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

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

ORDER ON MOTIONS REGARDING THE EFFECT OF A TERMINATION FOR CONVENIENCE ON DAMAGES

Following a hearing on Miller Construction Company's five contract claims against the Southcoast Region of the Alaska Department of Transportation and Public Facilities regarding the Shelter Cove Road project, the Office of Administrative Hearings issued an initial decision and order on July 27, 2020. The decision determined that the Region's finding of default and termination of the project was wrongful. The effect of this ruling was to convert the termination into a termination for convenience, rather than a termination for default. The decision did not include a ruling on damages, in part because additional proceedings were necessary to determine damages for a termination for convenience.

After the July decision, the case was stayed while the parties worked on settlement. The parties have asked, however, that this office temporarily lift the stay in order to rule on motions regarding the effect of a termination for convenience. In the Region's view, the termination for convenience has mooted all of Miller Construction's contract claims. Instead, Miller Construction can submit a claim for compensation for all reasonable costs associated with the project. Because this would include costs for all reasonable work, the Region asserts that Miller Construction would be fairly compensated by this approach.

In Miller Construction's view, however, the only claim that is converted to a cost-plus damages claim is its termination claim. All other claims remain viable. Because the damages due under the contract claim procedures would likely exceed the cost-plus damages awarded under the termination claim procedures, Miller Construction argues that this is the only fair interpretation.

The analysis of these cross-motions will begin with a discussion of a preliminary issue raised by Miller Construction. We will then turn to the merits of each party's interpretation of the contract, as construed under federal law.

A. Has this office already determined that merger of all claims into the termination claim is prohibited because it would be a penalty?

As a preliminary matter, Miller Construction argues that we need not consider the merits of the parties' competing interpretations of federal cases because this office has already determined that Miller Construction's claim survive an order of termination. Miller Construction recalls the December 31, 2019, order in this case. That order rejected the interpretation of subsection 108-1.08 of the Standard Specifications (found in the Contracting Officer's Decision) that all preexisting claims are forfeited upon an entry of default.[1] Miller Construction argues that the order means that all of its preexisting claims are live and all associated damages survive the termination. It also argues that the Region's current motion must be denied on the basis that it would impose a penalty in that it would take away some of Miller Construction's damages.

Neither the holding nor the reasoning of the December 31 order, however, controls the outcome here. The December 31 order dealt with the forfeiture clause of subsection 108-1.08 following an entry of default. It did not discuss the merger of claims under a termination of convenience.[2]

Moreover, a merger of claims would not be a penalty. A penalty occurs when the nonbreaching party seeks to punish the act of breach. That is not allowed because under contract law, breaching is not considered a bad act. Here, in contrast, the Region is the breaching party, so it is not seeking to punish Miller Construction for breach. The Region's argument is that Miller Construction agreed in advance that it would limit its damages claim should the Region terminate the contract. Typically, an agreement to limit damages is enforceable unless it would be unconscionable or involved bad faith.[3] Thus, here, if the contract provides for merger of claims upon termination, this office will enforce that requirement.

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[1] *See* Order Granting Miller's Motion for Summary Adjudication on the Effect of Default Termination on Pre-Existing Claims (Dec. 31, 2019).

[2] This analysis does not mean that I do not see Miller Construction's point. It would be incongruous if the effect of these rulings would be to leave a contractor better off under a termination for default than under a termination for convenience. Because I am not sure that this could be a result of granting the Region's motion, and because I do not find that the language of subsection 108-1.09 effects a merger of all claims, I will not ponder this issue further.

[3] *See, e.g., North Pac. Erectors, Inc. v. State, Dep't of Admin.,* 337 P.3d 495, 507 (Alaska 2013) ("[p]arties are free to enter into contracts that contain provisions that apportion damages in the event of a default, and may agree to a particular measure of damages in the event of a breach or a default." (quoting 24 Richard A. Lord, Williston on Contracts § 64:17, at 152 (4th ed.2002))); *cf. also, e.g., City of Dillingham v. CH2M Hill Nw., Inc.,* 873 P.2d 1271, 1275 (Alaska 1994) ("a party may contract to limit liability for damages resulting from breach of contract" unless "he acts fraudulently or in bad faith" (quoting 6A Arthur L. Corbin, *Corbin on Contracts* § 1472, at 606 (1962))).

