UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: September 27, 2011

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

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

denied appellant's certified claims for breach of a precedent agreement (PA) and a firm transportation service agreement (the REX West FTSA), between appellant and respondent, both pertaining to the pipeline constructed by appellant (REX pipeline or pipeline). The PA contained obligations of respondent that were relied upon by the Federal Energy Regulatory Commission (FERC) for approval of the construction of the REX pipeline. Additionally, the PA set forth conditions precedent that, upon their occurrence, obligated respondent to enter into FTSAs to transport natural gas that respondent received as royalties-in-kind (RIK) under respondent's RIK program from producers' oil and gas from land leased from the Federal Government.[2]

Appellant filed its complaint[3] with this Board alleging five claims.[4]

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

Claim 5 was stated as an alternative claim "if . . . it should be determined that the [PA] is not a binding contract." As stated previously, we held in our decision on jurisdiction that the PA is a binding contract. We therefore do not address Claim 5.

"respondent" or "MMS."

[2] In *Rockies Express Pipeline LLC v. Department of the Interior*, CBCA 1821, 10-2 BCA ¶ 34,542 (the decision on jurisdiction), this Board held that the PA is a contract under the purview of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2006) (CDA) (now codified at 41 U.S.C. §§ 7101-7109) and that this Board has jurisdiction pursuant to the CDA to resolve the appeal. Respondent had alleged that the PA was not a contract but rather an agreement to negotiate and enter into contracts in the future.

[3] Respondent alleges for the first time in its post-hearing response brief that the claims in appellant's complaint are not the same claims alleged in appellant's certified claim and addressed in the contracting officer's final decision. This argument lacks merit. The certified claim, Appeal File, Exhibit 35, and the complaint both address the alleged breach of the PA and failure to pay reservation costs allegedly due under the REX West FTSA.

[4] 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 with specificity five "claims" which might ordinarily be denoted as "counts" in a complaint.

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

On November 10, 2010, the parties filed stipulations of fact (Stipulations). A hearing on the merits was held in Washington, D.C., on November 17-19, 2010.[5] The parties each filed two post-hearing briefs[6] and the record was closed on May 24, 2011.

Background

The following factual background supplements that contained in our previous decision on jurisdiction.[7]

The MMS's RIK Program

In the mid-1990s, MMS began a pilot program exploring the economic feasibility of accepting RIK in lieu of royalty-in-value (RIV). Under the RIK program, MMS accepted a portion of the oil and natural gas produced by oil and gas producers as payment of the royalties due and owing the Federal Government. Stipulation 10. In concert with selling oil and gas on the open market, MMS had to procure processing services to process the oil or gas that it received from producers. It also had to procure transportation services to ship the

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[5] During the hearing on the merits, extensive parol evidence was offered by individuals who were involved in the negotiation of the PA and its appendices. As discussed in this decision, we find the relevant language of the PA and the REX West FTSA clear and unambiguous, even though the parties offer differing interpretations of specific language in the PA and the FTSA. A dispute over interpretation of contract language does not render clear language ambiguous simply because the parties do not agree on its interpretation. Accordingly, parol evidence cannot be used to vary the plain meaning. *Dynamics Corp. of America v. United States*, 10 Cl. Ct. 275 (1986).

[6] Issues raised in the post-hearing briefs not addressed in this decision were not relevant to the resolution of the appeal.

[7] Stipulations are quoted verbatim, unless otherwise noted, with editorial changes for clarity and the inclusion of various abbreviations and acronyms used in this decision.

oil or gas it received in-kind from the location where producers delivered royalty production to MMS to a beneficial market. Stipulation 11. In May 2004, MMS adopted a published five-year plan for the RIK program. Stipulation 12; Appeal File, Exhibit 59 at 439-93.

It was the acknowledged understanding of MMS at the inception of the RIK program, as approved by the Director of MMS, that standard industry contracts were to be used and that the transportation and sale of natural gas received as RIK were not governed by the Federal Acquisition Regulation (FAR). Appeal File, Exhibit 438 at 4-5. MMS's understanding was reported periodically to Congress. Appeal File, Exhibits 43 at 6, 45 at 7, 48 at 13.

The REX Pipeline

REX built the REX Pipeline between 2006 and 2009.[8] The REX pipeline is 1679 miles long, stretching from the Cheyenne Hub near Cheyenne, Wyoming, to Clarington, Ohio (with additional branch lines from Meeker, Colorado, and Opal, Wyoming, to the Cheyenne Hub). Stipulation 13. REX intended to open the pipeline in three stages because the project was being sequentially certified by FERC. Stipulation 14. The first pipeline segment, also called the Certificate 1 segment, was to transport gas from production areas west of Cheyenne, Wyoming, through the existing Cheyenne Hub, eastward to Audrain County, Missouri (the "Audrain Hub"). This segment is known as REX West. Stipulation 15. The second segment of pipeline, called the Certificate 2 segment, was to originate at Audrain and terminate in Lebanon, Warren County, Ohio (the "Lebanon Hub"). Stipulation 16. The third pipeline segment would transport gas from the Lebanon hub to Clarington, Monroe County, Ohio (the "Clarington Hub"). Stipulation 17. The Certificate 2 and Certificate 3 segments were eventually combined, and these segments are collectively known as REX East. Stipulation 18.

Before building a pipeline, a pipeline company must receive a Certificate of Convenience and Necessity from FERC. In issuing such certificates, FERC relies on any precedent agreements between the pipeline company and shippers of natural gas, which contain commitments from shippers to ship gas on the pipeline, to support a finding that the

[8] The construction of the pipeline was a private venture. Pursuant to the PA between REX and MMS, MMS reserved approximately 2.5% of the pipeline's capacity to ship gas during the contemplated duration of the FTSAs that were to be executed once the segments of the pipeline were built and operational. The remainder of the pipeline's capacity was reserved by other shippers of gas. Stipulations 27-30.

pipeline is in the public interest. FERC views the precedent agreements as binding agreements. Stipulation 19.

REX conducted an open season that started on November 9, 2005, and ended on December 19, 2005, to seek commitments in the form of PAs from shippers regarding the reservation of space on the proposed interstate REX pipeline. Stipulation 20.

Negotiation of the PA - Special Provisions Related to MMS - Exclusion of the Termination for Convenience Clause

In late October or early November 2005, REX and MMS entered into discussions regarding MMS's commitment to reserve space for shipping natural gas that it had received as RIK on the REX pipeline. Stipulation 21. REX developed and utilized with all bidders, i.e., potential shippers, in the open season a "pro forma" [i.e., standard] PA. The purpose of the PAs was to secure a commitment from shippers to ship gas on a newly constructed pipeline. Stipulation 23.

