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Docket: 1684CV05562

Date: April 20, 2017

**Parties: A.L. PRIME ENERGY CONSULTANT, INC. vs. MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY**

Judge: /s/Mitchel H. Kaplan, Justice of the Superior Court

SUFFOLK, ss.

RESERVATION AND REPORT OF AN INTERLOCUTORY ORDER TO THE APPEALS COURT

This action arises out of a contract between the plaintiff, A.L. Prime Energy Consultant, Inc. (Prime), and the defendant, Massachusetts Bay Transportation Authority (MBTA) for the supply of Ultra Low Sulfur Diesel Fuel (ULSDF) (the Supply Contract), and the unilateral termination of the Supply Contract by the MBTA. Prime asserts, among other claims, that the MBTA breached the Supply Contract by terminating it before its end date.

Factual Background

Prime was awarded the Supply Contract on July 1, 2015, after a public bidding process. It was to continue for a period of two years. The Supply Contract contained a so-called "termination for convenience" provision that states:

Termination for Convenience. The Authority [MBTA] may, in its sole discretion, terminate all or any portion of this Agreement or the work required hereunder, at any time for its convenience and/or for any reason by giving written notice to the Contractor [Prime] thirty (30) calendar days prior to the effective date of termination or such other period as is mutually agreed upon in advance by the parties. If the Contractor is not in default or in breach of any material term or condition of this Agreement, the Contractor shall be paid its reasonable, proper and verifiable costs in accordance with generally accepted government contracting principals as set forth in the Federal Acquisition Regulations, including demobilization and contract closeout costs, and profit on work performed and Accepted up to the time of termination to the extent previous payments made by the Authority to the Contractor have not already done so. Such payment shall be the Contractor's sole and exclusive remedy for any Termination for Convenience, and upon such payment by the Authority to the Contractor, the Authority shall have no further obligation to the Contractor. The Authority shall not be responsible for the Contractor's anticipatory profits or overhead costs attributable to unperformed work.

On July 12, 2016, the MBTA terminated the Supply Contract pursuant to the termination for convenience clause quoted above. In its complaint, Prime alleges that the sole reason for the MBTA's exercise of the termination for convenience clause was that it had learned that it could obtain ULSDF at a cheaper price from another vendor. It contends that an agency's right to invoke termination for convenience clauses is limited by principles of bad faith and abuse of discretion and, under these principles, a government agency is not permitted to cancel a contract solely to enable it to purchase the same goods for less money from another vendor.

Procedural Background

The MBTA moved to dismiss the complaint for failure to state a claim. It argued that it was entitled to invoke the termination for convenience clause for any or no reason at all, including that it learned of an opportunity to purchase the goods in question for less money from another vendor after it awarded the Supply Contract to Prime, following a public bidding process. In a Memorandum of Decision and Order on the Defendant's Motion to Dismiss (the Decision) issued on March 3, 2017 the court denied the MBTA's motion. On April 3, 2017, the MBTA filed a Motion for Reconsideration or, in the alternative, To Report Pursuant to Mass. R. Civ. P. 64. On April 20, 2017, the court denied so much of the motion as requested reconsideration, but allowed the MBTA's request that the question of law underlying the Decision

be reported for appellate review.

Rationale for the Reservation and Report

As explained in much greater detail in the Decision, no Massachusetts courts have ruled on the question of whether any limitations apply to a government agency's or municipality's right to invoke a termination for convenience clause in a procurement contract. As the use of these clauses originated in federal procurement contracts, much of the authority on the proper exercise of termination for convenience clauses in government contracts has been developed in the Federal Circuit Court of Appeals and its predecessor the Court of Claims. Whether a government agency is permitted to invoke this clause to avoid a procurement contract so that the agency may purchase the same goods or services from another vendor for less money has been the subject of a number of opinions. While this court identified a trend among those federal decisions, it was not completely apparent. Moreover, Massachusetts appellate courts are not bound by these decisions applying federal contracting law. In consequence, the court finds that the following question so affects the merits of the controversy that the matter ought to be determined by the Appeals Court before any further proceedings in the trial court. In addition, as termination for convenience clauses are frequently employed in state and municipal procurement contracts, the resolution of this question by an appellate court will be of assistance generally to government agencies and contractors.

The Question Reported

For the foregoing reasons, the trial court respectfully reports the following question for decision by the Appeals Court pursuant to Mass. R. Civ. P. 64(a):

May a government agency invoke a termination for convenience clause contained in a procurement contract for the purchase of goods for the sole reason that it has learned of an opportunity to purchase the same goods at a lower price from another vendor?

Stay Order

Further proceedings in this case are stayed in the Superior Court until further order of the Appeals Court.

/s/Mitchel H. Kaplan, Justice of the Superior Court