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

BRIEF OF PLAINTIFF-APPELLEE, A.L. PRIME ENERGY CONSULTANT, INC.

MICHAEL P. MURPHY
BBO No. 554224
REGNANTE, STERIO & OSBORNE LLP
Edgewater Place, Suite 630
Wakefield, MA 01880-6210
(781) 246-2525
mmurphy@regnante.com

Dated: September 11, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Plaintiff-Appellee, A.L. Prime Energy Consultant, Inc., by its undersigned counsel, hereby discloses the following:

1. Parent Corporation(s) of A.L. Prime Energy Consultant, Inc.: None.

2. Publicly-Held Corporation(s) Owning More Than 10% of A.L. Prime Energy Consultant, Inc.'s Stock: None.

TABLE OF CONTENTS

Page

Table of Authorities.................................5-8

I. STATEMENT OF THE ISSUE...........................9

II. STATEMENT OF FACTS..............................9

A. The MBTA/Prime Publicly Bid Contract.......9

B. The MBTA's Termination of the Contract....10

C. The Complaint and the MBTA Motion to Dismiss.................................12

D. The MBTA's Submission of Factual Materials.................................13

III. SUMMARY OF ARGUMENT............................14

IV. ARGUMENT..18

A. The Termination for Convenience Clause Does Not Permit the Government to Terminate a Publicly and Competitively Bid Contract for the Sole Purpose of Obtaining a Better Price..................18

1. The Standard of Review...............18

2. The Purpose and Requirements of the Public Bidding Law...................19

3. The Termination for Convenience Clause...............................20

4. The MBTA Is Not Entitled to Terminate The Contract for Any Reason; the Termination For Convenience Standard Must Be Met..........................30

B. Count II of the Complaint States A Cause of Action for Breach of The Implied Duty of Good Faith and Fair Dealing by the MBTA 35

CONCLUSION...38

TABLE OF AUTHORITIES

Case **Page(s)**

4N Inter., Inc. v. Metropolitan Transit Authority, 56 S.W. 3d (Tex. Ct. App. 2001) 35

Anthony's Pier 4, Inc. v. HVC Associates, 411 Mass. 451 (1991) 36

Bell v. Mazza, 394 Mass. 176 (1985) 18

Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404 (1995) 18

Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 *Harv. L. Rev.* 369 (1980) 37

Cadle Co. v. Vargas, 55 Mass.App.Ct. 361 (2002) 36

Caldwell & Santmyer, Inc. v. Glickman, 55 F. 3d 1578 (Fed. Cir. 1995) 24

Capital Safety, Inc. v. State Div. of Bldgs. And Construction, 369 N.J. Super. 295 (App. Div. 2004) 24

Cherrick Distributors, Inc. v. Polar Corp., 41 Mass. App. Ct. 125 (1996) 36

Clark v. State Street Trust Co., 270 Mass. 140 (1930) 30

Colonial Metal Co. v. United States, 494 F.2d 1355 (1974) 21

Dep't of Labor & Indus. v. Boston Water & Sewer Commn., 18 Mass.App.Ct. 621 (1984) 20

Druker v. Roland Wm. Jutras Associates, Inc., 370 Mass. 383 (1976) 35

E. Amanti & Sons, Inc. v. Town of Barnstable, 42 Mass.App.Ct. 773 (1997) 16,19

E.A. Farnsworth, Contracts §7.17(a) at 329 (1990) 37

Flagg v. AliMed, Inc., 466 Mass. 23 (2013) 18

Fortune v. National Cash Register Co., 373
Mass. 96 (1977) 35

Greer Properties, Inc. v. LaSalle Nat. Bank,
874 F.2d 457 (7th Cir. 1989) 37

Iannacchnio v. Ford Motor Co., 451 Mass. 623 (2008) 18

Interstate Eng'g Corp. v. City of Fitchburg,
367 Mass. 751 (1975) 19

Krygoski Construction Co., Inc. v. U.S.,
94 F. 3d 1537 (Fed. Cir. 1996) ....passim

Lewis v. Chase, 23 Mass.App.Ct. 673 (1987) 30

Louis Stoico, Inc. v. Colonial Development Corp.,
369 Mass. 898 (1976) 30

Lynch v. United States, 292 U.S. 571,
54 S. Ct. 840, 78 L. Ed. 1434 (1934) 35

Mb Oil Ltd. Co. v. City of Albuquerque, 382 p.
3d 975 (N. Mex. Ct. App. 2016) 24,34

*Modern Cont'l Const. Co., Inc. v.
City of Lowell*, 391 Mass. 829 (1984) 16,19

*Morton Street LLC v. Sheriff of Suffolk
County*, 453 Mass. 485 (2009) 12,28

Nash & Cibinic, Federal Procurement Law 1104-07
(3d Ed. 1980) 20

NCLN20, Inc. v. United States, 99 Fed. Cl.
734 (2011) 25

Nesbitt v. United States, 345 F. 2d 583 (1965),
cert. denied 383 U.S. 926, 86 S. Ct. 931, 15
L. Ed. 2d 846 (1966) 24

Nolan Brothers v. United States, 405 F. 2d
1250 (1969) 24

Northern Heel Corp. v. Compo Indust., Inc., 851 F.2d 456 (1st Cir. 1998) 37

Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000) 25

Petricca Const. Co. v. Com., 37 Mass.App.Ct. 392 (1994) 20

Phipps Products Corp. v. Massachusetts Bay Transp. Auth., 387 Mass. 687 (1982) 20

