COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12370

A.L. PRIME ENERGY CONSULTANT, INC.,

PLAINTIFF-APPELLEE,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

DEFENDANT-APPELLANT.

On Reservation and Report from the
Superior Court for Suffolk County

REPLY BRIEF OF DEFENDANT-APPELLANT MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

Ryan E. Ferch
BBO No. 670151
rferch@mbta.com
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
Legal Department, Suite 7760
Ten Park Plaza
Boston, MA 02116
Telephone: (617) 222-4449

Kevin P. Martin
BBO No. 655222
kmartin@goodwinlaw.com
Joshua J. Bone
BBO No. 687722
jbone@goodwinlaw.com
Tucker DeVoe
BBO No. 693426
tdevoe@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Telephone: (617) 570-1000
Facsimile: (617) 523-1231

September 28, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

INTRODUCTION

This case presents a straightforward question of contract interpretation. The plain language of the diesel fuel supply contract (the "Contract") between Massachusetts Bay Transportation Authority ("MBTA") and A.L. Prime Energy Consultant, Inc., ("A.L. Prime") permitted MBTA to terminate "for any reason," including to obtain a better price elsewhere, and the plain language precludes A.L. Prime from recovering the only relief (anticipatory profits) it could be seeking in this lawsuit. Ignoring the Contract's plain language, A.L. Prime seeks in its brief to cast this as a case about public bidding statutes, even though: (1) no violation of public bidding statutes was pled, (2) no public bidding statute applies to the procurement at issue here, and (3) MBTA's conduct of the bidding process complied with public bidding principles in any event. A.L. Prime also echoes the Superior Court's reliance on inapposite federal contracting precedents. This Court should enforce the Contract according to its terms and reverse the Superior Court's decision denying MBTA's motion to dismiss.

ARGUMENT

I. THIS CASE INVOLVES CONTRACT INTERPRETATION, NOT PUBLIC BIDDING LAWS.

In an effort to escape the plain language of the Contract in this breach of contract case - no doubt because it is fatal to its claims, see Opening Br. at 16-24; infra at 7-12 - A.L. Prime principally argues that MBTA's termination decision ran afoul of Massachusetts public bidding statutes. See Appellee's Br. at 19-20, 25 n.5, 29, 33. But A.L. Prime did not plead a violation of public bidding laws and its brief does not identify a public bidding statute that might apply to this MBTA diesel fuel contract. In any event, even assuming public bidding principles apply to the Contract, MBTA complied with them.

First, A.L. Prime's public bidding arguments are a complete non sequitur. The complaint MBTA moved to dismiss does not allege any improprieties in the procurement process leading to the Contract, let alone that MBTA's termination of the Contract violated some public bidding law.

Second, A.L. Prime has failed to identify a single public bidding statute that might have applied to the procurement at issue in this case. Of the six

public bidding cases A.L. Prime cites (at 19-20), two involved M.G.L. c. 149, §§ 44A-44H, a statute that by its express terms applies to all "public agenc[ies] . . . not including the Massachusetts Bay Transportation Authority." M.G.L. c. 149, § 44A(1) (emphasis added).[1] Two involved M.G.L. c. 30, § 39M, a provision that applies only to a "contract for the construction, reconstruction, alteration, remodeling or repair of any public work, or for the purchase of any material" for such a project - not a contract for commuter rail diesel fuel, which has nothing to do with any "public work." See Andover Consultants, Inc. v. Lawrence, 10 Mass App. Ct. 156, 160 (1980) (defining "public work" for purposes of § 39M as "public buildings and improvements on land owned by the commonwealth or one of its subdivisions").[2] One involved both c. 149, §§ 44A-44H and c. 30, § 39M.[3] And the last involved M.G.L. ch. 161A, § 5(b), which

---

[1] Interstate Eng'g Corp. v. City of Fitchburg, 367 Mass. 751, 752-53 (1975); E. Amanti & Sons, Inc. v. Town of Barnstable, 42 Mass. App. Ct. 773, 773-74 (1997).

