenance of real property; or the disposal of personal property. *Id.* § 602(a). It does not

cover all government contracts. *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). The existence of a contract to which the Government and the contractor are parties is an essential prerequisite to Board jurisdiction. *Presidio County, Texas v. General Services Administration*, CBCA 1209, 08-2 BCA ¶ 33,976; *Inversa, S.A. v. Department of State*, CBCA 440, 07-2 BCA ¶ 33,690.

The respondent characterizes the PA as an agreement to agree in the future, as the PA contemplates entering into FTSAs after the PA was executed, and maintains that a contract is not formed until the FTSA is signed. The respondent also asserts that the PA cannot be a contract as it lacks consideration, and that the contracting officer did not have authority to enter into the PA. Thus, the respondent asserts that the PA is not a contract within the purview of the CDA, and this Board lacks jurisdiction to resolve the appellant's claims of breach of the PA.

The appellant maintains that the PA is a contract for services within the purview of the CDA. It asserts that the PA is an agreement between the parties in which the respondent agreed to supply a commitment to ship gas through a pipeline to be constructed and the appellant would provide transportation services for the gas through that pipeline upon fulfillment of specific conditions precedent in the PA under the specific terms set forth in the PA and its appendices. Thus, according to the appellant, the PA is a contract, supported by consideration, for services and therefore within the purview of the CDA.

This Board addressed this jurisdictional issue in *Inversa, S.A.*:

> It is hornbook law that the existence of a Government contract depends upon an unconditional offer by a purported contractor and an unconditional acceptance by the Government. . . .
>
> An offer must be a promise, and a mere expression of intention or a general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer. . . .
>
> Consequently, an informal agreement, such as a letter of intent, may be considered an enforceable contract only if the agreement contains the essential terms and conditions, the agreement is made or approved by an authorized official, and the execution of a formal agreement is regarded by all parties as a technicality.

07-2 BCA at 166,779 (citations omitted).

The PA is Supported by Consideration

With regard to the respondent's assertion that the PA lacked consideration, the PA contains an express commitment by the respondent to ship natural gas, and states that this commitment would be used by the appellant as support for the construction and operation of the project. Appeal File, Exhibit 4 at 2. The PA states further that it was executed as evidence of the agreement between the appellant and the respondent that, upon satisfaction of the conditions precedent the respondent would enter into FTSAs providing for firm interstate natural gas transportation service to be provided by the appellant to respondent. *Id.* at 3. Additionally, the respondent's obligations included that it would execute a minimum of three FTSAs. *Id.* at 9. Thus, the PA contained mutual promises and obligations and therefore was supported by valid consideration.

Execution of the PA by an Authorized Official

The PA states that the parties intend to be legally bound. Appeal File, Exhibit 4 at 3. The contracting officer executed the PA and also separately executed Appendix A, which contained the respondent's election of specific agreed terms in the FTSAs as explained below. *Id.* at 16-19. There is nothing in the PA that gives rise to a question as to the contracting officer's authority to execute it.

The respondent asserts that if the PA is anything other than an agreement to agree, the contracting officer did not have authority to enter into the PA, as the respondent interprets the FAR as prohibiting it from contracting for more than ten years and the aggregate term of the FTSAs exceeded ten years. The question of whether the FAR applies to the FTSAs is an issue that remains to be resolved in the merits portion of this appeal.

The PA is a Contract within the Purview of the CDA

The plain meaning of the PA's language supports the appellant's position that the PA is a contract for services within the purview of the CDA.

The PA cannot be characterized as a letter of intent or a mere expression of intention or general willingness to do something on the happening of a particular event. The PA consists of detailed provisions with three appendices. Relying upon the express commitment of the respondent to ship its natural gas through the pipeline, the appellant committed substantial funds to the "support and operation" of the pipeline. The appellant would

thereafter provide transportation services[10] through the pipeline for the respondent to ship specific quantities of natural gas through identified delivery points at specific prices according to specific pricing calculations.

The PA contains an express statement that the parties intended to be bound by the agreement, Appeal File, Exhibit 4 at 3, and that specific, enumerated obligations of both parties arose upon satisfaction of specific conditions precedent. Included in these obligations are the appellant's obligation to transport natural gas through a minimum of twenty-five delivery points and the respondent's obligation to enter into a minimum of three FTSAs. *Id.* at 7, 9.