Questar Builders, Inc. v. CB Flooring, LLC, 410 Md. 241, 978 A.2d 651 (Md. Ct. App. 2009) 24

RAM Eng'g & Constr. Inc. v. Univ. of Louisville, 127 S.W. 3d 579 (Ky. 2003) 24,27,34

Ritan Const., Inc. v. Washington Elementary School Dist. No. 6, 208 Ariz. 379, 93 P.3d 1095, Ariz. Ct. App. 2004), vacated on other grounds, 210 Ariz. 419, 111 P.3d 1019, 1024 (Ariz. 2005) 24

S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., 343 Mass. 635, 640 (1962) 31

Shea v. Bay State Gas Co., 383 Mass. 218, 222-23 (1981) 30

Sigal Constr. Corp. v. General Services Admn., CBCA 508, 10-1 BCA ¶34, 442 (May 13, 2010) 25

Starr v. Fordham, 420 Mass. 178 (1995) 31

TigerSwan, Inc. v. United States, 110 Fed. Cl. 336 (2013) 20,24,27

Torncello v. U.S., 681 F.2d 756 (1982)............. passim

T.W. Nickerson, Inc. v. Fleet Nat. Bank, 456 Mass. 562 (2010) 36

USM Corp. v. Arthur D. Little Systems, Inc., 28 Mass.App.Ct. 108 (1989) 31

Vila & Son Landscaping Corp. v. Posem Const., Inc., 99 So. 3d 563 (Fla. Dist. Ct. App. 2012) 35

Williston on Contracts, §7.6, at 77-79 and §7.7 at 88-89 (4th ed. 1998) 34

G.L. c. 106, §1-304 36

I. **STATEMENT OF THE ISSUE**

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? R.A. 229-232.

II. **STATEMENT OF FACTS**

This case results from the termination by the Defendant/Appellant, Massachusetts Bay Transportation Authority ("MBTA"), of its two year contract with the Plaintiff/Appellee, A.L. Prime Energy Consultant, Inc. ("Prime"), for the supply of unleaded low sulfur diesel fuel ("ULSD") (the "Prime Contract"). Complaint, R.A. 10-16.

A. **The MBTA/Prime Publicly Bid Contract**

The MBTA's Invitation for Bids ("IFB") was issued on January 15, 2015, for the two year supply (with an MBTA option for a third year) of its requirements for ULSD. R.A. 18-97. The contract price was set based upon the price posted for ULSD by Platts, New York Barge Low Posting (a wholesale pricing benchmark) on the date of delivery, and the additional amount per gallon (the differential) to be charged by the bidder.

R.A. 24-25. The bidders were required to sign the MBTA's 84 page contract and bid package. R.A. 18-97. The MBTA reserved the "right to cancel this bid at any time prior to execution of the contract." R.A. 23, IFB, §1.4.

The bids were publicly opened and read on April 20, 2015. Prime was the low bidder with a price differential of $0.1290 per gallon over the Platts benchmark price. R.A. 17, Compl. ¶¶7-8. Prime was eventually awarded the contract, with an effective date of September 1, 2015.[1] R.A. 11, Compl. ¶¶9-12. Upon signing of the contract by the MBTA, Prime was required to supply the MBTA with its ULSD requirements at the low bid price over the two-year term of the agreement (with an MBTA option for a third year), estimated at 15,000,000 gallons per year. R.A. 24-25.

B. The MBTA's Termination of the Contract

In April 2016, the MBTA informed Prime that it was considering termination of the Prime Contract, on the basis that it could achieve cost savings by purchasing ULSD under the state contract between the

---

[1] The effective date was delayed for two months because the MBTA erroneously awarded the bid to a higher bidder, R.A. 2-3, Compl. ¶¶6-12. This was a portent of the MBTA's subsequent, erroneous cost comparison analysis upon which it relied in deciding to terminate the Prime Contract. See discussion at n.2, below.

Commonwealth and Dennis K. Burke ("Burke") (the "State Contract"). R.A. 3-4, Compl. ¶¶14-17.

The MBTA formally terminated the Prime Contract by letter of July 12, 2016, under the claimed authority of the termination for convenience clause, §5.29.3. R.A. 099-100.

By letter to the MBTA dated July 29, 2016, counsel for Prime stated that the termination for convenience clause could not be used to undercut the contract the MBTA had solicited through the public bidding process and, further, that the MBTA's cost comparison analysis was erroneous.[2] R.A. 102-108.

By reply letter of August 29, 2016, counsel for the MBTA stated that the termination was proper and would not be rescinded. It confirmed beyond doubt that the reason for the MBTA's termination was to obtain a better price:

> The MBTA's desire to save money by utilizing economies of scale available through the Commonwealth's existing blanket

---

[2] The Complaint alleges that the MBTA did not use the correct prices for its comparison dates and did not include the additional amounts charged under the State Contract for the premium ULSD supplied in the winter months. The State Contract ULSD price is based upon the OPIS (Oil Price Information Service) daily rack price, a different pricing benchmark than the Platts benchmark price required for the Prime Contract. R.A. 12, Compl. ¶¶15-17.