[2] Petricca Const. Co. v. Commonwealth, 37 Mass. App. Ct. 392, 393 (1994); Dep't of Labor & Indus. v. Boston Water & Sewer Comm'n, 18 Mass. App. Ct. 621, 622 (1984).

[3] Modern Cont'l Const. Co., Inc. v. City of Lowell, 391 Mass. 829, 831-32 (1984).

applies only to MBTA's "real estate" transactions, not its purchases of diesel fuel.[4] A.L. Prime therefore has identified no statutory basis for its new argument that MBTA violated public bidding statutes.[5]

Third, even if there were some legal basis for considering public bidding rules in this case, MBTA complied with general public bidding principles: it followed "full and open competitive bidding practices" that ensured the "fair and equal treatment of bidders and the integrity of the public bidding process." Appellee's Br. at 28, 33. As A.L. Prime acknowledges, MBTA "required" all bidders "to sign the MBTA's 84 page contract" - the same contract A.L. Prime now claims MBTA breached - which included the termination provision at issue here. Id. at 10; see also R.A. 011,

---

[4] Phipps Prod. Corp. v. MBTA, 387 Mass. 687, 690-91 (1982).

[5] Although A.L. Prime does not cite them, several Superior Court opinions have purported to find implied in every Request for Proposals a requirement that the public entity "place all bidders on equal footing." Diebold Election Sys., Inc. v. Galvin, No. 07-1129-BLS1, 2007 WL 1129400, at *3 (Mass. Super. Mar. 27, 2007). No Massachusetts appeals court has endorsed this principle, however. As explained infra at 4-6, MBTA did not violate this principle: MBTA's RFP included the very termination clause A.L. Prime now seeks to evade, so all bidders, including A.L. Prime, were equally aware that MBTA retained that termination right.

¶ 5 (complaint alleges that MBTA's RFP "constitutes the Contract"); R.A. 049. As a result, every bidder was on equal notice of the contractual language A.L. Prime now seeks to evade. Put differently, A.L. Prime bid for a contract with this termination clause, won a contract with this termination clause, was paid for fuel pursuant to a contract with this termination clause for nearly a year, but is now seeking through this litigation to get something for which it and no other party bid: a contract excluding this termination clause. By seeking an advantageous term not offered in the bidding process, it is A.L. Prime that seeks to subvert public bidding principles.

A.L. Prime (at 28) criticizes MBTA's decision to take advantage of the Operational Services Division's statewide diesel fuel contract with Dennis K. Burke, Inc., on the ground that this decision "open[ed] the door to mistrust by the public of a new deal, cut with no public notice or review, to replace a competitively bid contract." This too is a non sequitur. A.L. Prime's complaint nowhere alleges that the Dennis K. Burke contract was formed in violation of public bidding rules. In fact, that contract was itself the

product of a public bidding process.[6] Contrary to A.L. Prime's baseless insinuations, MBTA simply switched from one publicly bid contract to another.

A.L. Prime also suggests (at 33) that "no reasonable bidder" would "go through the effort and cost of making a low bid . . . with the expectation that the agency will terminate the very contract it solicited . . . because the agency is able to undercut the price." This argument, of course, ignores that the Contract on its face disclosed that very possibility - termination "for any reason" includes for a lower price - yet A.L. Prime and others bid on it. See Opening Br. at 17-18; infra at 7-8. In any event, it is not necessary for courts to pare back contractual termination rights to protect vendors (especially those compensated for their mobilization and demobilization costs). If agencies too liberally invoke their termination rights, would-be vendors unhappy with the specified compensation will either decline to enter contracts with such agencies or will insist on higher prices or tighter termination clauses before agreeing to bid.

[6] See "Request for Response (RFR): Ultra Low Sulfur Diesel Contract, ENE40," May 22, 2015, www.COMMBUYS.com (search for "ENE40").