B. Does federal law provide guidance on whether a termination for convenience moots all other claims?

Both the July decision and an earlier order in this case confirm that this office will rely on relevant federal contract law in the absence of applicable state law.[4] Accordingly, the parties begin their arguments on the effect of a termination for convenience by citing to federal law. Each party has found tantalizing quotes from authoritative federal cases that support its interpretation of the contract. For example, the following quotes seem to strongly support the Region's position:

- United States Court of Claims 1976: "In the absence of bad faith or clear abuse of discretion, the effect of the constructive termination for convenience is to moot all breach claims and to limit recovery to costs."[5]
- United States Gov't Printing Office Board of Contract Appeals 2001: "The general rule is that when a contract is terminated for convenience, all contract claims are merged into the subsequent termination for convenience claim."[6]
- United States Court of Federal Claims 1997: "In contrast to common law damages for breach of contract, the clause limits the contractor's recovery to costs incurred prior to the termination, a reasonable profit on the work performed, and certain additional costs associated with the termination."[7]

The following statements of federal law, on the other hand, seem to allow a contractor to pursue independent equitable claims in addition to a termination claim, thus supporting Miller Construction's position:

- United States Court of Federal Claims 2000: "Breach of contract claims are not subsumed, or resolved, by final termination claims."[8]
- United States Court of Federal Claims 1998: "it is impermissible for the government to rid itself of contractual responsibilities through use of the termination clause."[9]

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4 *See* Decision at 38 n.180 (July 27, 2020); Order Granting in Part Region's Motion to Establish Law of the Case at 2 n.1 (Dec. 20, 2019).
5 *Kalvar Corp. v. United States,* 543 F.2d 1298, 1304 (Ct. Cl. 1976).
6 *In re Cactus Press/Power Ent., Inc.,* GPOBCA No. 20-99, 2001 WL 109190 at n.1 (U.S. Gov't Printing Off. Bd. Cont. App. 2001).
7 *Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627, 637-38 (1997).
8 *J. Cooper & Assocs., Inc. v. United States*, 47 Fed. Cl. 280, 286 (2000)
9 *SIPCO Servs. & Marine, Inc. v. United States*, 41 Fed. Cl. 196, 220 (1998) (citing *McDonnell Douglas Corp. v. United States,* 35 Fed.Cl. 358, 368 (1996)).

- United States Court of Federal Claims 2000: "a plaintiff may bring independent contract claims, in addition to a Termination for Convenience proceeding, so long as the plaintiff follows the applicable jurisdictional requirements."[10]
- United States Court of Appeals, Federal Circuit 1996: "the regulations anticipate the submission of claims independently of the termination settlement proposal."[11]
- United States Court of Appeals, Federal Circuit 1999 (unpublished decision) "any equitable adjustment claim that [claimant] might have was not extinguished by the government's termination for convenience."[12]

Taken together, these quotes, although enticing, suggest that federal law might not be much help. It appears that the answer to whether other contract claims survive a termination for convenience is "it depends."

In *Krygoski Construction Company v. United States,* the federal circuit has traced the advent of termination clauses in federal law to a post-wartime dilemma that was created when multiple procurement contracts had to be canceled at the end of hostilities.[13] The effect of the clause was to allow the government to settle a breach claim based on partial performance. The contractor was no longer able to pursue expectation damages of total anticipated profit that would have been received but for the termination. Instead, the contractor was compensated by being recompensed all costs incurred to date, together with the expected profit percentage for those costs (which could be much less than total expected profit under the contract).[14]

In 1969, the United States Court of Claims adopted a "merger" doctrine for contracts that were terminated for convenience.[15] It held that after a contract had been terminated for convenience, a contractor could not pursue a breach of contract claim based on an allegation of defective specifications.[16] The merger rule was modified, however, in 1996 by the successor United States Court of Federal Claims in *James M. Ellett Construction Company v. United*

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10 *Advanced Materials, Inc. v. United States,* 46 Fed. Cl. 697, 701 (2000).
11 *James M. Ellett Const. Co., Inc. v. United States*, 93 F.3d 1537, 1548 (Fed. Cir. 1996).
12 *Am. Eagle Indus., Inc. v. Babbitt,* 215 F.3d 1344 (Fed. Cir. 1999) (unpublished) (Table)1999 WL 508318.
13 94 F.3d 1537, 1540-41 (Fed. Cir. 1996).
14 *Nolan Bros., Inc. v. United States,* 405 F.2d 1250, 1254 (Ct. Cl. 1969).
15 *Id.* at 1253.
16 *Id.*

States[17]. *Ellett* held that a contractor may pursue additional claims that seek compensation specifically allowed by law that would not be available under the termination claim.[18]

The Region argues that *Ellett* is not applicable here because it is limited to application of the federal Contract Defense Act.[19] The underlying reasoning of *Ellett,* however, is simply that where an equitable claim would provide a remedy in addition to the remedy allowed under the termination clause, the claim is not foreclosed.[20] Applying this reasoning here does not require that we apply the terms of the federal Contract Defense Act. Therefore, the applicable holding of *Ellett* is that the termination clause does not necessarily foreclose equitable claims. Instead, a decisionmaker will need to closely examine the governing law (or, in this case, the terms of the contract) to determine the rights of the parties.[21] Applying this holding here will require that we examine the terms of the contract.