> fuel contract, even if misguided,
> cannot be termed "bad faith."

R.A. 110-113.

C. The Complaint and the MBTA Motion to Dismiss

On September 6, 2016, Prime filed this action, alleging that the MBTA had breached the contract through its improper use of the termination for convenience clause (Count I), and had breached its implied duty of good faith and fair dealing (Count II).[3] R.A. 10-16.

The MBTA filed a Motion to Dismiss the Complaint, asserting that it had the right to terminate the Prime Contract for any reason pursuant to the "Termination for Convenience" clause, §5.29.3.

The trial judge denied the motion to dismiss. He held that federal case law and this Court's decision in *Morton Street LLC v. Sheriff of Suffolk County*, 453 Mass. 485 (2009) suggest that "the SJC would adopt the limitations imposed by the Federal Circuit on the use of termination for convenience provisions and, in particular, the requirement that there must be some predicate for the termination other than the

---

[3] This case was transferred to the Business Litigation Session ("BLS") on November 2, 2016, upon allowance by the BLS of the assented to motion to transfer. R.A. 4.

opportunity to obtain a better price for the items or services procured." R.A. 225.

The trial judge subsequently denied the MBTA's Motion for Reconsideration, R.A. 227, and reported the issue stated at p.7 for review on appeal, pursuant to *Mass. R. Civ. P.* 64(a). R.A. 229-232.

D. The MBTA's Submission of Factual Materials

The MBTA filed an affidavit and selective documents with the trial court in support of its motion to dismiss, in spite of the Rule 12(b)(6) requirement that the motion be decided based on the allegations of the Complaint, R.A. 114-215. These materials are notable for indicating that, in contrast to the abrupt termination of the Prime Contract, the MBTA's plan was to transition to OSD pricing and procedures through implementation of new contracts following the expiration of existing contracts:

- The MBTA intends "to immediately take the necessary steps to follow the Commonwealth's regulations for the Procurement of Commodities or Services, 80 CMR 21.00, and related OSD policies for the MBTA's procurement of goods and services funded through its operating budget...As a result of discussions with OSD, we will engage in a phased approach to the transition to the OSD regulations." R.A. 125, August 5, 2016 MBTA letter to OSD. (emphasis added).

- The MBTA "is in the process of adopting the Commonwealth's regulations for procurement" so that "better volume discounts can be negotiated." R.A. 127, 9/13/16 MBTA Implementation for Purchasing and Procurement - Phase I Initial Launch Stage.

- Procedures to be implemented include "[o]rientation and training of MBTA procurement staff in the development of RFRs [Request for Responses from contractors/vendors] under the OSD regulations and policies." *Id.*

III. SUMMARY OF ARGUMENT

The trial judge correctly ruled that the Complaint stated a claim, namely that the MBTA did not have the right to terminate the Prime Contract, a public competitively bid contract which the MBTA solicited, for the purpose of obtaining a better price for ULSD from another vendor.

The MBTA had the right to terminate the contract for convenience, not for any reason and not without regard to any minimum standard of conduct or good faith.

The language of §5.29.3, in its entirety, makes clear that the termination for convenience standard is applicable. Following a single isolated reference to "and/or for any reason," §5.29.3 goes on to provide that the MBTA's exclusive remedy to pay reimbursement of costs applies only to "any termination for a

convenience," not as the remedy for a termination for "any reason." Moreover, §5.29.3 is titled "Termination for Convenience," a term which has a distinct meaning and history, and it references the Federal Acquisition Regulations.

The context and purpose of the Prime Contract makes clear that the "termination for convenience" standard applies and that there must be some predicate for termination other than self-dealing. No reasonable bidder on a multi-year contract anticipates that the MBTA could terminate the very contract it solicited in order to undercut the price with another vendor.

The Federal Circuit Court of Appeals ("FCCA"), which addresses these clauses in the context of federal procurement, has stated unequivocally that a "contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source." *Krygoski Construction Co., Inc. v. U.S.*, 94 F. 3d 1537, 1541, 1544-1545 (Fed. Cir. 1996). *Kyrgoski* further established that the recent enactment of statutes governing the bid process, "fully address the concerns ...

regarding the government's shopping for lower prices after contract award," by mandating that contracting officers maintain full and open competition in the procurement process, and impartial and equitable treatment of the bidding contractors. *Id.* at 1542.

The public bidding statutes of the Commonwealth serve the same purpose: they are intended not only to permit the awarding authority to obtain the lowest price among responsible bidders, but also to establish an open, honest procedure for competitive bidding for public contracts. *Modern Cont'l Const. Co., Inc. v. City of Lowell*, 391 Mass. 829, 840 (1984). There is a strong public policy to insure that all bidders are on an equal footing in the competition. *E. Amanti & Sons, Inc. v. Town of Barnstable*, 42 Mass.App.Ct. 773, 776 (1997). Therefore, the same considerations addressed by the FCCA and by federal contracting law - preventing the government from shopping for better prices in order to preserve a fair and open competitive bid process - apply here to invalidate the MBTA's contract termination.