In sum, the bulk of A.L. Prime's brief focuses on public bidding principles that are entirely irrelevant to this case, but as to which MBTA's actions comported in any event. A.L. Prime's public bidding arguments should not shift attention from the Contract's plain language, which unambiguously favors MBTA's position.

II. MBTA COMPLIED WITH THE PLAIN LANGUAGE OF THE CONTRACT.

A.L. Prime has offered no meaningful response to MBTA's plain language contract interpretation arguments. The contractual terms "for any reason," "sole discretion," "sole and exclusive remedy," and "shall not be responsible" mean what they say. Under the Contract, MBTA had the right to terminate the Contract "for any reason" - including to obtain a better price elsewhere - so long as it paid A.L. Prime for fuel delivered and its mobilization and demobilization costs, and A.L. Prime explicitly disclaimed payment for anticipatory profits on fuel not actually delivered. See Opening Br. at 16-24.

A.L. Prime (at 25 n.5) suggests that the cases MBTA cited in its Opening Brief (at 17-23) addressing similar contractual terms are distinguishable because they involved "contracts between private parties."

This argument is flawed twice over. First, it ignores the out-of-state public contract cases MBTA does cite that considered termination language less broad than that found in the Contract, but that still held that the contracts allowed termination to obtain a better price. See Opening Br. at 30-34.

Second, the Contract is not interpreted less favorably to MBTA merely because of its governmental status. "The commonwealth in making with [a] company [a] contract . . . put[s] itself in the position of a private citizen." See Boston Elevated Ry. Co. v. Metro. Transit Auth., 323 Mass. 562, 567 (1949); see also Ford Motor Co. v. United States, 378 F.3d 1314, 1320 (Fed. Cir. 2004) ("In a case in which the United States is a party to a contract, we apply general rules of contract construction."). Thus, contrary to A.L. Prime, both private and public contract cases are relevant here, and the cases MBTA has cited support its interpretation of the Contract's terms.

Rather than offer some alternative interpretation of those terms, A.L. Prime (at 30-32) emphasizes the phrase "Termination for Convenience," which appears as the title of the termination clause. A.L. Prime suggests that this phrase incorporates federal

limitations on the scope of a public entity's termination right that override the actual text of the Contract's termination clause.[7] But A.L. Prime ignores the Contract's "Headings Not Binding" clause (R.A. 040, § 5.13), under which "[t]he headings appearing at the beginning of the articles, sections, parts, paragraphs or subparagraphs in this Contract have been inserted for identification and reference purposes only." Given this clause, the phrase "Termination for Convenience" is nothing more than a convenient descriptor of MBTA's termination right, the substance of which is set forth fully and exclusively in the body of the clause.

True, as A.L. Prime observes (at 32), the phrase "Termination for Convenience" also appears once in the body of the termination clause: mobilization and demobilization payments "shall be the Contractor's sole and exclusive remedy for any Termination for Convenience." R.A. 049. But A.L. Prime's "Termination for Convenience" argument does not address the last sentence of the termination clause, which states – without reference to any "Termination for Convenience"

[7] MBTA's termination decision complied with these federal limitations in any event. See Opening Br. at 26-30; infra at 13-18.

- that MBTA "shall not be responsible for the Contractor's anticipatory profits or overhead costs attributable to unperformed work." R.A. 049. This language standing alone is sufficient grounds for dismissing A.L. Prime's claims.[8]

A.L. Prime's only other contract interpretation argument is the suggestion (at 34) that MBTA's interpretation of the contract would render it illusory. But Massachusetts courts have established a high bar for finding a contract illusory: so long as both parties are bound to "do something" that provides some modicum of benefit to the other, the contract is not "entirely lacking in consideration," and "[t]he law does not concern itself with the adequacy of [that] consideration." Graphic Arts Finishers, Inc. v. Boston Redevelopment Auth., 357 Mass. 40, 43 (1970). Here, the Contract guaranteed A.L. Prime valuable consideration, including payment for fuel it delivered, specific remedies in the event of termination, and at least 30 days' advance notice of

