BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION & PUBLIC FACILITIES

MILLER CONSTRUCTION CO., LTD.	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, SOUTHCOAST REGION	)	OAH No. 19-0088-CON

ORDER ON COMPENSABILITY OF MILLER CONSTRUCTION'S CLAIMED EXPENSES FOR PREPARATION OF ITS TERMINATION CLAIM

A. Introduction

Miller Construction filed a claim for termination-for-convenience damages, including a claim for claim-preparation expenses. The Region issued a Contracting Officer's Decision, ruling that many of the claimed preparation expenses are not compensable under the contract. The parties have briefed the issues in dispute. Under the contract, the costs incurred in converting the termination for default into a termination for convenience are not compensable as claim preparation expenses.

B. Are expenses incurred in converting a default termination to a termination for convenience compensable as claim-preparation expenses?

Under the Standard Specifications, subsection 108-1.09 allows compensation for costs "reasonably necessary for preparation for the termination claim and settlement negotiations."[1] Miller Construction claims that it is entitled to compensation for legal and other professional expenses incurred during the first phase of the proceedings on the Shelter Cove project because those proceedings converted the termination for default into a termination for convenience. Miller Construction argues that it was prohibited from filing its termination-for-convenience claim until it had a legal ruling converting the termination for default into a termination for convenience. It concludes the initial hearing on the termination for default was simply a first step, clearly necessary for the preparation of its termination-for-convenience claim.

The Region disputes Miller Construction's interpretation. It argues that expenses incurred in the prosecution of the wrongful-termination claim are compensable under the claims provision of the Standard Specifications, subsection 105-1.17.[2] This subsection sets out that an appeal from a

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[1] MCC Initial Brief on Recovery of Claim Prep. Exp. at 2 (citing SCR 330 at 64 (§108-1.09(3)(a)(3))). Note that this order addresses preparation costs. The compensability of settlement costs is not in dispute, and will not be discussed in this order.

[2] SCR Opening Brief Regarding the Compensability of Claim Preparation Expenses at 1.

Contracting Officer's Decision issued under §105-1.17 will be "decided in accordance with the State Procurement Code's appeal procedures, including . . . AS 36.30.631"[3]. Because AS 36.30.631 specifically addresses compensability of claim-prosecution expenses, the Region asserts that only AS 36.30.631 can be used to determine the compensability of expenses incurred in prosecuting a claim under §105-1.17. It concludes that if claim-prosecution expenses are allowed under subsection 109-1.08 (as claim-preparation expenses), instead of subsection 105-1.17, it would "annul" the reference to AS 36.30.631 in subsection 105-1.17.[4]

The Region overstates its case. Miller Construction's approach would not annul the reference to AS 36.30.631 in subsection 105-1.17 because the reference would still apply to all claims that were not termination-for-convenience claims. Nevertheless, the larger point made by the Region is well taken. The contract specifically provides a mechanism for compensation of claim-prosecution expenses (AS 36.30.631) for claims filed under subsection 105-1.17, and a different mechanism for compensation of claim-preparation expenses for termination-for-convenience claims (§108-1.09(3)(a)(3)). This tends to support a conclusion that we should not merge claim prosecution into claim preparation unless the contract makes clear that a claim-prosecution expense could be treated as a claim-preparation expense.

Nothing in the contract indicates that prosecution of a wrongful-termination claim can be treated as preparation of a termination-for-convenience claim. Subsection 108-1.09 does not include a cross-reference stating "notwithstanding §105-1.17" or otherwise provide an exception to the rule that claim-prosecution expenses are compensable under AS 36.30.631. In addition, even under subsection 108-1.09, claim-prosecution expenses are not compensable. Once the termination-for-convenience claim is appealed, and the parties begin the claim-prosecution process, claim-prosecution expenses are specifically excluded from the category of claim-preparation expenses that are eligible for compensation under subsection 108-1.09.3.a.(3). Given that claim-prosecution expenses for the termination-for-convenience claim are not compensable under subsection 108-1.09.3.a.(3), common sense would reason that claim-prosecution expenses for the wrongful-termination claim are also not compensable under that subsection.

Moreover, the plain language of the contract does not support Miller Construction's interpretation. Here, Miller Construction ignores the word "preparation" and instead focuses on the

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3 SCR 330 at 36 (§ 105-1.17).

4 SCR Brief at 3.

words "reasonably necessary." It then concludes that all acts in making it eligible to file a termination-for-convenience claim are compensable because they are necessary for the filing of the that claim—without regard to whether the act taken was in preparation of the termination claim or in preparation or pursuit of a different matter.