The MBTA's argument that it must have the ability to undercut a publicly bid contract in order to avoid dire consequences, such as "cutting valuable services," is wholly unfounded. To the contrary, the lack of reported cases establish that the government has rarely sought or needed to use the termination for convenience clause to obtain a better deal. The reasons for this are evident: the public, competitive bidding process initiated by the agency eliminates or greatly reduces the availability of a lower price; and the agency, as one would expect, does not seek to undercut the contract it solicited.

Moreover, any financial benefit to be obtained by the government by taking such an action is far outweighed by the Commonwealth's public policies of assuring the integrity of the public bid process and of requiring that all parties to a contract be governed by at least some minimum standard of good faith and fair dealing.

IV. ARGUMENT

A. The Termination For Convenience Clause Does Not Permit the Government to Terminate a Publicly and Competitively Bid Contract for The Sole Purpose of Obtaining a Better Price

1. The Standard of Review

In addressing a Rule 12(b)(6) Motion to Dismiss, the Court must take as true the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor. *Flagg v. AliMed, Inc.*, 466 Mass. 23, 26 (2013); *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

The plaintiffs need only surmount a minimal hurdle to survive a motion to dismiss for failure to state a claim. *Bell v. Mazza*, 394 Mass. 176, 184 (1985). A complaint should not be dismissed if the facts alleged in the complaint and the reasonable inferences drawn therefrom plausibly suggest an entitlement to relief. *Iannacchnio v. Ford Motor Co.*, 451 Mass. 623, 626 (2008).

As discussed below, not only does the complaint state a cause of action, the MBTA's termination of the Prime Contract constitutes an abuse of discretion as a matter of law.

2. **The Purpose and Requirements of the Public Bidding Law**

The starting consideration for analysis is the critical fact that the Prime Contract was signed following a public, competitive bidding process initiated by the MBTA. As discussed below, at pp. 19-22, a fair and openly bid contract cannot be terminated by the government for convenience simply to obtain a better price.

The public bidding statutes are intended not only to permit the awarding authority to obtain the lowest price among responsible bidders, but also to establish an open and honest procedure for competitive bidding for public contracts. *Modern Cont'l Const. Co., Inc. v. City of Lowell*, 391 Mass. 829, 840 (1984) (awarding authority is charged with compliance with the public bidding statutes); *Interstate Eng'g Corp. v. City of Fitchburg*, 367 Mass. 751, 757-758 (1975). There is a strong public policy to ensure that all bidders are on an equal footing in the competition. *E. Amanti & Sons, Inc. v. Town of Barnstable*, 42 Mass.App.Ct. 773, 776 (1997). Compliance is mandated even where a violation may benefit the public and there is no harm to the awarding authority from the violation. *Phipps*

Products Corp. v. Massachusetts Bay Transp. Auth., 387 Mass. 687, 692 (1982). *And see Petricca Const. Co. v. Com.*, 37 Mass.App.Ct. 392, 397 (1994) ("an essential element of the 'equal footing' principle not only requires that 'bidders have the opportunity to bid in the same way,' but mandates that bidders 'bear the same risk of rejection'", citing *Dep't of Labor & Indus. v. Boston Water & Sewer Commn.*, 18 Mass.App.Ct. 621, 626 (1984)).

3. **The Termination for Convenience Clause**

The termination for convenience clause was developed as a mechanism by which the government could avoid large unneeded military procurements upon cessation of war and other hostilities. *TigerSwan, Inc. v. United States*, 110 Fed. Cl. 336, 344 (2013); *Torncello v. U.S.*, 681 F.2d 756, 763 (1982), citing *Nash & Cibinic, Federal Procurement Law* 1104-07 (3d Ed. 1980). Because these clauses first developed in the context of federal procurement, the authority on termination for convenience clauses has developed primarily in the Federal Circuit Court of Appeals ("FCCA") and its predecessor, the Court of Claims.

After the termination for convenience clause began to be used in peacetime contracts, there was

inconsistent guidance from the FCCA on the limitations which should be applied to its use.

In *Torncello*, the Navy procured services from another party for a better price instead of the contractor to which the contract was awarded, and terminated the contract for convenience. The plurality and concurring opinions applied different standards in determining the limits of the government's discretion to terminate for convenience.

The plurality opinion utilized a "changed circumstances" test, requiring "some kind of change from the circumstances of the bargain or in the expectations of the parties" in order to support a termination for convenience. *Id.*, 681 F.2d at 772. The concurring judges concluded that a "bad faith/abuse of discretion" standard should be applied. *Id.* at 773-74. Under either standard, the court held that the Navy had breached the contract. In the process, the court overturned *Colonial Metals Co. v. United States*, 494 F.2d 1355 (1974), which had approved the Navy's termination for convenience of a contract for copper in order to obtain a better price.

Krygoski Const. Co., Inc. v. U.S., 94 F.3d 1537 (Fed. Civ. 1996), established that the test to be applied by the FCCA would be the abuse of discretion/bad faith standard, not the broader change in circumstances test applied by the *Torncello* plurality. The court emphasized, however, that the Government's authority to invoke a termination for convenience has its limits. "A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source," citing *Torncello*. *Id.* At 1541.

The *Kyrgoski* court did not, as the MBTA argues, go on to contradict this unequivocal statement, nor did it hold that the only bar to a termination for convenience is if the agency signed the contract with no intention of honoring it. To the contrary, the court determined that recent statutes, particularly the Competition in Contracting Act ("CICA"), "fully address the concerns of the *Torncello* plurality regarding the Government's shopping for lower prices after contract award." *Id.* at 1542.