[8] A.L. Prime's brief (at 32) also misleadingly omits the initial capitalization of the phrase "Termination for Convenience," which, in context, suggests that the parties meant to use the title of the termination provision as shorthand for MBTA's full termination right, including the right to terminate "for any reason."

termination, permitting A.L. Prime to sell fuel to MBTA in the interim. See Simons v. American Dry Ginger Ale Co., Inc., 335 Mass. 521, 524-25 (1957) (contract for goods "terminable at will by either party" was not illusory because the contract would remain "effective at least until the expiration of a reasonable period following notice of termination"); Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 596-97 & n.37 (2007) (where, as here, the parties "mutually intended to be bound" by a contract for the future sale of goods, such mutual intent - combined with specific purchase and sale terms - is "sufficient consideration" to render the contract not illusory). Because of this consideration, the contract is not illusory.[9]

---

[9] The two out-of-state cases A.L. Prime cites to support its illusory contract argument are inapposite. One did not involve anything close to the consideration afforded A.L. Prime here. See RAM Eng'g & Const., Inc. v. Univ. of Louisville, 127 S.W. 3d 579, 586 (2003) (service contract promised only reimbursement for costs, not, as here, a guaranteed 30-day sales period and payment for goods delivered). And the other suggested that termination clauses are enforceable even if they might "seem . . . illusory" because "[t]he flexibility provided by a termination . . . clause allows it to limit expenditures without binding successor governments to contractual obligations that are not in the best interests of the citizenry." Mb Oil Ltd. Co. v. City of Albuquerque, 382 P.3d 975, 978-79 (N. Mex. Ct. App. 2016).

A.L. Prime's "illusory contract" argument also proves too much. If A.L. Prime is correct that the termination provision renders the Contract illusory, the Court cannot discard that unambiguous language in favor of the rule A.L. Prime prefers and then find MBTA in breach of the rewritten agreement. See Shahin v. I.E.S., 83 Mass. App. Ct. 908, 909 (2013) (other than to correct a mutual mistake, courts have no authority to rewrite unambiguous contractual terms). Instead, the Court must declare the Contract unenforceable in its entirety, leaving A.L. Prime entitled at most to reasonable reliance damages - precisely what MBTA's termination letter said it would pay. See R.A. 099-100; Gill v. Richmond Co-op Ass'n, 309 Mass. 73, 80 (1941) (party could recover only expenses incurred in reasonable reliance on illusory contract).

MBTA is entitled to the benefit of the bargain it struck: the right to terminate "for any reason," including to obtain a better price, subject only to payment of A.L. Prime's "sole and exclusive remedy." MBTA promised to provide that remedy, so A.L. Prime's case should be dismissed.

III. PRECEDENT SUPPORTS MBTA'S INTERPRETATION OF ITS TERMINATION RIGHT.

MBTA's Opening Brief (at 24-34) demonstrated a strong basis in precedent for enforcing the termination clause according to its plain terms and allowing termination to obtain a better price elsewhere. By contrast, A.L. Prime has failed to cite any cases from any jurisdiction that actually support the categorical rule it seeks.

A.L. Prime relies on Morton Street LLC v. Sheriff of Suffolk County, 453 Mass. 485 (2009), but that decision allowed a public entity to exercise a contractual termination right to save money - precisely what A.L. Prime claims MBTA cannot do here. See Opening Br. at 24-26. Morton Street stands for the principle that termination clauses provide public entities necessary leeway to "allocate available resources more suitably" when conditions warrant. Id. at 494.