A boundary on the *Ellett* doctrine, however, can be found in the case most relied upon by the Region, *Kalvar v. United States.*[22] In that case, the federal government breached its contract to purchase film from the claimant. The court held that the breach constituted a constructive termination.[23] After rejecting the claimant's allegation of bad faith, the court discussed claimant's damage claims. It eliminated three of the claimant's damage claims because they "clearly pertain only to anticipatory profits, which are barred by the termination-for-convenience clause."[24] For the two other damage claims, the court allowed one for costs associated with termination. It disallowed the other because it found that it was a cost related to preparing a breach of contract claim.[25]

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[17] 93 F.3d at 1546-47 (allowing contractor to pursue equitable claim in addition to termination claim because law allowed for interest on costs awarded under equitable claim but not on costs awarded under termination claim).

[18] *Id.*

[19] Region's Opposition at 4-5.

[20] *Ellett,* 93 F.3d at 1546-47. *Ellett* distinguished *Nolan* because in *Nolan,* the addition of an equitable claim to the termination claim would not have affected the damage measure: both would result in an assessment of costs, so they might as well be merged. *Id.* Once the law changed, and interest became available for an equitable claim, it made sense to truncate the claims. *See also Avant Assessments, LLC v. United States,* 134 Fed. Cl. 323, 331-33 (2017). In *Avant,* the court explicitly addressed the issue of whether a breach of contract claim sought a different remedy from the termination claim. *Id.* After finding that "[t]he two claims concern compensation as a result of different actions of the government," the court concluded that the claimant could pursue both claims. *Id*

[21] To the extent that the Government Printing Office Board of Contract Appeals suggested in dicta that the underlying reasoning in *Ellett* might be limited to cases arising under the Contract Defense Act, I disagree with that conclusion. *See Cactus Press/Power,* 2001 WL 109190 at n.1. As explained in the text that follows, however, I agree that the holding of *Kalvar* barring claims for anticipatory profit is applicable here.

[22] 543 F.2d 1298.

[23] *Id.* at 1301.

[24] *Id.* at 1303.

[25] *Id.* at 1305.

The key takeaway from *Kalvar* is that any claim that seeks damages for the breach of contract caused by the termination are not allowed. This means that any claim for anticipatory profits—a claim that typically would not attach until the contract, or a portion of the contract, is terminated—would not be allowed because anticipated damages are a form of termination damages that are prohibited under subsection 108-1.09.[26] Other forms of damages, however, such as damages for an equitable claim that arose outside of termination, would be allowed unless the contract provides that the claim is merged with the termination claim.[27]

Accordingly, we turn next to the terms of the contract to determine whether it does, in fact, require that preexisting equitable claims unrelated to the termination are merged into a claim for termination damages.

C. Does the contract require that all claims be merged into the termination claim?

When interpreting a contract, "[t]he goal of the court is to enforce the reasonable expectations of the parties."[28] Determining the parties' expectations requires "examining the language used in the contract, case law interpreting similar language, and relevant extrinsic evidence, including the subsequent conduct of the parties."[29]

Although federal law provided limited help, we can draw two conclusions from the cases to help guide the exploration of the contract for evidence of the parties' expectations. First, we see that the original interpretation of termination clauses in government contracts was that it effected a merger of all claims. This interpretation remained in force until a change in law required a different interpretation. From this, we conclude that an interpretation of a termination clause to require merger would not be outlandish.

Second, however, we also see that the tension between merger and nonmerger has been around for a long time. *Nolan* was decided in 1969, *Kalvar* in 1976, and *Ellett* in 1996. This means that the Department has been on notice of this issue for 25 years. If the intent of the

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[26] Region hearing exhibit 330 at 65.