> CICA requires executive agencies, when procuring property or services, to "obtain full and open competition through use of competitive procedures." 41

> U.S.C. § 253(a)(1)(A) (1994). Thus, CICA ensures that contracting officers receive bids at competitively low prices. For each solicitation, a contracting officer must maintain full and open competition in the procurement process, unless one of the limited exceptions applies. See 10 U.S.C. § 2304 (1994). CICA mandates impartial, fair and equitable treatment for each contractor. See 10 U.S.C. §§ 2304 and 2305 (1994).

Id. at 1542-1543.

Kyrgoski, by citing CICA and pre-CICA *Torncello* with approval on this point, established that terminating a publicly bid contract simply to obtain a better bargain constitutes bad faith. There is no legal basis for claiming a distinction between an agency signing a contract with no intent to honor it and an agency terminating a contract after it is awarded so that it does not have to honor it.

As the plaintiff in *Kyrgoski* did not claim that the contract was terminated for a better price - which would have been a clear breach of contract - the court needed to review only whether the agency had an intent not to honor the contract at the time it was signed. It found that the termination and re-bidding of the contracat, following discovery by the agency that the

scope of work had greatly increased, was proper and necessary to preserve full and open competition and to avoid any prospect of prejudice to other bidders. *Id.* at 1544-1545.[4]

This clear, common sense and appropriate standard has been affirmed in numerous cases since *Kyrgoski*. See *TigerSwan, supra,* (the "abuse of discretion" standard has been satisfied when the government has terminated a contract for convenience in order to get

---

[4] Other cases illustrating proper application of the termination for convenience clause are *Nolan Brothers v. United States*, 405 F. 2d 1250 (1969) (physical changes at site made performance too difficult or too costly); *Nesbitt v. United States*, 345 F. 2d 583 (1965), cert. denied 383 U.S. 926, 86 S. Ct. 931, 15 L. Ed. 2d 846 (1966) (contractor did not meet the contract requirements); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F. 3d 1578 (Fed. Cir. 1995) (ambiguity in the bid specifications "impeded full and open competition" in the bidding process); *Mb Oil Ltd. Co. v. City of Albuquerque*, 382 P.3d 1975 (N. Mex. Ct. App. 2016) (contractor unable to meet the fuel requirements of the city); *Capital Safety, Inc. v. State Div. of Bldgs. and Construction*, 369 N.J. Super. 295 (App. Div. 2004) (contract for asbestos abatement properly terminated for convenience, due to the government's inability to relocate its employees from the floor where work was scheduled to proceed, a contingency contemplated by the parties). Two states have adopted the broader change in circumstances test to warrant the government termination of a contract for convenience, see *RAM Eng'g & Constr. Inc. v. Univ. of Louisville,* 127 S.W. 3d 579 (Ky. 2003); *Ritan Const., Inc. v. Washington Elementary School Dist. No. 6,* 208 Ariz. 379, 93 P.3d 1095, 1112, footnotes 30 and 31 (Ariz. Ct. App. 2004), vacated on other grounds, 210 Ariz. 419, 111 P.3d 1019, 1024 (Ariz. 2005) (en banc). Another state, Maryland, has held that private "at will" termination for convenience clauses are subject to and limited by an implied duty of good faith and fair dealing. *Questar Builders, Inc. v. CB Flooring, LLC,* 410 Md. 241, 978 A.2d 651 (Md. Ct. App. 2009).

a better price for itself"); *Sigal Constr. Corp. v. General Services Admn.*, CBCA 508, 10-1 BCA ¶ 34, 442 (May 13, 2010); *NCLN20, Inc. v. United States*, 99 Fed. Cl. 734, 759 (2011) ("entering a contract with no intention of honoring it, or terminating a contract to find a better bargain, are grounds for invalidating a termination for convenience"). And see *Northrop Grumman Corp. v. United States*, 46 Fed. Cl. 622, 627 (2000) (NASA terminated contract to build a space station for the purpose of saving the space station program, which had to be restructured and scaled down; NASA "did not terminate this contract for convenience 'simply' to acquire a better bargain from another source, even if that may have been the result.")[5]

The MBTA nevertheless argues, based on reference to selected publications, that the right to undercut a contract it solicited is necessary for it to avoid, among other dire outcomes, "cutting valuable services, requesting larger taxpayer subsidies, charging the commuting public higher prices or deferring necessary

---

[5] The cases cited by the MBTA for the proposition that it had the right to terminate the contract for any reason are inapposite: they involved contracts between private parties, not a multi-year government contract signed following a public bidding process governed by the termination for convenience standard.

maintenance." MBTA Brief, pp. 6-8, 35. This claim is wholly unfounded.

The MBTA does not cite any other instance in which it - or any other Massachusetts governmental agency - determined it was necessary to terminate a contract for convenience to obtain a better price. The lack of reported cases on this issue indicates that the government has rarely sought or needed to use the termination for convenience clause to obtain a better deal.[6] The reasons for this are evident: the public, competitive bidding process initiated by the agency eliminates or greatly reduces the availability of a lower price; the agency, as would be expected, does not seek to undercut the contract it solicited; and the FCCA has made clear that such a termination is an abuse of discretion. The government also maintains the broad discretion to terminate for virtually any other good faith reason which impacts its need for the subject goods and services or affects the performance of the contract.