During their negotiations, REX and MMS agreed to make material deviations from the language of the pro-forma PA. These deviations made the PA a non-conforming transportation agreement. As a result, FERC had to approve the deviations. The parties discussed and negotiated many iterations before reaching the final PA. Stipulation 24. [9]

REX did not have prior experience with the Federal Government acting as a shipper over a pipeline. Stipulation 26. MMS did not discuss the FAR with REX during negotiations over the PA. Stipulation 31. Neither the PA nor the form for the FTSA attached to the PA as Appendix B contained any FAR clauses. Stipulation 32.

During negotiations, MMS advised REX that it would not enter into the PA unless certain termination provisions were included to protect MMS's interests. Stipulation 33. As a result, Provision 3, "Special Provisions Related to MMS Status as a Government Agency,"

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[9] MMS, through the RIK program, entered into only two PAs: the REX PA and a PA related to the Entrega portion of what became the REX pipeline. Entegra Gas Pipeline, L.L.C. had authorization from FERC to construct an interstate pipeline from Rio Blanco, Colorado, to the Cheyenne Hub (where the REX project was to begin). It was understood by the parties that the REX project and the Entegra Projects would be combined through corporate acquisition and regulatory integration so that, by the in-service date of REX West, the Entegra FTSA would be superseded by the REX West FTSA. Stipulation 25.

was added to the PA and to the form FTSA attached as Appendix B. Stipulation 34. Included in this section of the PA was the following language:

> 3. Special Provisions Related to MMS [sic] Status as a Government Agency
>
> (a) . . . .[10]
>
> (b) If the U.S. Minerals Management Service is, during the term of the FTSAs, directed by Legislative action or required by a change in the Federal or State policy to discontinue taking gas in kind, thereby rendering Shipper unable to meet its MDQ [maximum daily quantity] obligation under this Agreement, Shipper shall have the right to terminate the FTSAs upon thirty (30) days written notice to Transporter.

Appeal File, Exhibit 4 at 5.

REX refers to Provision 3 as a "specially negotiated" provision deviating from the terms of the pro forma PA signed by other shippers. This provision was the subject of negotiation between the parties before the PA was finalized. Appellant's Post-Hearing Brief at 10-12.

MMS understood that a Termination for Convenience clause was not included in the PA because REX objected to the inclusion of such a provision as contrary to industry practice. One of MMS's negotiators of the PA stated his understanding as to why a Termination for Convenience clause was not included in the PA:

> "[T]hat would completely and totally run counter to our approach in royalty in kind. . . . In a general sense, it would strain credulity that a pipeline company who is going to put billions of dollars into constructing a pipeline would allow for a clause that would render meaningless a shipper's commitment to ship on that pipeline and would thus render meaningless the pipeline company's investment on behalf of its shareholders in putting money into a large project like this.
>
> It is the most -- it is the height of -- of noncommerciality [sic] to have a contract in there that just on -- on a whim, the government could cancel

[10] Provision 3(a) of the PA is set forth in full in our decision on jurisdiction.

> something at its convenience. Absolutely and totally runs counter to everything that we did at the time.

Appeal File, Exhibit 438 at 7.

The Understanding as to the Non-Applicability of FAR to the PA – Approval by the MMS Executive Committee – Execution of the PA

The contracting officer for MMS's RIK program at the time the PA was negotiated was not included in most of the negotiations between REX and MMS. However, the contracting officer reviewed drafts of the PA shortly before the agreement was signed, and her comments were incorporated into the final PA. Stipulations 35, 36.

The contracting officer knew that FAR clauses were not included in the PA. Stipulation 38. The contracting officer understood that the RIK program was following the commercial practices of the oil and gas industry and using "standard industry contracts," i.e., ones without FAR clauses, for transportation and processing of natural gas. Stipulation 39. The contracting officer also understood that the transportation and processing agreements were incidental to the sale of gas, which was the sale of a commodity, and therefore the FAR did not apply to transportation and processing agreements. Stipulation 40.

On January 26, 2006, an MMS official who negotiated the PA and other MMS personnel presented to the Executive Committee, MMS's management group having oversight over the RIK program, information regarding the REX Pipeline project and the opportunity it represented for the RIK program. After the presentation, the Executive Committee unanimously approved going forward with the REX project. Stipulations 2(a), 41. MMS was interested in the REX pipeline both to enhance revenue under the RIK program and to move gas out of the Rockies, where it was plentiful, into the eastern markets of the United States, where it was less plentiful. MMS supported the pipeline because it believed that, once the pipeline was built, prices for gas in the Rockies would increase, which would in turn increase royalty revenues for the Government, whether taken in-kind or in-value. Stipulation 42.

On February 6, 2006, the contracting officer executed the PA on behalf of MMS. The PA was also duly executed by REX. Stipulation 43. The contracting officer understood the PA to require the Government to sign the FTSAs and Negotiated Rate Agreements specified in the PA once the conditions precedent set forth in the PA had been met. Stipulation 44.

Relevant Provisions of the PA

The PA contains, *inter alia*, the following provisions:

> 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[.]

Appeal File, Exhibit 4 at 2.

> 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 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) [minimum daily quantities] described herein.

Appeal File, Exhibit 4 at 9.

> 9. Termination Rights
>
> (b) Transporter shall have the right to terminate this Precedent Agreement with no liability to Shipper by giving Shipper five (5) days advance written notice (which notice must be given, if at all, within ten (10) days after the occurrence or non-occurrence of the relied upon event); provided that notice under this Section 9(b) may be given at any time while Shipper shall be in default of its obligations under Section 8(c) in the event: . . . .

Appeal File, Exhibit 4 at 10.

> 10. Authorities

> This Precedent Agreement and the performance hereof are subject to all present and future applicable valid laws, orders, decisions, rules and regulations of duly constituted governmental authorities having jurisdiction over the provision of natural gas transportation service in the interstate commerce of the United States of America ("governmental authority"). Should either of the parties, by force of any such law, order, decision, rule or regulation, at any time during the term of this Precedent Agreement be ordered or required to do any act inconsistent with the provisions hereof, then for the period during which the requirements of such law, order, decision, rule or regulation are applicable, this Precedent Agreement shall be deemed modified to conform with the requirement of such law, order, decision, rule or regulation; provided, however, nothing herein shall alter, modify or otherwise affect the respective rights of the parties to terminate this Precedent Agreement under the terms and conditions hereof.

Appeal File, Exhibit 4 at 12.

> 12. Representations
>
> Each Party represents to each other as follows: . . .
>
> This Precedent Agreement has been duly executed and delivered by such Party. This Precedent Agreement constitutes the legal, valid, binding and 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.

Appeal File, Exhibit 4 at 13.

MMS Reports to Congress

The Report to Congress: Mineral Management Service - Royalty in Kind Operation for Fiscal Year 2006 stated:

> Transportation and processing contracts are negotiated and executed where favorable to optimize revenued returns over RIV. Standard Industry contracts and business processes are used. . . . In January 2006, the MMS Executive Committee approved the first MMS RIK natural gas long haul firm transportation commitment . . . on the Rockies Express pipeline. This

> decision, based on extensive study of the Wyoming natural gas markets[,] involved both MMS staff and outside commercial and legal experts.