A.L. Prime (at 28-29) attempts to distinguish Morton Street on its facts, arguing that there is a difference between not having sufficient money to pay a contract and only wanting to save money on a contract. But nothing in Morton Street treats the

specific facts in that case as necessary, rather than merely sufficient, for its holding that a termination to conserve resources was properly for convenience. If anything, the facts of this case more strongly support the public entity's right to terminate a contract to save money: the contract in Morton Street only concerned the meaning of the term "convenience," and did not include the broad "for any reason" and "sole discretion" terms applicable here. In any event, MBTA, like the sheriff in Morton Street, has been running a deficit and must find someplace to cut.[10]

A.L. Prime (at 26) cites the "lack of reported cases" addressing termination rights in public contracts to question the importance Morton Street ascribed to such rights as a tool for budgetary flexibility. That hardly follows. The issue may rarely arise in reported opinions because contractors do not generally question the meaning of unambiguous

---

[10] A.L. Prime criticizes MBTA's reliance on "selected publications" to support its arguments about the importance of budgetary flexibility for MBTA, but these "selected publications" were all produced by public entities pursuant to constitutional, executive, or legislative mandates. See Opening Br. at nn.2-7. Courts may take judicial notice such information. See Anzalone v. Admin. Office of the Trial Court, 457 Mass. 647, 659 (2010) (taking judicial notice of facts contained in public entity's annual report).

termination provisions and when they do they lose, not because public entities either rarely exercise them or do not value them.

In addition to relying on Morton Street, MBTA's brief (at 30-34) cited various out-of-state cases affirming a public entity's right to exercise a contractual termination clause to save money. Other than expressing disagreement with their holdings, A.L. Prime hardly addresses these cases at all.[11] Nor has A.L. Prime identified a single case from any other state holding as a categorical matter - i.e., notwithstanding the plain language of a particular contract - that a public entity may not terminate a contract to obtain a better price elsewhere.

Instead, A.L. Prime purports to find support for this categorical rule in the same federal precedents on which the Superior Court mistakenly relied. MBTA has already distinguished these cases at length

---

[11] A.L. Prime does assert (at n.11) that Vila & Son Landscaping Corp. v. Posen Construction, Inc., 99 So. 3d 563 (Fla. Dist. Ct. App. 2012), on which MBTA has relied, "involved a private contract." But the contract at issue was between a government contractor and a subcontractor. Id. at 564. Moreover, the court in that case explained at length why it would not be appropriate to preclude a public entity from terminating a contract to obtain a better price elsewhere. Id. at 567-68.

(Opening Br. 26-30). They involved Federal Acquisition Regulations allowing termination only when a contracting officer determined termination to be "in the Government's interest," 48 C.F.R. § 49.101(b) - not, as here, "for any reason" and in MBTA's "sole discretion." And they found bad faith only where the public entity intended to terminate the contract at the time of contract formation - whereas here, A.L. Prime has alleged that MBTA decided to terminate the Contract only after it had already been in effect for several months.

Responding to MBTA's argument concerning federal agencies' ability to terminate, A.L. Prime asserts (at 32 n.8) that the applicable "Government's interest" standard is "effectively as broad as that contained in the Prime contract." This is not accurate: federal courts have developed a body of case law interpreting the "Government's interest" standard to require a close examination of the facts of every termination decision to assess its reasonableness. See, e.g., Krygoski Const. Co, Inc. v. United States, 94 F.3d 1537, 1544 (Fed. Cir. 1996) (noting that the "contract language," which incorporated the regulation, "governs the legal relations of the parties" and proceeding to

evaluate whether the contracting officer had sufficient justification to terminate the contract in the "Government's interest"). The terms "for any reason" and "sole discretion" invite no similarly searching inquiry, so the federal cases shed no light on the proper interpretation of this Contract.