[6] The MBTA's 9/1/16 Annual Report discussed its extensive efforts to increase efficiencies and obtain cost savings, including through outsourcing of operations, internal management changes and efficiencies, more strategic contracting, a new fare collection system, and changes to cash handling and warehouse operations. R.A. 133-150. There is no mention of the need to be able to cut short a properly bid contract awarded to a low bidder.

In light of the Commonwealth's public policy of assuring impartial and equitable treatment of bidders and the integrity of the public bid process, the same considerations addressed by the FCCA and by CICA - preventing the government from shopping for better prices following a fair and open competitive bid process - apply here to invalidate the MBTA's contract termination.[7]

Allowing termination of a publicly bid contract for any reason also potentially implicates the integrity of the public official responsible for administering the contract. In *RAM Eng'g & Constr. Inc. v. Univ. of Louisville*, 127 S.W. 3d 579, 587 (Ky. 2003), the court held that a public university could not terminate for convenience a contract awarded to the low bidder without a change of circumstance, which was necessary to assure the public that "the government cannot simply excuse itself from a contract for any reason, or no reason at all. Such a change of circumstance was necessary. The public should have no

---

[7] The MBTA argues that Prime agreed to accept reimbursement of its costs upon a termination for convenience of the MBTA. However, this provision does not apply where, as here, the termination for convenience is improper. In such a case, traditional common law damages for breach of contract are available to the contractor. *Kyrgoski, supra*, 94 F.3d at 1540-41; *TigerSwan, supra*, 110 Fed. Cl. At 346, and cases cited.

cause to doubt the honesty of the officials of this Commonwealth." *Id.* at 586.

The facts of this case demonstrate the importance of preserving full and open competitive bidding practices. There is an issue of whether the MBTA in fact saved costs by terminating the Prime Contract, a risk eliminated by a fair and equal bidding process, public comparison of the bid prices and the opportunity to protest and correct an error, which Prime was able to do here. Moreover, such termination opens 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 Court has recognized that the discretion provided to the government by the termination for convenience provision is not without limits. In *Morton Street LLC v. Sheriff of Suffolk County*, 453 Mass. 485 (2009), the Sheriff of Suffolk County signed a ten-year lease, with written notice to the landlord that the lease would be terminated if funding was lost. Three years into the lease term, the sheriff lost the funding which had paid for the entire annual cost of the lease, and, as a result, terminated the contract.

The Court found that the loss of funds plainly warranted termination for convenience, and therefore did not need to determine the full extent of the government's discretion to terminate a contract for convenience. "Because [the sheriff] was already faced with a considerable deficit, funding this lease [through her own budget] would have meant reducing or eliminating the funding devoted to other obligations or programs." *Id.* at 494. It is difficult to perceive that the Court's holding would have been the same had the sheriff, with no loss of funding, terminated the lease solely in order to sign a lease for a better rent with another landlord, a process which the sheriff could, without some minimum standard of conduct and regardless of the term of the subsequent lease, repeat at will.

In this case, there was no loss of funding by the MBTA, no change in its fuel purchase requirements, and no other predicate which would warrant a termination for convenience. The MBTA simply used the termination for convenience clause for a purpose completely at odds with protecting the integrity of the public bidding process and assuring equal treatment of bidders.

4. The MBTA Is Not Entitled to Terminate The Contract for Any Reason; the Termination For Convenience Standard Must Be Met

The MBTA also argues that the termination for convenience standard does not control because §5.29.3 states that it may terminate "at any time for its convenience and/or for any reason." This argument is refuted by the language of §5.29.3 in its entirety and the context and purpose of the Prime Contract.

The words of a contract must be examined in light of the circumstances surrounding its making to ascertain the intention of the parties. See *Louis Stoico, Inc. v. Colonial Development Corp.*, 369 Mass. 898, 902 (1976); *Clark v. State Street Trust Co.*, 270 Mass. 140, 152 (1930). See also *Shea v. Bay State Gas Co.*, 383 Mass. 218, 223 (1981) (a contract is interpreted "with reference to the situation of the parties when they made it and to the objects sought to be accomplished" (citation omitted)); *Lewis v. Chase*, 23 Mass.App.Ct. 673, 677 (1987) ("A contract should be construed to give it effect as a rational business instrument and in a manner which will carry out the intent of the parties"). "An interpretation which gives a reasonable meaning to all of the provisions of

a contract is to be preferred to one that leaves a part useless or inexplicable." *S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc.*, 343 Mass. 635, 640 (1962) (citation omitted); *USM Corp. v. Arthur D. Little Systems, Inc.*, 28 Mass.App.Ct. 108, 116 (1989) ("The object of the court is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose"). The scope of a party's obligation cannot "be delineated by isolating words and interpreting them as though they stood alone." *Starr v. Fordham*, 420 Mass. 178, 190 (1995) (citation omitted).

Section 5.29.3 states:

> **Termination for Convenience.** The Authority may, in its sole discretion, terminate all or any portion of this Agreement for the work required hereunder, at any time for its convenience and/or for any reason giving written notice to the Contractor 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 principles as set forth in the Federal Acquisition

> Regulations, including demobilization and contract close out 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 payments 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.

R.A. 49.