A common dictionary defines "preparation" to mean "the action or process of making something ready for use."[5] A natural reading of the use of the term "preparation" in subsection 108-1.09 would interpret it to mean the preparation of the claim itself for use—the use being the submission of the claim to the Region. This would incorporate many steps, including the acts of researching rules on compensability, identifying and accounting for all eligible expenses, requesting clarification on the law for purposes of preparation of the claim, and the drafting of the claim itself. Acts taken for the purpose of becoming eligible to prepare a claim, however, are not acts done in preparation of the claim.

Further, if acts that were part of the chain of events leading to the filing of a termination claim were compensable because they were necessary for preparation of the claim, there would be no clear line between compensable and non-compensable expenses. Here, when Miller Construction was prosecuting its wrongful-termination claim, it was working on that claim. It was not preparing its termination-for-convenience claim.[6]

This interpretation is supported by the contract's distinguishing between a "termination claim," which is governed under subsection 108-1.09, and other claims, which are governed under subsection 105-1.17.[7] These are separate processes.[8] As Miller Construction points out, it was not able to proceed under subsection108-1.09 until "it is determined" under the first process "that the Contractor was not in default."[9] This tells us that the contract anticipates that the preparation of the termination-

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5 Webster's third New International Dictionary at 1790 (unabridged 1986).

6 A further complication is that Miller Construction filed several claims—in addition to its wrongful-termination claim, it filed extra work, differing-site-condition, underpayment, and fish-stream-bedding claims. All claims were prosecuted during the hearing. Only the work on the wrongful-termination claim would be compensable as a preparation expense under Miller Construction's theory.

7 *Compare* SCR 330 at 36 (§105-1.17) *with id.* at 64 (§108-1.09).

8 Each process is initiated by a Contracting Officer's Decision—first for Miller Construction's initial claim (wrongful termination) under §105-1.17, SCR 330 at 36, and second, for its termination for convenience claim, SCR 330 at 64. That two decisions are required, each governed by a different subsection of the contract, provides additional support for a conclusion that the process for adjudicating the first decision is not compensable as preparation for submitting the claim that leads to the second.

9 SCR 330 at 63 (§108-1.08).

for-convenience claim is different from the process whereby "it is determined that the Contractor was not in default."[10]

Indeed, Miller Construction's brief shows that Miller Construction itself interprets the word "preparation" to mean the steps taken to craft its termination-for-convenience claim, not the steps taken to make it eligible to file a claim. In its brief, Miller Construction states that "MCC had no right to ***prepare*** or file a termination for convenience claim until after a final decision was entered declaring MCC's termination for default wrongful and converting MCC's termination for default into a termination for SCR's convenience."[11] Thus, Miller Construction acknowledges that while it was prosecuting its wrongful-termination claim it was not preparing its termination-for-convenience claim.[12] This confirms that Miller Construction interprets the term "prepare" to mean actual working on the matter, not working on a different matter.

As the Region points out, many federal administrative decisions have reached the same conclusion. For example, in a 1996 case, a contractor had successfully converted a termination for default into a termination for convenience.[13] In the damages phase of the termination-for-convenience proceedings, the contractor sought compensation for professional expenses that "were incurred by [the contractor] in overturning the wrongful default termination."[14] The contractor argued that the expenses were compensable under the contract terms for a termination for convenience, which allowed compensation for "costs reasonably necessary for the preparation and presentation of settlement claims to the contracting officer."[15] The Contract Appeals Board for the District of Columbia rejected the claim, holding "[e]xpenses incurred in prosecuting a claim or appeal against the government are not allowable settlement expenses."[16]

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10 SCR 330 at 63 (§108-1.08).

11 Miller Construction Initial Brief on Recovery of Claim Preparation Expenses at 1-2 (March 7, 2022) (emphasis added).

12 Although Miller Construction is correct that the first process is *necessary* for the later process of preparing a termination-for-convenience claim, its acknowledgement that the contract distinguishes between the two processes supports a conclusion that the contract did not intend that the two processes should be merged. Note that I would not state the issue in terms of whether Miller Construction had a "right" to be preparing its termination for convenience claim before July 27, 2020. Work undertaken before July 27, 2020, might be compensable under subsection 108-1.09 if the workproduct was for preparation of the termination for convenience claim and was not used in the prosecution of the wrongful termination claim. The broader takeaway from Miller Construction's language in its brief, however, is the admission that when it was prosecuting the wrongful termination claim it was not preparing its termination for convenience claim.

13 *Appeal of MCI Constructors, Inc.*, DCCAB No. D-924, 1996 WL 331212 (D.C.C.A.B. June 4, 1996).