As for the federal courts' focus on the time of contract formation, A.L. Prime (at 20-25) suggests that Torncello v. United States, 681 F.2d 756 (Fed. Cir. 1982), and Krygoski stand for the general principle that a public entity may not terminate a contract to receive a better price elsewhere. But A.L. Prime ignores the many Federal Circuit cases, including Krygoski, that have explicitly confined that rule to the time of contract formation. See Opening Br. at 28-29 & nn. 13-14. Indeed, A.L. Prime has failed to cite a single post-Krygoski federal trial or appellate court case that has ever applied this categorical rule to a contract the public entity did not intend to terminate at the outset.[12]

In sum, both Massachusetts and out-of-state cases

[12] MBTA (Opening Br. at 29-30) has already distinguished the trial court cases A.L. Prime cites (at 24-25), which did not involve a government entity's termination of a contract to save money.

support MBTA's right to terminate the Contract to obtain a better price elsewhere, whereas A.L. Prime's categorical rule lacks any precedential support. This Court should not invent an entirely new rule hampering the budgetary flexibility of public entities.

IV. MBTA DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

The implied covenant of good faith and fair dealing gets A.L. Prime no further than its breach of contract claim. A breach of the implied covenant only "occurs when one party violates the reasonable expectations of the other." Chokel v. Genzyme, 449 Mass. 272, 276-77 (2007); see also Opening Br. at 23 & n.11. Given the termination clause, A.L. Prime could not reasonably have expected to receive anything more than what MBTA has provided: the right to sell diesel fuel to MBTA for two years or until MBTA exercised its termination right, and, if MBTA exercised that right, payment for fuel actually delivered and for its mobilization and demobilization costs. A.L. Prime could not reasonably have expected payment for anticipatory profits - the remedy it seeks for MBTA's supposed breach of the implied covenant - because the Contract explicitly states that MBTA "shall not be

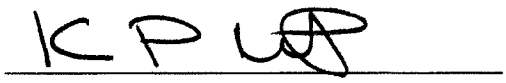
responsible for [A.L. Prime's] anticipatory profits or overhead costs attributable to unperformed work." RA 013; 049.

Insisting that MBTA breached the implied covenant nonetheless, A.L. Prime primarily relies on Anthony's Pier Four, Inc. v. HVC Associates, 411 Mass. 451 (1991), for the proposition that a party may not "use discretionary contract rights in order to leverage better terms." Appellee's Br. at 36. The basis for this Court's concern in Anthony's Pier Four is entirely absent here. MBTA did not seek to exploit a contractual loophole in an effort to coerce A.L. Prime into renegotiating its deal. Instead, MBTA exercised an unambiguous contractual termination right in order to shift to the Operational Services Division's contract. See Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004) (Implied covenant may not be "invoked to create rights and duties not otherwise provided for in the existing contractual relationship."). That A.L. Prime is not happy with its express contractual remedy for such a termination does not give rise to a good faith claim.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in its Opening Brief, MBTA respectfully requests that this Court reverse the Superior Court's decision denying MBTA's motion to dismiss.

Respectfully submitted,



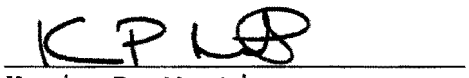
Kevin P. Martin, Esquire
BBO No. 655222
kmartin@goodwinlaw.com
Joshua J. Bone, Esquire
BBO No. 687722
jbone@goodwinlaw.com
Tucker DeVoe
BBO No. 693426
tdevoe@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Telephone: (617) 570-1000
Facsimile: (617) 523-1231

Ryan E. Ferch
BBO No. 670151
rferch@mbta.com
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
Legal Department, Suite 7760
Ten Park Plaza
Boston, MA 02116
Telephone: (617) 222-4449

Dated: September 28, 2017

CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(k)

I, Kevin P. Martin, counsel for Massachusetts Bay Transportation Authority, hereby certify that the foregoing Reply Brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass. R. App. P. 18; and Mass. R. App. P. 20.



Kevin P. Martin

CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for Massachusetts Bay Transportation Authority, hereby certify that I have served two copies of this Reply Brief by causing them to be delivered by First Class Mail and email to counsel for A.L. Prime Energy Consultant, Inc., this 28th day of September, 2017:

Michael P. Murphy, Esquire
Regnante, Sterio & Osborne LLP
401 Edgewater Place, Suite 630
Wakefield, MA 01880-6210.

KPM

Kevin P. Martin