Section 5.29.3 by its terms provides that a termination under this section is subject to the termination for convenience standard historically used with government contracts. Following the isolated reference to "and/or for any reason," §5.29.3 provides that the MBTA has the right to terminate and pay reimbursement of costs as the exclusive remedy only for "any termination for convenience," not as the remedy for a termination for "any reason."[8] Moreover,

[8] The MBTA's argument that §5.29.3 confers broader authority than the "termination for convenience" provision implemented by the Federal Acquisition Regulations ("FAR") is not accurate. The FAR provides that a termination for convenience may be made "when it is in the Government's interest," see 48 C.F.R. §2.1011, a standard effectively as broad as that contained in the Prime Contract.

§5.29.3 is titled "Termination for Convenience," a term with a distinct meaning and history, and it expressly references the Federal Acquisition Regulation.

The context and purpose of the Prime Contract reinforces this conclusion. The MBTA solicited bids for the supply of ULSD over a two year term - with an optional third year - to obtain a low price premised upon the supply of a large volume of fuel over an extended term, and to guarantee the supply of fuel essential to its operations over a multi-year period.

No reasonable bidder goes through the effort and cost of making a low bid for a multi-year contract with the expectation that the agency will terminate the very contract it solicited one day (or a week or a month or any other time) after it is awarded, because the agency is able to undercut the price.

Even if the MBTA had written the contract to state that it had a flat right to terminate for any reason, with no reference to termination for convenience, it would be unenforceable as a violation of the court's public policy of assuring the fair and equal treatment of bidders and the integrity of the public bidding process.

Further, such a contract would be unenforceable due to lack of consideration. See *Torncello*, 681 F.2d at 769, citing *Restatement, Second, Contracts*, Section 77, and Williston, Contracts Section 195, p. 481 (3d ed. 1957 and Supp. 1979) (a route of complete escape violates any other consideration furnished and is incompatible with the requirements of a contract). "[I]f there is no good faith limitation set by a change of circumstances, then the government's contracted for promise becomes illusory." *RAM Eng'g & Constr. Inc. v. Univ. of Louisville, supra*, 127 S.W. 3d at 579, 586, citing Williston on Contracts, §7.6, at 77-79 and §7.7 at 88-89 (4th ed. 1998). If reimbursement to a contractor for its costs is the contractor's only remedy, then the government may be "procuring something for nothing." *Id.*, citing *Torncello.* See *also Mb Oil Ltd. Co. v. City of Albuquerque*, 382 P. 3d 975, 979 (N. Mex. Ct. App. 2016) (the placement of some limitations on the government's ability to terminate at will is "designed to ensure that government contracts with nonmutual termination for convenience clauses are not illusory".[9]

[9] There are several state cases which hold that the government may terminate for convenience in order to obtain a better price: *4N Inter., Inc. v. Metropolitan Transit*

B. **Count II of the Complaint States a Cause of Action for Breach of the Implied Duty of Good Faith and Fair Dealing by the MBTA**

Count II of the Complaint states a claim that the MBTA breached its implied duty of good faith and fair dealing. This is a separate and independent cause of action not addressed by the trial court.

Every Massachusetts contract contains an implied covenant that neither party will do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.[10] *Druker v. Roland Wm. Jutras Associates, Inc.*, 370 Mass. 383, 385 (1976). "Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard." *Fortune v. National Cash Register Co.*, 373

Authority, 56 S.W. 3d (Tex. Ct. App. 2001), which did not recognize federal precedent or government public policy considerations regarding the government contract bidding process; *A.J. Temple Marble & Tile, Inc. v. Long Island R.R.*, 172 Misc. 2d 422, 659 N.Y.S. 2d 412 (N.Y. Sup. Ct. 1997), by failing to require *Kyrgoski's* unequivocal recognition that terminating solely to obtain a better price is a breach of contract; *Vila & Son Landscaping Corp. v. Posem Const., Inc.*, 99 So. 3d 563 (Fla. Dist. Ct. App. 2012) (involved a private contract, but also relied upon a misreading of *Kyrgoski*).

[10] "When the [government] enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579, 54 S. Ct. 840, 843, 78 L. Ed. 1434 (1934).

Mass. 96, 102 (1977). See *T.W. Nickerson, Inc. v. Fleet Nat. Bank*, 456 Mass. 562, 570 (2010); *Anthony's Pier 4, Inc. v. HVC Associates*, 411 Mass. 451, 471-472 (1991); *Cadle Co. v. Vargas*, 55 Mass.App.Ct. 361 (2002) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."); *Cherrick Distributors, Inc. v. Polar Corp.*, 41 Mass. App. Ct. 125, 127 (1996).[11]

A termination for convenience provision or other contract term granting broad discretion to one of the parties does not displace the duty of good faith and fair dealing; to the contrary, the implied duty of good faith is a necessary check against the abuse of such a provision. In *Anthony's Pier 4*, the court held that the defendant could not use discretionary contract rights in order to leverage better terms: it is "bad faith to use discretion 'to capture opportunities foregone on contracting as determined by the other party's reasonable expectations - to refuse to pay the expected cost of performance.'" 411 Mass.