Appeal File, Exhibit 45 at 7, 9.

The Report to the Royalty Policy Committee, Mineral Revenue Collection from Federal and Indian Lands and the Outer Continental Shelf (Dec. 17, 2007) stated:

> As the RIK program has grown, a sophisticated set of operating procedures has evolved to address program activities. These include the following:
>
> > The use of standard industry contracts for RIK sales and service contracts. The sales and service provider contracts used in the RIK program are those used in the U.S. oil and gas industry . . . . Use of these standard contracts provides private contracting entities with the assurance that doing business with the Federal Government is not radically different than transactions among private oil and gas companies.

Appeal File, Exhibit 47 at 131.

FERC Approval, Execution, and Terms of the REX West Agreements

On September 21, 2006, FERC issued a preliminary determination on the REX West certificate application. Appeal File, Exhibit 44. In the determination, FERC approved the non-conforming provisions contained in the PA between REX and MMS. Stipulation 45.

On April 24, 2007, MMS executed the REX West agreements, which included the REX West FTSA.[11] Stipulation 46. The REX West agreements contained the terms prescribed in the appendices of the PA. Stipulation 47. The REX West agreements do not contain FAR terms. Stipulation 48. The REX West agreements obligated REX to reserve capacity in the pipeline for MMS to ship 50,000 decatherm/per day (Dth/day) and obligated MMS to pay a monthly reservation charge. MMS was not obligated to ship any gas, but if MMS chose to do so, it would also pay a commodity charge. Stipulation 49. The duration

[11] REX West agreements are the FTSA and the Negotiated Rate Agreements (NRA) associated with the REX West portion of the REX pipeline facilities upstream of the Cheyenne Hub. Appeal File, Exhibit 6; Stipulation 2(o).

of the REX West FTSA would continue until superseded by the REX East FTSA. Appeal File, Exhibit 6 at 2.

The terms of the tariff issued by FERC governing the REX pipeline are incorporated into the REX West agreements. Stipulation 50. Under the tariff, a "reservation charge" is due every month during the term of the REX West agreements. The reservation charge is due whether or not gas is shipped over the pipeline. Stipulation 51. The REX West agreements specified a monthly reservation charge of $24.1508 per Dth per month ($1,207,540 per month) during the term of the agreement once REX West was in full service. Stipulations 2®, 52. Only after MMS and other shippers entered into REX West FTSAs was REX able to commence construction on the REX West portion of the pipeline. Stipulation 53.

Interim service on REX West (service from Opal, Wyoming to the ANR Pipeline Company (ANR) delivery point) began on January 12, 2008. Stipulation 54. REX West went into full service (to Audrain, Missouri) on May 20, 2008. Stipulation 55.

MMS Changes its Position on FAR Applicability to the PA

On November 7, 2007, a Department of the Interior solicitor advised MMS in a written memo, Appeal File, Exhibit 210, that the FAR, specifically Part 12, "Commercial Items," applies to RIK transportation contracts. Stipulation 56. The solicitor's advice was requested by certain contracting officers in the Western Area Administrative Center (WASC) (who were not involved in the negotiation of the PA) who had expressed concern that RIK agreements were being entered into for goods and services without regard to the FAR. Stipulation 57. The Solicitor's Office provides advice and counsel to its client agencies, but a contracting officer is not required to adhere to an individual solicitor's advice. Stipulation 58.

In April 2008, MMS contracted with Acquisitions Solutions, Inc. (the consultant) "to perform an assessment and provide recommendations and expert advice for transitioning the RIK program to a FAR-governed system for procuring . . . natural gas transportation and processing agreements." Appeal File, Exhibit 176 at 7. One of the objectives was:

> Analyzing the requirements of FAR Part 12 and commercial contracting requirements against current RIK contracting and recommending, where appropriate, requests for waivers of FAR requirements in order to allow the RIK program to mirror industry practices.

Id. With regard to transportation contracts for natural gas, the consultant identified areas in which MMS could deviate from FAR requirements, including the termination for convenience clause, in order to mirror industry practices, and also stated that, where possible, "the contracting officer could tailor [FAR] clauses to align with industry practices." *Id.* at 47. Further, the consultant recommended that the Rockies Express PA should be honored as executed until its expiration. *Id.* at 51.[12]

On May 9, 2008, the MMS Office of the Deputy Associate Director issued a report entitled Fiscal Year Alternative Internal Control Review, which stated in relevant part:

> In November 2007 the MMS Solicitor's office determined that the RIK service contracts are covered under FAR. Therefore, the WASC and the RIK must work together to ensure compliance with the FAR while achieving MMS goals for the RIK program . . . .
>
> Finding - There are minimal documented policies and procedures within the RIK office for the service contracting process now covered under FAR, effective November 2007 . . . .
>
> Corrective Actions - Establish and implement guidelines that will ensure the execution of service contracts prior to the sale of RIK volumes . . . . Identify all areas of the RIK contracting where waivers to the FAR may be necessary to permit competitive negotiation of service contracts and meet operational conditions, [and] FERC requirements . . . . Acquire expert contract services to 1) identify flexibilities within the FAR to adapt to standard industry practices, while maintaining FAR compliance 2) recommend where potential waivers of FAR requirements are needed to maintain commercial operation of the RIK program . . . . [13]

Appeal File, Exhibit 48 at 13.

The Conditions Precedent to Entering into the REX East FTSA Were Fulfilled

The parties agree that the conditions precedent to entering into the REX East FTSA were fulfilled. *Rockies Express Pipeline LLC*, 10-2 BCA at 170,355 & n.8

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[12] These recommendations were contained in the consultant's final report issued in April 2009. Appeal File, Exhibit 176.

[13] The consultant was apparently hired in response to this last recommendation.

Failed Attempts to Negotiate the REX East Agreements

On or about May 16, 2008, REX sent to MMS draft form REX East agreements which conformed to the provisions of the PA. Appeal File, Exhibit 7; Stipulation 59. The PA specified a reservation charge of $1,663,800 per month for service on the entire REX pipeline for the duration of the REX East agreements. Stipulation 60.

Shortly before May 28, 2008, MMS informed REX that it had concerns with the REX East agreements sent by REX and requested further discussions with REX. Stipulation 61. On June 16, 2008, MMS forwarded "Commercial Items" FAR clauses to REX and requested that the draft REX East agreements be amended to include the clauses. MMS provided each proposed provision in full text as it was written in the FAR. Stipulation 62.

