Interpreting Termination for Convenience Clauses: A.L. Prime Energy Consultant, Inc. v. MBTA

BY PAUL C. BAUER • MAY 7, 2018

In *A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transportation Authority* (MBTA), the Massachusetts Supreme Judicial Court issued an unambiguous decision on May 2, 2018, that a termination for convenience clause in a state or municipal contract will be interpreted and enforced according to the plain meaning of the contract under Massachusetts general contract principles and rejected the application of Federal standards for construction of the contract. By doing so, the Court allowed to stand the MBTA's right to terminate its procurement contract for diesel fuel with A.L. Prime in order to obtain lower priced fuel under a Statewide procurement.

In July 2015, the MBTA awarded Prime the contract to provide for ultra low sulfur diesel fuel. The contract (attached to the invitation for bids) included a termination for convenience clause permitting the MBTA to terminate the contract "in its sole discretion" "at any time for its convenience and/or for any reason" upon 30 days' notice. That same year, the Commonwealth, unrelatedly, obtained bids and entered into a contract for Statewide supply of the same type of diesel fuel. The MBTA eventually terminated the Prime contract and used the Statewide contract to obtain fuel at lower cost under the termination for convenience provisions.

Prime challenged the MBTA's right to terminate for convenience in order to obtain cost savings, asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

As there is a more established body of Federal law interpreting termination for convenience clauses, some state courts have applied Federal law in interpreting state termination for convenience clauses. Whether to impose the Federal standard or the Massachusetts general contract provisions to a termination for convenience in a state or municipal contract is a matter of first impression in Massachusetts. Under Federal law, a termination for convenience clause cannot be invoked in bad faith and cancelling a contract to procure the same product or service at a lower cost can constitute bad faith. Thus, in *Prime v. MBTA*, applying Federal law to interpret the termination for convenience clause could result in a conclusion that the MBTA acted in bad faith in terminating the contract, with resulting damages for lost profits rather than a claim limited to recovery of the contractor's sunk costs as contemplated by the contract.

The Court instead interpreted the contract under general Massachusetts principles of contract law and, in upholding the effectiveness of the MBTA's termination for convenience, the Court looked at all of the words of the clause: that the right to terminate could be exercised in MBTA's "sole discretion" and for "its convenience and/or for any reason" distinguishing that broad right from the Federal standard allowing termination in the "Government's interest."

The decision provides a clear statement that a termination for convenience clause in a contract with a state or municipal agency or authority will be construed under Massachusetts general contract principles of construction, and if

properly worded, will be effective to terminate a contract where the reason for such termination is to obtain cost savings from an alternate contracting source. The Court did not address and left for another day the question of whether a public entity may terminate a contract for convenience in order to rebid the requirement in search of a lower cost alternative.