[27] An interesting sidenote here is that it appears from the cases that damages for an equitable claim that is not merged into a termination claim will be calculated under the claim provision, rather than the termination provision, even if that results in a lower figure. In *SIPCO,* for example, the court was fully prepared to reduce the claimant's claimed costs for an equitable adjustment to the extent that the costs represented delay costs caused by the contractor's own conduct. *SIPCO Servs.*, 41 Fed. Cl. at 225-26. Courts appear to be more generous under the termination clause. In *Best Foam*, for example, the court allowed costs related to nonconforming work to be included in termination damages. 38 Fed. Cl. at 641.

[28] *Municipality of Anchorage v. Gentile,* 922 P.2d 248, 255–56 (Alaska 1996) (citing *Stepanov v. Homer Elec. Ass'n, Inc.,* 814 P.2d 731, 734 (Alaska 1991)).

[29] *Id.*

contract was to effect a merger of all claims upon termination, we would expect that the contract would make that clear, rather than leave the issue up to a decisionmaker trying to muddle his or her way through the federal cases. With this understanding, we turn now to the arguments of the parties regarding how to interpret the contract.

The Region notes that damages for a termination for convenience are governed by subsection 108-1.09 of the Standard Specifications. It argues that "[t]he specification on its face provides the basis for all recovery that a contractor is entitled to recover following a termination for convenience by DOT&PF, and does not provide recovery under any other theory."[30]

The problem for the Region, however, is that subsection 108-1.09 does not *prohibit* a contractor from pursuing other theories of recovery. Nor does it say that all theories of recovery are merged into the damage claim for the termination for convenience. The plain language of the damages clause of that subsection states that "[t]he Contractor shall submit any termination claim to the Contracting Officer within 90 days after the effective date of termination."[31] This language is specific to the *termination* claim. It has no effect on other claims, to the extent that those claims are not actually termination claims disguised as claims under a different theory of recovery.

The Region also points out, however, that subsection 108-1.08 contains a sharper limiting provision.[32] Subsection 1.08 applies to terminations for default. It states that "[if] it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligation s of the parties will be determined under Subsection 108-1.09, Termination for Convenience."[33] The Region argues that the plain meaning of the phrase "the rights and obligations of the parties" applies to all rights and responsibilities, not just some of them. Accordingly, the Region concludes that any claim Miller Construction might have will be governed by subsection 108-1.09, not other claims provisions.

The problem with this argument, however, is that it would apply only to terminations for default that are later converted to terminations for convenience. It would not apply to a garden-variety termination for convenience—one that occurred without a wrongful default. This would mean that a contractor terminated for convenience would have a broader menu of damage claims than one who was wrongfully terminated for default. That result cannot be correct. The better

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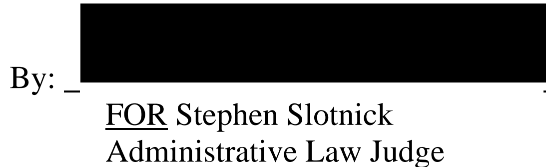
30 Region's Motion for Ruling of Law at 4.
31 Exhibit 1 to Region's Motion at 2.
32 Region's Opposition at 6.
33 SCR Hearing Exhibit 330 at 63.

interpretation of subsection 108-1.08 would note that the clause does not refer to "all" rights and responsibilities. In context, the clause applies to the rights and responsibilities of the parties that flow from the termination. It has no effect on the rights and responsibilities that flow from other actions of the Region or from other sections of the contract.

In sum, the language of the contract does not establish that all claims are merged into a termination claim following a termination. Nothing in subsection 108-1.09 indicates that the Department has taken steps to resolve the conflict between *Kalvar* and *Ellett.* Indeed, given that the damages clause of subsection 108-1.09 applies only to damages from the termination claim, a plain-language interpretation of the contract would favor the *Ellett* approach of nonmerger of claims.

In conclusion, the termination for convenience does not moot other damage claims that result from events other than termination. All damages that flow from termination, however, must be determined under the requirements of subsection 108-1.09.

DATED: February 1, 2021

By: 
FOR Stephen Slotnick
Administrative Law Judge

Certificate of Service: I certify that on February 2, 2021, a true and correct copy of this order was distributed as follows: Garth Schlemlein (by email); Jesse Franklin IV (by email); Allen Benson (by email): Dana Burke, AAG (by email); Seneca Freitag, AAG (by email); Eugene Hickey, AAG (by email); Max Garner, AAG (by email); Dep't of Law Central email (by email). A courtesy copy was also sent to Charles Deininger (by email) and Christopher M. Kennedy, ALJ (by email).

By: Patricia Sullivan
Office of Administrative Hearings

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