On June 19, 2008, MMS and REX met to discuss the REX East agreements. At the meeting, MMS advised REX that FAR provisions must be included in the REX East agreements before it would enter into the agreements.[14] MMS also advised REX that it needed approval to enter a ten-year commitment and it would seek that approval. Stipulation 63. During the meeting, REX conveyed its concerns about the proposed FAR clauses and specifically objected to including the FAR termination for convenience provision. REX also expressed concern that certain FAR clauses would conflict with the tariff issued by FERC. Stipulation 64.

By this time, a new contracting officer had replaced the individual who had served as the contracting officer at the time of the negotiation and execution of the PA. Appeal File, Exhibit 38.

From September 9, 2008, through December 5, 2008, the parties attempted to negotiate mutually acceptable revisions to the REX East FTSA, but they were unable to come to an agreement. During this period, MMS sent REX various FAR "Commercial Items" as well as FAR Utility clauses for inclusion in the proposed FTSA. REX, in turn, transmitted to MMS proposed revised versions of the FTSA for its consideration. Stipulations 66-74, 76.

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[14] MMS states that "[s]ubsequent to receiving the draft REX East FTSAs, [respondent] advised [appellant] that it would not enter into the REX East FTSAs unless they contained applicable FAR clauses." Respondent's Motion to Dismiss Claims 2, 3, and 4 at 10 (citing generally Appeal File, Exhibits 9, 10, 12, and 53); *See also Rockies Express Pipeline LLC*, 10-2 BCA at 170,355.

MMS did not seek a waiver, deviation, or exception from the FAR termination for convenience provision at any time. Stipulation 75.

REX Issues Notice of Termination of the PA

On or about December 11, 2008, REX provided MMS notice of termination of the PA. Stipulation 77. The notice of termination stated in part:

> In light of the failure of MMS to return executed agreements for REX EAST as required by the Precedent Agreement, and in accordance with section 9(b) of the Precedent Agreement, REX is hereby giving MMS notice of REX's termination of the Precedent Agreement, effective as of the date of this letter.

Appeal File, Exhibit 19.

MMS Discontinues Shipping Gas over the Pipeline and Paying Reservation Charges

March 31, 2009, was the last day that MMS shipped gas over the REX pipeline. Stipulation 78. Pursuant to the REX West agreements, MMS paid in full its monthly reservation charges to REX for the period January 12, 2008, through March 31, 2009. Stipulation 79. MMS has not paid reservation charges to REX under the REX West agreements or otherwise for any period after March 31, 2009. Stipulation 80.

REX East went into service to Lebanon, Ohio, on June 29, 2009. Stipulation 81.

REX Submits Certified Claims and Attempts to Mitigate Losses

By letter dated June 30, 2009, REX submitted certified claims pursuant to the CDA for breach of the REX West FTSA for failure to pay reservation charges for the period April 1, 2009 through June 29, 2009, and breach of the PA for failure to execute the REX East FTSA. Appeal File, Exhibit 35. These claims were denied by the contracting officer's final decision dated November 30, 2009. Appeal File, Exhibit 38.

REX has been able to mitigate some of its losses on the REX East pipeline by selling MMS's capacity for a rate less than the rate agreed to by MMS in the PA. Stipulation 82.

Government Accountability Office Investigation of the RIK Program and Report

In August 2009, the United States Government Accountability Office (GAO) issued a report of its investigation entitled "Royalty In Kind Program - MMS Does Not Provide

Reasonable Assurance It Receives Its Share of Gas, Resulting In Millions of Foregone Royalty." Appeal File, Exhibit 179. In this report, GAO set forth deficiencies in the RIK program resulting in uncollected royalties. These deficiencies included improper monitoring of production from which royalties are collected, insufficient audit of production and collection data, insufficient staff, insufficient training for staff, and lack of procedures to identify imbalances between royalties owed and royalties collected.

Secretary of the Interior Announces Phased Termination of the RIK Program

On September 16, 2009, the Secretary of the Interior (the Secretary) announced the phased-in termination of the RIK program. At the Secretary's direction, existing RIK sales contracts were allowed to expire at each contract's specified term. Also, MMS was not allowed to enter into new sales contracts. Stipulation 83. The termination of the program was announced before the House Committee on Natural Resources, at a hearing related to Committee Chairman Nick Rahall's proposed legislation called the "Clear Act." This proposed legislation called for the termination of the RIK program. Stipulation 84.

In his testimony, the Secretary stated that the agency's Inspector General and GAO had investigated various problems and ethical lapses within the MMS, and he considered the RIK program to be a "blemish" on the agency. He found the underlying premise of the program, to take a royalty in kind for sale in the market, to be inconsistent with the Government's practices in other areas. He therefore determined that the RIK program would be terminated, in order to transition to a more transparent and accountable royalty collections system. Appeal File, Exhibit 183 at 17-18, 20.

In response to the announcement of the termination of the RIK program, Chairman Rahill responded:

> Bravo, bravo, bravo, I salute you for your announcement today that by administrative decision you will end the Royalty-In-Kind program. As you know, I've been calling for that for several years, Mr. Secretary, and I do think it will end the opportunity for mischief, or the temptation, and perhaps provide a more decent return for the American people. So I salute you for that announcement you just made.

The Secretary's office did not know about the REX claim when the RIK program was terminated. Stipulation 86.

Termination of the RIK Program

After the Secretary's September 16, 2009, announcement, MMS phased out the RIK program, including not entering into any more sales contracts. MMS honored its existing sales contracts and allowed these contracts to expire in their natural course. Associated transportation and processing agreements were terminated when sales contracts ended, and none were breached. Stipulation 87.

On December 8, 2009, the Secretary issued a memo ending the RIK program. Stipulation 88. This memo read in part:

> In my testimony before the House Natural Resources Committee on September 16, 2009, I announced my decision to terminate the Royalty in Kind (RIK) program. This decision to terminate the program comes after a thorough review and is based upon my strong conviction that the Department of Interior [sic] should be regulating, not participating in, industry activities, as well as concerns that have been raised regarding the program's capacity to ensure transparency and a fair return to the taxpayer.

Appeal File, Exhibit 188.

All sales contracts related to the sale of gas in Wyoming expired as of October 31, 2009. All other gas sale contracts expired as of March 31, 2010. All remaining RIK-related contracts expired as of September 30, 2010. Stipulation 89.

Stipulation of Damages

REX claims and MMS stipulates that $3,542,121 would be due REX if REX were to prevail on its claim for breach of the REX West FTSA. REX claims and MMS stipulates that, taking into account mitigation by REX, the amount due for breach of the PA through October 31, 2009, is $3,319,104. Appeal File, Exhibits 270, 433 at 1; Respondent's Post-Hearing Brief at 95.

Discussion

Claim for Breach of the REX West FTSA

Claim 1 of the complaint alleges breach of the REX West FTSA by MMS for failure to pay three months of reservation charges which REX alleges MMS was obligated to pay.