14 *Id.*

15 *Id.*

16 *Id. See also, e.g., Appeals of E. L. David Const. Co., Inc.*, ASBCA No. 29225, 89-3 B.C.A. (CCH) ¶ 22140 (June 30, 1989) ("We know of no case where legal fees in the preparation, presentation and prosecution of a formal proceeding to

Miller Construction argues that we should not apply federal precedent here because the federal statutory scheme for awarding costs and fees is different from the Alaska scheme. In particular, it notes that if this matter were under federal law, attorney's fees and consultant's fees incurred in prosecuting the wrongful-termination claim would be awarded under the federal Equal Access to Justice Act. It asserts that under federal law, fees "are fully reimbursable."[17] Under Alaska law, in contrast, if Miller Construction is not awarded its prosecution fees as "preparation" costs under subsection 108-1.09, it will receive only "a small fraction" of its consultant fees, and the compensability of its attorney's fees will be limited by the guidelines of Civil Rule 82.[18]

Miller Construction's argument, however, is not persuasive. Contractors who prevail in other claims filed under subsection 105-1.17 will have their fees and costs determined under the rules provided in subsection 105-1.17. Even if federal law might be more generous to those contractors, their fees are determined under Alaska law. Here, we must treat Miller Construction the same as other contractors—when Miller Construction prevails in a claim filed under subsection 105-1.17, its award of fees and costs will be governed by subsection 105-1.17.

Moreover, Miller Construction's attempt to distinguish federal law fails because the federal law being interpreted here (making preparation expenses compensable) is comparable to the Alaska law. We look to federal law in part so that we have an understanding of industry practices and interpretations. Although federal decisions are not binding, we generally follow them unless an Alaska decision reached a different conclusion or the federal decision was illogical or otherwise unpersuasive.[19] Here, the federal decisions cited by the Region show that industry practice considers prosecution of a wrongful-termination claim to be a different act than preparation of a termination-for-convenience claim. Miller Construction has not cited any federal cases to the contrary. The conclusion reached in those cases is consistent with the commonsense conclusion reached from a normal reading of Alaska law and the Alaska contract. It follows that Miller Construction's expenses from the proceedings to convert the termination for default into a termination for convenience are

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convert a termination for default into a termination for the convenience of the Government have been allowed. We have uniformly held that this is the prosecution of a claim against the Government and disallowed legal fees." (quoting *Appeal of Mccollum*, ASBCA No. 23269, 81-2 B.C.A. (CCH) ¶ 15311 (Aug. 12, 1981)). In *E.L. David,* the Board of Contract Appeal distinguished the preparation of a termination for convenience claim from the process of converting a termination for default into a termination for convenience: "When these kinds of fees are incurred as part of the preparation of a termination for convenience settlement proposal they are recoverable in a reasonable amount." *Id.*

17 Miller Construction Response at 4.

18 *Id.*

19 *Cf., e.g., Earthmovers of Fairbanks, Inc. v. State, Dep't of Transp. & Pub. Facs.*, 765 P.2d 1360, 1364 (Alaska 1998).

compensable under the claims provision, subsection 105-1.17, not the termination-for-convenience provision, subsection 108-1.09.

C. What evidence is required to show that an expense is compensable?

Although the parties at first appeared to be far apart regarding what documentation was required to show that an expense was compensable as a preparation expense under §109-1.08, most of that difference will be resolved upon receipt of this order holding that claim-prosecution expenses are not compensable under subsection 109-1.08. Indeed, Miller Construction's responsive brief included an accounting of compensable preparation expenses that was significantly different from its request for compensation for both preparation and prosecution expenses. I have briefly reviewed the documentation attached to the claim, and, although I expect the Region may have some questions regarding the claim, my expectation is that the parties can reach agreement regarding the compensability of these claimed expenses.[20]

DATED: April 12, 2022.

[redacted]

By: _____
Stephen Slotnick
Administrative Law Judge

Certificate of Service: I certify that on April 12, 2022, a copy of this document was distributed by email to: Jesse O. Franklin IV (by email); Allen R. Benson (by email); Garth Schlemlein (by email); Laurel Barton (by email); Tess Keeley (by email); Max D. Garner (by email); Chris A. Robison (by email); Patricia Runyan (by email); Leilani J. Tufaga (by email); Christina M. Fisher (by email); Dep't of Law central email (by email); Liz Forkan (by email); Anadela Gallego (by email). A courtesy copy was also sent to Hilary Porter (by email) and Christopher M. Kennedy, ALJ (by email).

By: [redacted]
Office of Administrative Hearings

[20] Miller Construction is requesting $164, 565.95 in claim preparation expenses. The Region has identified "approximately $125,000" as compensable. The Region has requested that I adopt the process laid out in the 1996 federal Contract Appeal Board decision cited earlier, *Appeal of MCI Constructors, Inc.*, DCCAB No. D-924, for documentation to verify the reasonableness of claimed preparation expenses. I have reviewed this case and agree with the Region that the documentation requirements set out in that case are reasonable. My expectation, however, is that this will not be an issue.