---

[11] As this is a contract for the sale of goods, the duty of good faith and fair dealing imposed by the Uniform Commercial Code, G.L. c. 106:1-304, also applies here.

at 471-472, citing *Northern Heel Corp. v. Compo Indust., Inc.*, 851 F.2d 456, 471 (1st Cir. 1998), and *E.A. Farnsworth, Contracts* §7.17(a) at 329 (1990), quoting *Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 *Harv. L. Rev.* 369, 372-373 (1980); *Greer Properties, Inc. v. LaSalle Nat. Bank*, 874 F.2d 457, 458-459 (7th Cir. 1989) (seller's right to terminate the Purchase and Sale Agreement if the cost to clean-up environmental contamination became "economically impracticable," did not permit seller to terminate for the purpose of obtaining a better price from another buyer).

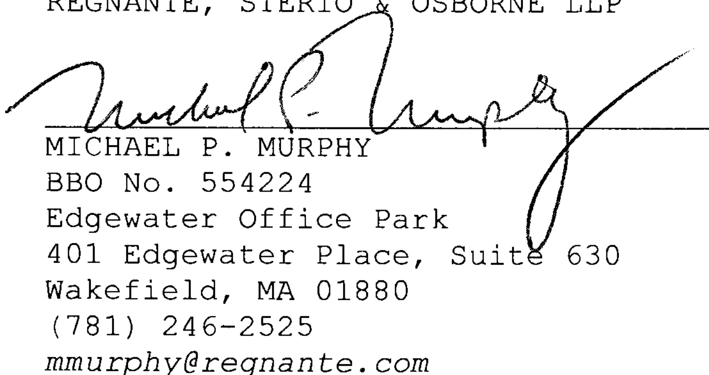
The importance of the implied duty of good faith and fair dealing is especially pronounced here, given the public policy considerations for the fair bidding of contracts. There is no question but that the MBTA's decision to terminate the fairly and competitively bid Prime Contract in order to obtain a better price destroyed Prime's right to receive the benefits of the contract, and was a breach of its duty of good faith and fair dealing.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Honorable Court: (1) answer "No" to the question reported by the trial court, and (2) remand this case to the trial court for further proceedings consistent with its decision.

Respectfully submitted,

A.L. PRIME ENERGY CONSULTANT, INC.,
By its attorneys,
REGNANTE, STERIO & OSBORNE LLP

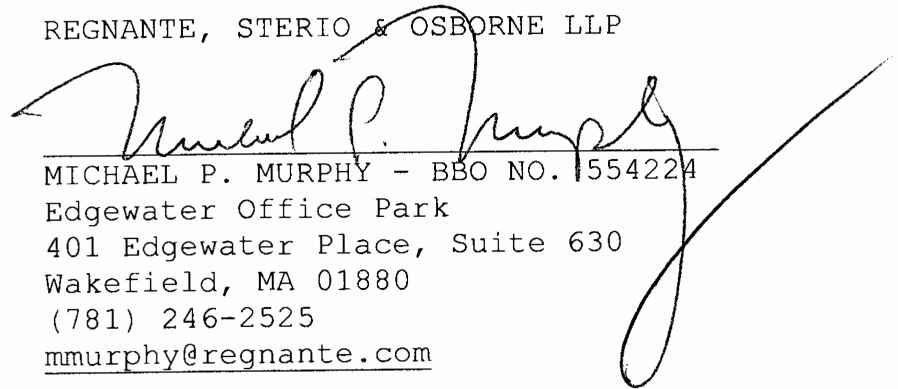


MICHAEL P. MURPHY
BBO No. 554224
Edgewater Office Park
401 Edgewater Place, Suite 630
Wakefield, MA 01880
(781) 246-2525
mmurphy@regnante.com

CERTIFICATE OF SERVICE

I, Michael P. Murphy, counsel for A.L. Prime Energy Consultant, Inc., hereby certify that I have served a copy of this Opposition by causing it to be delivered by email and first class mail to counsel for the Defendant/Appellant, Ryan E. Ferch, Esq., Massachusetts Bay Transportation Authority, Legal Department, Suite 7760, Ten Park Plaza, Boston, MA 02116; and Kevin P. Martin, Esq., Joshua J. Bone, Esq., Tucker DeVoe, Esq., Goodwin Procter LLP, 100 Northern Avenue, Boston, MA 02110 on this 11th day of September, 2017.

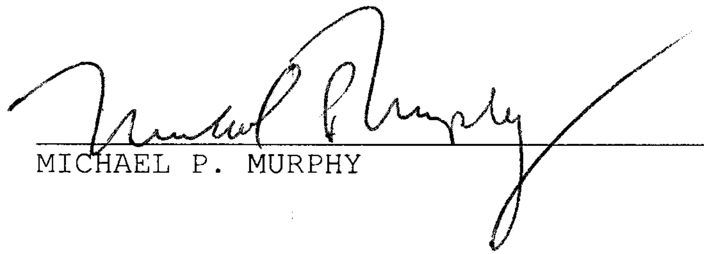
REGNANTE, STERIO & OSBORNE LLP



MICHAEL P. MURPHY - BBO NO. 554224
Edgewater Office Park
401 Edgewater Place, Suite 630
Wakefield, MA 01880
(781) 246-2525
mmurphy@regnante.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(K) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel states that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(b), 16(e), 16(f), 16(h), 18 and 20.



MICHAEL P. MURPHY

Dated: September 11, 2017