On April 24, 2007, MMS executed the REX West agreements required by the PA. The REX West agreements were the FTSA and the NRA associated with the REX West portion of the pipeline. The REX West agreements contained the terms prescribed in the appendices of the PA. The REX West agreements obligated REX to reserve capacity in the pipeline for MMS to ship 50,000 Dth/day and obligated MMS to pay a monthly reservation charge. MMS was not obligated to ship any gas, but if MMS chose to do so, it would also pay a commodity charge.

The terms of the tariff issued by FERC governing the pipeline are incorporated into the REX West agreements. Under this tariff, a "reservation charge" is due every month during the term of the REX West agreements. The reservation charge is due whether or not gas is shipped over the pipeline. The REX West agreements specified a monthly reservation charge of $1,207,540 per month during the term of the agreement once the REX West pipeline was in full service. Interim service on REX West (service from Opal, Wyoming, to the ANR delivery point) began on January 12, 2008. REX West went into full service (to Audrain, Missouri) on May 20, 2008. The duration of the REX West agreements continued until REX East went into service on June 29, 2009.

Pursuant to the REX West agreements, MMS paid in full its monthly reservation charges to REX for the period from January 12, 2008, through March 31, 2009. MMS has not paid reservation charges to REX under the REX West agreements or otherwise for any period after March 31, 2009.

REX seeks to recover monthly reservation charges for April, May, and June 2009, which it alleges MMS was obligated to pay but failed to pay. MMS maintains its obligation to pay reservation charges ended on March 31, 2009, the last day it shipped gas on the pipeline. Additionally, MMS asserts that REX's actions in terminating the PA "made it impractical to ship gas beyond the in-service date [for REX East] projected in [REX's] Termination Notice - April 1, 2009."

MMS's position lacks merit, as it is contrary to the plain language of the REX West FTSA and the tariff incorporated into the FTSA, both of which obligated MMS to pay reservation charges whether it shipped gas or not until REX East went into service. The fact

that REX terminated the PA and advised MMS of a potential in service date for REX East did not impact MMS's ability to ship gas through the date REX East was actually placed in service, nor did MMS's obligation to pay reservation charges depend on whether it shipped gas.

Pursuant to the terms of the REX West FTSA, REX is entitled to reservation charges for April, May, and June 2009 for MMS's breach of the REX West FTSA.

Quantum for Breach of the REX WEST FTSA

REX claims and MMS stipulates that $3,542,121 would be due REX if REX were to prevail on its claim for breach of the REX West FTSA. Accordingly, REX is entitled to this amount.

Claims for Breach of the PA

Claim 2 of the complaint alleges MMS breached the PA by failing to enter into the REX East FTSA and to pay monthly reservation charges for the entire ten-year duration of that FTSA in the amount of $173,230,601.10 plus accruing interest. Claim 3 alleges MMS breached the PA's implied duty of good faith and fair dealing.[15] Claim 4 alleges MMS breached the representation in clause 12 of the PA that the PA is a "legal, valid, binding and enforceable obligation of [MMS]." As discussed herein, we find that MMS has breached the PA by failing to enter into the REX East FTSA. However, damages are limited because of the occurrence of the event contemplated in the specially negotiated termination provision 3(b) of the PA.

Allegations of Breach

We held in our decision on jurisdiction that the PA is an enforceable contract with all the essential terms set forth in the PA and the appendices. The appendices included the terms of the FTSAs, which MMS was obligated to enter into once all specified conditions precedent were met. *Rockies Express Pipeline LLC*, 10-2 BCA at 170,357. The parties agreed that the conditions precedent set forth in the PA for entering into the REX East agreements, including the FTSAs, were fulfilled.

[15] In resolving the allegation of breach of the PA, we did not find it necessary to address the alleged breach of the implied duty of good faith and fair dealing, since we find breach of contract for other reasons.

REX's claims of breach of the PA are based upon MMS's actions after the conditions precedent for entering into the REX East agreements were fulfilled. MMS, having concluded that its initial determination that the FAR did not apply to contracts for transportation of natural gas was erroneous, attempted to renegotiate the terms of the REX East FTSA, allegedly to make the FTSA compliant with the FAR. MMS insisted on the inclusion of FAR clauses and did not seek deviations to preserve the essential terms of the FTSA that had been included in the PA, in particular the exclusion of a termination for convenience clause. Ultimately, after months of negotiation, REX issued a notice of termination of the PA.[16]

The Issue of FAR Applicability Is Not Dispositive

MMS officials at the time of the execution of the PA and for several years thereafter, including the period during which the REX West agreements were executed, were of the understanding that standard industry contracts should be used for transportation of natural gas and that the FAR did not apply to such contracts. Nevertheless, MMS justifies its failure to enter into the REX East agreements with the same terms as the REX West agreements because it subsequently concluded that the FAR applies to the procurement of transportation services for natural gas under the RIK program. MMS believes therefore that the PA procurement was illegal because it was not FAR compliant. REX counters that FAR did not apply, that its agreements with MMS were legally valid and binding, and that MMS is liable for its breach of those agreements. Both parties have submitted detailed arguments in support of their respective positions as to FAR applicability. As discussed below, whether or not the FAR applied to this procurement, MMS has breached the PA by failing to execute the REX East FTSA.

MMS Breached the PA if the FAR Did Not Apply to the Procurement

If the FAR did not apply to the procurement of transportation services for natural gas, MMS breached its contractual obligation in provision 8(a) of the PA because it failed to execute the REX East FTSA when all conditions precedent were fulfilled. MMS's insistence

[16] MMS asserts that REX failed to give notice of a dispute pursuant to the Disputes clause of the PA. Respondent's Post-Hearing Response Brief at 10-11. However, MMS was aware that REX disputed MMS's insistence on including FAR clauses in the REX East FTSA, and the negotiations that resulted were an attempt to resolve this dispute. MMS therefore had actual notice of the dispute once it refused to execute the REX East agreements initially tendered by REX. REX's attempt to negotiate a resolution did not waive its right to claim a material breach. *See, e.g.*, *Northern Helex Co. v. United States*, 455 F.2d 546 (Ct. Cl. 1972).

that essential terms of the REX East FTSA be altered from those that were negotiated and included in the PA was a material breach of the PA, as those terms relate to a matter of vital importance and go to the essence of the contract. *Gilbert v. Department of Justice*, 334 F.3d 1065, 1071 (Fed. Cir. 2003). This material breach justified REX's termination of the PA. *Stone Forest Industries, Inc. v. United States*, 973 F.2d 1548 (Fed. Cir. 1992).[17]

MMS Breached the PA if the FAR Applied to the Procurement

We address MMS's assertion of illegality as a threshold issue.

The PA Procurement Was Not Illegal

The Government may cancel a contract awarded in violation of procurement statutes and regulations. *Schoenbrod v. United States*, 410 F.2d 400, 403-04 (Ct. Cl. 1969). Where the illegality is plain and palpable, the contract is void ab initio, and recovery under the contract is prohibited. *Id.*; *Prestex Inc. v. United States*, 320 F.2d 367, 372-73 (Ct. Cl. 1963).