The respondent is required in the PA, clauses 4 and 5, to elect rates, maximum daily quantities (MDQ) of natural gas to be shipped, and delivery points. Appeal File, Exhibit 4 at 6-7. Appendix A contains the respondent's election of rates, MDQ, and delivery points together with another component of pricing to be applied to the elected rates - Fuel, Loss & Unaccounted For percentages. *Id.* at 16-23. Appendix A was separately signed by the same contracting officer who executed the PA. Appendix B contains the form of the FTSA to be entered into upon fulfillment of the conditions precedent. *Id.* at 24-27. Appendix C contains an additional pricing calculation (the REX Basis/Transport Difference), *id.* at 29-30, that was also described in detail in the PA, *id.* at 4-5.

All of these terms are agreed in advance within the PA and its appendices to be applicable to the services rendered by the appellant to the respondent and the obligations of the respondent upon fulfillment of the conditions precedent. The parties agree that the conditions precedent for entering into the REX East FTSA have been fulfilled. Thus, the PA with its appendices is not an agreement to agree in the future. The PA is a contract entered into by an executive agency whereby the appellant provides services to the respondent, and therefore a contract within the purview of the CDA.

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[10] As described by the respondent in its motion to dismiss, the services provided by the appellant to the respondent are transportation services for the natural gas received by respondent in the RIK program to support the respondent's mission to receive natural gas as RIK and sell it on the open market.

The Board has Subject Matter Jurisdiction over the Appellant's Claims of Breach of the PA

As the PA is a contract within the purview of the CDA, the appellant's claims arising from its allegation that the respondent breached the PA by not fulfilling its obligation under the PA to enter into the REX East FTSA when the condition precedents of the PA were fulfilled are therefore claims pursuant to the CDA and within the jurisdiction of this Board. Respondent's motion to dismiss claims 2, 3, and 4 of the complaint is denied.

Respondent's Motion to Dismiss the Entire Appeal

Respondent has moved to dismiss the entire appeal, alleging that clause 16 of the PA entitled "Dispute Resolution" is an agreement of the parties to vest exclusive jurisdiction over their disputes in the United States District Court for the Southern District of New York. Appeal File, Exhibit 4 at 14. In support of its position, the respondent states that this clause reflects the intent of the parties to apply the Little Tucker Act (LTA), 28 U.S.C. § 1346(a)(2), to all disputes arising from the PA. The LTA is the waiver of sovereign immunity that allows the United States to be sued in federal district court if the amount of the claim is $10,000 or less. While the LTA is not mentioned in clause 16 or anywhere else in the PA, the respondent nevertheless concludes that the LTA is the legal basis of clause 16 and that this dispute must be resolved in the United States District Court of the Southern District of New York with appellant's recovery limited to $10,000.

The Respondent's position lacks merit. The Dispute Resolution clause, by its own terms, applies only "[t]o the fullest extent allowed by law." As the PA is a contract within the purview of the CDA, the CDA provides the exclusive remedy for the resolution of claims of breach of the PA, and the appellant has the choice of forum allowed by the CDA, i.e., an appeal to the United States Court of Federal Claims or the appropriate board of contract appeals.[11] *Dalton v. Sherwood Van Lines, Inc.*, 50 F. 3d 1014 (Fed. Cir. 1995); *Gonzalez-McCaulley Investment Group, Inc. v. United States*, slip op. (Fed. Cl. Aug 3, 2010); *Government Technical Services LLC v. United States*, 90 Fed. Cl. 522 (2009); *Morgan v. United States*, 55 Fed. Cl. 706 (2003).

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[11] The Dispute Resolution clause also states: "Transporter and Shipper agree that the provisions of subparagraph (a) above shall not apply to any controversy wherein the FERC has or exercises jurisdiction." While subparagraph (a) of the clause is the notice provision, neither party has alleged lack of notice or that FERC has jurisdiction over the disputes alleged in this appeal.

Appellant, having filed a certified claim pursuant to the CDA and received a contracting officer's final decision setting forth its appeal rights pursuant to the CDA, has elected to proceed at this Board. The appeal is properly before this Board. Respondent's motion to dismiss the entire appeal is denied.

Decision

Respondent's motions to dismiss claims 2, 3, and 4 of the complaint and to dismiss the entire appeal and for lack of jurisdiction are **DENIED**.

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ALLAN H. GOODMAN
Board Judge

We concur:

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JERI K. SOMERS
Board Judge

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RICHARD C. WALTERS
Board Judge