In determining whether an award is palpably illegal, courts seek to protect innocent contractors. *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir.1986). Contractors generally know little about the complex procurement statutes and regulations and should not suffer for every deviation from them. *Trilon Educational Corp*., 578 F.2d 1356 (Ct. Cl. 1978). As a result, a contractor is penalized for a violation of a statute or regulation only when the contractor's actions or statements invited the illegal award, or when the illegality itself was so obviously contrary to statute or regulation that the contractor should have recognized it. *Amdahl Corp*., 786 F.2d at 395 (quoting *Dairy Sales Corp*., 52 Comp. Gen. 215, 218 (1972)). When the question of illegality is close, the contractor should be accorded the benefit of all reasonable doubts and the contract award upheld unless clearly invalid. *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963).

The circumstances of the instant case do not lead to a conclusion of illegality. REX's actions or statements clearly did not invite the understanding that the procurement was not governed by the FAR, nor was the conclusion that the procurement was not governed by the FAR itself so obviously contrary to statute or regulation that REX should have recognized it. At the inception of the RIK program through the time the PA was negotiated and executed

[17] MMS asserts that REX did not give notice of termination pursuant to provision 9(b) of the PA. Provision 9(b) applied in circumstances in which REX would relieve MMS from liability in the event of termination. REX's termination of the PA was based on the right to terminate in the event of material breach and was not pursuant to this provision in the PA.

and the REX West agreements were executed, the MMS Executive Committee and the contracting officer had a clear and unequivocal understanding that contracts for transportation of natural gas were not governed by the FAR and shared this understanding with Congress and REX. REX had no experience with government procurement and therefore had no basis to raise the issue of FAR applicability. MMS understood that standard industry contracts would be used, and that the inclusion of a Termination for Convenience clause was contrary to industry practice. The issue of FAR applicability was not discussed with REX and the resulting PA and appendices did not contain FAR clauses.

When all parties act under the assumption that a statute or regulation does not apply, then the alleged illegality is not obvious and the question of illegality is, at most, close. *Cubic Applications, Inc. v United States*, 37 Fed. Cl. 345 (1997). As further evidence of the parties' understanding that the FAR did not apply to this procurement, REX and MMS executed the REX West Agreements in substantially the same form as in the appendices to the PA, without FAR clauses and without raising the issue of FAR applicability. The doctrine of concurrent interpretation, or contemporaneous construction, holds that great, if not controlling, weight should be given to the parties' actions before a dispute arises in order to interpret a contract. *Saul Subsidiary II Ltd. Partnership v. General Services Administration*, GSBCA 13544, et al., 98-2 BCA ¶ 29,871.

MMS suggests that "[a]ppellant, a billion dollar corporation, should have known that the Federal [Acquisition] Regulations were required to be included in the REX agreements."[18] Respondent's Post-Hearing Brief at 76. In making this suggestion, MMS ignores its initial conclusion that the FAR did not apply and the fact that the issue of FAR applicability was never discussed. MMS's assertion that REX nevertheless should have come to a contrary conclusion as to the applicability of the FAR lacks merit. As our appellate authority has stated, "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Maxima Corp. v. United States*, 847 F.2d 1549, 1556 (Fed. Cir. 1988) (quoting Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970)).

[18] MMS cites *General Builders Supply Co. v. United States*, 409 F.2d 246 (Ct. Cl. 1969), as a legal basis for its suggestion. This decision requires a contractor to be familiar with the regulations that apply to its contract. It does not impose upon a contractor the duty to second-guess the Government's own determination that certain regulations do not apply.

Accordingly, we find that the procurement of the PA was legal and must be upheld. *John Reiner & Co.*[19]

MMS Failed to Follow the Provisions of the FAR that Would Have Preserved the Essential Terms of the Bargain

Provision 8(a) of the PA required MMS to enter into the REX East FTSA when all conditions precedent occurred. The parties agree that the conditions precedent occurred. Provision 10 of the PA states that "[t]his Precedent Agreement and the performance hereof are subject to all present and future applicable valid . . . regulations of duly constituted governmental authorities having jurisdiction over the provision of natural gas transportation service in the interstate commerce of the United States of America." Provision 12 of the PA states that "[t]his Precedent Agreement constitutes the legal, valid, binding and enforceable obligation of such Party."

MMS relies upon provisions 10 and 12 of the PA to justify its insistence that the essential terms of the PA and the REX East agreements be materially changed when it concluded that FAR would apply to contracts for the transportation of natural gas. While it is true that provisions 10 and 12 of the PA demand compliance with applicable regulations, MMS's actions violated these provisions because MMS failed to properly apply the FAR to the unique circumstances of the PA. Had MMS properly complied with the FAR, it would have preserved the bargain it had made by applying the FAR provisions that allow for deviations. These provisions clearly contemplate circumstances such as the unique procurement at issue in this appeal.

The relevant FAR provisions read as follows:

> Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specific needs and requirements of each agency. *The development and testing of new techniques and methods of acquisition should not be stifled simply because such action would require a FAR deviation.* The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods.

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[19] In *John Reiner & Co.*, the contractor was not awarded breach damages because the contract contained a Termination for Convenience clause. The PA does not contain a Termination for Convenience clause.

48 CFR 1.402 (2008) (emphasis added). The FAR defines a deviation as any one or combination of the following:

> (a) The issuance or use of a policy, procedure, solicitation provision . . . contract clause . . . , method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR.
>
> (b) The omission of any solicitation provision or contract clause when its prescription requires its use.
>
> (c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR . . . .
>
> (d) The use of a solicitation provision or contract clause prescribed by the FAR on a *substantially as follows* or *substantially the same* as basis . . . , if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject matter in the FAR.
>
> (e) The authorization of lesser or greater limitations on the use of any solicitation provision, contract clause, policy, or procedure prescribed by the FAR.
>
> (f) The issuance of policies or procedures that govern the contracting process or otherwise control contracting relationships that are not incorporated into agency acquisition regulations . . . .

48 CFR 1.401.

Thus, instead of applying the deviation provisions of the FAR to preserve the bargain that it had made, in particular exclusion of the termination for convenience clause, MMS insisted on materially altering the previously agreed terms by inclusion of FAR terms, including a Termination for Convenience clause.[20] In so doing, MMS breached provisions 10 and 12 of the PA requiring correct application of applicable regulations and the contractual assertion that the PA was legally binding. The result was that it failed to enter into the REX East agreements, including the REX East FTSA, as required by provision 8(a).

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[20] MMS's consultant recommended, after REX's termination of the PA, that a waiver of the FAR requirements would have been the proper corrective action.

As we stated previously, a party breaches a contract when it is in material non-compliance with the terms of the contract. We find this breach material, as it relates to a matter of vital importance and goes to the essence of the contract. *Gilbert.* As such, MMS's material breach justified REX's termination of the PA.

The Christian Doctrine Does Not Justify MMS's Breach

Because many of the FAR clauses MMS sought to incorporate into the REX East agreements, including the Termination for Convenience clause, were mandatory, MMS asserts that "[e]ven if these clauses were omitted from the PA and the REX East agreements, the Boards and Courts would interpret [them] as though the clauses were in fact in the Agreements." Respondent's Post-Hearing Brief at 69 (citing the "Christian Doctrine," as held in *G.L. Christian & Associates v. United States*, 312 F.2d 418, *reh'g denied*, 320 F.2d 345 (Ct. Cl. 1963). The *Christian* decision does not prohibit the exercise of FAR deviations when justified, nor does it demand that the Government materially alter a legal, negotiated bargain when the bargain can be preserved by deviating from the FAR.

The Doctrine of Mutual Mistake is Not Applicable

MMS alleges that the initial PA procurement is a case of mutual mistake, as neither party realized the FAR applied. Thus, it argues, "[O]nce it became clear that the FAR applied, the parties should have reformed the PA and the follow-on transportation agreements to remedy the mistake." Respondent's Post-Hearing Brief at 75-76. This argument ignores the predicate of the RIK program, i.e, the use of standard industry contracts, the negotiated exclusion of the Termination for Convenience clause, and the inclusion of the ten-year duration for the FTSAs. The argument does not recognize MMS's ability pursuant to the FAR to preserve the bargain that was made by application of the deviation provisions. This is not a case for reformation due to mutual mistake, as the parties were not mistaken as to the terms they intended to include and exclude in the PA and the FTSAs.

Quantum for Breach of the PA

The Interpretation of Provision 3(b) of the PA

REX seeks recovery of $173,230,601.10, the reservation charges MMS would have paid during the entire ten-year duration of the REX East FTSA. MMS maintains that even if it breached the PA by not entering into the REX East FTSA, damages are limited by provision 3(b) of the PA, which reads as follows:

> If the U.S. Minerals Management Service is, during the term of the FTSAs, directed by Legislative action or required by a change in the Federal or State policy to discontinue taking gas in kind; thereby rendering Shipper unable to meet its MDQ obligation under this Agreement, Shipper shall have the right to terminate the FTSAs upon thirty (30) days written notice to Transporter.

While MMS understood that a termination for convenience clause was not acceptable to REX, provision 3(b) was a specially negotiated termination provision to protect the interest of MMS from a possible, foreseeable event, i.e., the discontinuance of taking gas in kind. It is clear that, pursuant to the above provision, if MMS were, during the term of the FTSAs, directed by legislative action or required by a change in Federal or state policy to discontinue taking gas in kind, MMS could terminate any existing FTSAs. This is reasonable, and certainly understandable, since MMS would have no reason to pay to reserve capacity on the pipeline if it no longer was receiving gas to ship.

MMS was directed by the Secretary of the Interior to discontinue taking gas in kind when the Secretary terminated the RIK program. Even so, the parties disagree whether the facts surrounding the termination of the RIK program comprised a "change in Federal policy" as contemplated in provision 3(b).

MMS maintains that even if the REX East FTSA had been executed by the parties, the Government would have been relieved of its obligation to pay reservation charges as of October 31, 2009, the last date that gas would have been shipped under the RIK program. MMS bases this position on its interpretation of provision 3(b), asserting that the Secretary's decision to discontinue the RIK program was a "change in Federal policy to discontinue taking gas in kind" which would have rendered MMS unable to meet its obligation to ship gas, thereby making it a certainty that MMS would have terminated the FTSA. On the other hand, REX asserts that the decision of the Secretary and subsequent termination of the RIK program was not a "change in Federal Policy to discontinue taking gas in kind" within the purview of provision 3(b).

We employ the ordinary meaning of the words used in an agreement unless there is evidence that the parties meant otherwise, through the adoption of a special definition. *Tecom, Inc. v. United States*, 66 Fed. Cl. 736 (2005). The PA and its appendices do not define "policy" or "federal policy," nor does either of them indicate that the parties intended to adopt a special definition for these terms. We therefore turn to the plain meaning of these terms.

The plain meaning of "policy" is "a definite course of action or method of action selected from among alternatives in light of given conditions to guide and determine present and future decisions; a high-level plan embracing the general goals and acceptable procedures, especially of a governmental body." *Webster's New Collegiate Dictionary* 882 (1979).

We find that MMS's interpretation comports with this plain meaning of "policy" and the plain meaning of provision 3(b). The Secretary's decision to terminate the RIK program, made in light of investigatory findings of the agency's Inspector General and the GAO, and the need for greater transparency in Government, was "a change in Federal policy to discontinue taking gas in kind." The existing policy of taking royalty-in-kind was changed to only taking royalty in value. Thus, the Government would have no gas to ship, so under provision 3(b), any existing FTSAs would be terminated.

REX offers a myriad of unpersuasive arguments that do not comport with the plain meaning of the term "policy." REX acknowledges that "the parties did not expressly assign any special meaning to the term (federal policy)." Appellant's Post-Hearing Brief at 59. REX suggests that MMS could have added clarifying language to provision 3(b). However, REX does not suggest that its own representatives could have done so, nor does REX explain why its own representatives did not. *Id.* Provision 3(b) was subject to negotiation, and both parties had the opportunity to suggest clarifying language if needed. An argument by one party that the other party failed to do so lacks merit.

REX further suggests that MMS's representatives who negotiated the PA must have had in mind the definitions of federal policy that are implied within the Administrative Procedure Act (APA) 5 U.S.C. §§ 551(4), and a decision of the Department of the Interior Board of Land Appeals (IBLA), *Amoco Prod. Co.*, 112 IBCA ¶ 77 (1989), requiring federal policy decisions within the context of the APA to be subject to rulemaking and comment. REX admits that the APA does not define "policy," but alleges that the APA "prescribes how policy statements are made." Appellant's Post-Hearing Brief at 59-60. REX believes MMS's representatives had these concepts in mind because "these views were known to the public when the Precedent agreement was signed." *Id.* at 61. Since the Secretary's decision

was not subject to the processes outlined by the APA or the IBLA decision, REX argues it was not a "change in Federal policy" within the purview of provision 3(b).

This argument fails legally and factually. The APA exempts from notice, comment, and rulemaking any matter relating to contracts. 5 U.S.C. § 553(a)(2). While REX suggests that MMS had the APA and IBLA decision in mind during the negotiation of the PA, there is no indication that this is true, nor does REX suggest that its own representatives considered these concepts.

REX also cites *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994), as applicable. In that case, holders of oil and gas leases challenged the authority of the Department of the Interior to change procedures for determining oil and gas royalties by an internal, unpublished paper without calling for comment and rulemaking under the APA. The court held that this procedure was a substantive rule subject to the APA. This factual situation is not applicable to the instant case, in which the Secretary of the Interior terminated a program after investigation by the agency and GAO. The Secretary's authority to terminate the RIK Program and his reasons for doing so are not at issue.

As REX correctly states, "[T]he Board is not called upon to decide whether the Secretary's decision to terminate the RIK program should have been the subject notice and comment rulemaking [sic]. It is called upon only to find the meaning of a phrase employed by the parties in their contract: Was the Secretary's decision to terminate the RIK program a 'change in the Federal . . . policy'." Appellant's Post-Hearing Brief at 61. As stated above, we find that the decision was a change in federal policy.

REX states further that "the mere termination of the RIK program, without being under the compulsion of a formal change in federal policy, was not enough to allow Respondent out of the contract." Appellant's Post-Hearing Brief at 63. This statement appears to imply a difference between formal and informal change in federal policy, a distinction not stated in the PA.

Additionally, REX asserts that since the direction of the Secretary was to honor existing contracts, MMS may not have terminated the PA when it terminated the RIK program and after the last gas shipped. This argument also fails. Once there was no gas to ship, it is not reasonable to assume the MMS would have continued the FTSA in effect and paid reservation costs without any prospects of shipping gas on the pipeline.

REX also insists that unless the change in federal policy is something more than what the Secretary did to terminate the RIK program, this would convert provision 3(b) to a termination for convenience clause, which REX rigorously opposed during negotiations.

Appellant's Post-Hearing Brief at 58-59. REX apparently does not understand the premise of a termination for convenience clause. Such a clause would have allowed the Government to terminate the PA for its convenience if it determined that termination was in the best interest of the government, even if the RIK program were still in place. *See, eg.*, *Maxima Corp.*, 847 F.2d at 1552. Provision 3(b) conditions termination on a specifically foreseen terminating event that did in fact occur. It is not analogous to a termination for convenience clause. REX's position on this issue fails in all respects. There is no indication in the PA that the definition of "federal policy" posited by REX's counsel was the contractual intent of the parties or the intent of any individual who was involved in the negotiation of the PA.[21]

Provision 3(b) Limits REX's Damages

REX believes that its termination of the PA in response to MMS's breach bars MMS from relying upon provision 3(b). REX therefore maintains that it is entitled to the reservation charges that MMS would have paid during the ten-year duration of the REX East FTSA, even if the Secretary's decision to terminate the RIK program was a change in Federal policy.

REX's position on this issue lacks merit, as it fails to recognize the general principle that "the non-breaching party is not entitled, through the award of damages, to achieve a position superior to the one it would reasonably have occupied had the breach not occurred." *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1371 (Fed. Cir. 2003). As we found above, had the breach not occurred and the REX East FTSA been executed, the FTSA would have terminated as the result of the occurrence of the terminating event specified in provision 3(b) of the PA, and MMS would owe REX no additional reservation charges. To award REX reservation charges thereafter would place REX in a better position than it would have achieved had MMS not breached.

REX relies primarily upon a series of decisions of the Court of Claims that involve a contractor with a contract to recover and sell helium to the Government. After purchasing some helium, the Government failed to receive funding and did not continue to purchase helium. The contractor terminated the contract for non-payment. Thereafter, the Government attempted to exercise its right to terminate the contract, relying upon a

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[21] Even if the negotiated language were ambiguous, we could not apply the rule of *contra proferentem* to construe the ambiguity against the drafter. Where a contract is negotiated and bargained for, such as the PA in this instance, there is no "drafter" who has unilaterally prepared a document which is not subject to negotiation. *Prince George Center, Inc. v. General Services Administration*, GSBCA 12289, 94-2 BCA ¶ 26,889.

specifically-negotiated termination clause, that provided for termination in the event that one of two specific terminating events occurred.

In *Northern Helex Co. v. United States*, 455 F.2d, 546 (Ct. Cl. 1972), the Court held that the non-payment was a material breach that entitled the contractor to terminate the contract, and reserved a determination of damages for a future hearing. In *Northern Helex Co. v. United States*, 20 CCF ¶ 83,514 (Ct. Cl. 1974),[22] the Court did not hold, as REX implies, that the contractor's termination barred the operation of the specially-negotiated termination clause. Rather, the Court extensively analyzed the factual circumstances and found that neither of the terminating events specified in the specially-negotiated termination clause had occurred. The Court ruled further that the Government could not convert its breach to a Termination for Convenience, as there was no Termination for Convenience clause in the contract. The Court then determined that the amount of damages due the contractor would be damages for the entire contract period.[23]

The circumstances of the instant appeal clearly differ from those in the *Northern Helex* decisions. While there is no Termination for Convenience clause in the PA, the terminating event contemplated in the PA's specifically-negotiated termination clause -- provision 3(b) – did occur, i.e, "a change in Federal policy to discontinue taking gas in kind." REX's damages are therefore limited by the actual occurrence of the terminating event. Had the breach not occurred, and the REX East FTSA been executed, the discontinuance of taking gas in kind would have ended the obligation of the MMS to pay reservation changes on October 31, 2009.

Calculation of Quantum for Breach of the PA

REX claims and MMS stipulates that, taking into account mitigation by REX, the amount due for breach of the PA through October 31, 2009, is $3,319,104. Accordingly, REX is entitled to recover this amount.[24]

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[22]Later decisions by the Court in this case are not relevant to the resolution of this appeal.

[23]REX also cites *Merando v. Mathay*, 152 F.2d 21 (D.C. Cir. 1945), and *Witchbeck v. United States*, 77 Ct. Cl. 309 (1933), which hold that damages accrued prior to termination cannot be avoided by termination. These decisions do not hold that the entire anticipated costs of performance are due when the contract is terminated before completion.

[24]MMS also asserts that REX's damages would have been limited by operation of Provision 3(a) of the PA, as the decline of natural gas prices, as described by REX's expert

Decision

MMS breached the REX West FTSA by not paying reservation charges as agreed. REX is entitled to damages for this breach in the amount of $3,542,121. MMS breached the PA by not executing the REX East FTSA and not paying reservation charges. REX is entitled to damages for this breach, limited by Provision 3(b) of the PA, in the amount of $3,319,104.

The appeal is **GRANTED IN PART** in the amount of $6,861,225, plus interest pursuant to the CDA from the date the contracting officer received the claim.

_____
ALLAN H. GOODMAN
Board Judge

We concur:

_____
JERI KAYLENE SOMERS
Board Judge

_____
RICHARD C. WALTERS
Board Judge

during the hearing, would have resulted in termination of the REX East FTSA by July 2010. Respondent's Post-Hearing Brief at 93-94. As we find that Provision 3(b) limits damages through October 2009, we do not address this issue.