IN THE SUPREME COURT OF FLORIDA

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,	:	
Defendant/Petitioner,	:	
vs.	:	Case No. 72-451
COASTAL CAISSON DRILL CO., INC.,	:	
Plaintiff/Respondent.	:	

An Appeal from the District Court of
Appeal for the Second District of Florida

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE FACTS AND CASE

American's statement of the facts and case is misleading and incomplete. American fails to put the C-Way/Coastal subcontract in proper context. In response to DOT's request for proposals, C-Way submitted a proposal indicating, inter alia, that it would furnish a contract bond in accordance with Florida Statutes 255.05 (R. 190). The contract between DOT and C-Way also provided that C-Way would provide a contract bond in accordance with Florida Statutes 255.05 (R. 191).

C-Way, in fact, furnished a contract bond to DOT in accordance with the request for proposals, in accordance with C-Way's contract with DOT, in accordance with DOT's standard specifications, and in accordance with Florida Statutes 255.05 and 337.18. The bond provided that it would remain "in full force" unless C-Way complies fully with Sections 255.05 and 337.18 and unless C-Way "promptly makes payment to all persons supplying labor, material, equipment and supplies, used directly or indirectly" in the improvements (R. 191).

C-Way discussed with Coastal the possibility of Coastal providing, as a subcontractor, certain material, supplies, labor and equipment in connection with the improvements. During the discussions between C-Way and Coastal, Coastal was told that the improvements were for a state road project, but was not told that it would be required to waive its statutory rights under Florida Statutes 255.05 and 337.18. Discussions were primarily confined to scope of work and payment issues (R. 191).

American claims that the subcontract expressly waived Coastal's right to sue C-Way's surety, American (American Brief 1). The subcontract, however, specifically referenced C-Way's contract with DOT and specifically provided that Coastal's "performance . . . is to be made in accordance with all applicable Florida Department of Transportation plans, specifications and submittals" (R. 191-192). The purported waiver - fine-printed paragraph six on the backside of the subcontract - does not expressly refer to bonds pursuant to Sections 255.05 and 337.18 which were designed to protect subcontractors and suppliers on state contracts (R. 191-192). Rather, the allegations - which must be accepted as true on American's motion to dismiss - are that "[u]nbeknownst to Coastal and clearly in derogation of its reasonable expectations, there was a fine print boilerplate provision (paragraph 6 on the back of the subcontract) purporting to waive all rights under any bond or bonds executed by [C-Way]" (R. 191).

Although the circuit court did dismiss the second amended complaint, the circuit court noted that it was "concerned about . . . the public policy issue, in light of the provisions of [Florida Statutes] 255.05," that the waiver "appear[ed] to be in derogation of that statute," and that "what C-Way has done here is circumvent [the exemption provision of Florida Statutes 255.05] by obtaining a waiver directly from the subcontractor" (R. 188-189). In dismissing, the circuit court noted that it was "not pleased with ruling the way [it had] ruled" and invited

Coastal to "assert whatever appellate rights [Coastal feels] appropriate" (R. 278). Because the circuit court dismissed the complaint on a motion to dismiss, the circuit court made no "findings."

On appeal, the Second District Court of Appeal filed a ten-page opinion. The Second District found merit in Coastal's argument that the waiver was ambiguous because "[t]he parties had typed on the face of the form contract a provision expressly stating that performance was to be in accordance with applicable state regulations, without excepting any specific regulation or portion of the contract." The Second District found that such provision "appeared to conflict with the general waiver of rights contained in a list of conditions printed on the back of the contract;" that any ambiguity in the contract should be construed against C-Way as the drafter; and that a provision added to a form contract takes precedent over a printed boilerplate term.

Apart from any ambiguity, however, the Second District was even more pursuaded by certain public policy considerations. The Second District noted that public policy limits the right to contract and that where a private agreement contravenes an established interest of society or has a tendency to be injurious to the public welfare it is void as against public policy. The Second District noted that "an individual cannot waive the protection of a statute that is designed to protect both the public and individual." The Second District went on to note that "there was a [very compelling] public interest in providing protection

for subcontractors on public projects," and that "one purpose of the statute was to insure payment of the workers." The Second District noted that permitting waivers could adversely affect the bidding process. The Second District also noted that the Legislature had "specif[ied] certain exemptions to the bond requirement and clearly could have included express provisions for individual waivers, just as it did in Section 713.18 concerning mechanic's liens." Moreover, the Second District noted "because the legislature has already delineated certain exemptions, the waiver of rights against a bond on public works project is an issue more appropriately determined in the legislative process than judicial forum." The Second District concluded that "allowing private waiver of the statutory right to sue on the construction bond required by Section 255.05 could frustrate the intent of the legislature by undermining the bidding process, and by risking state involvement in contractor/subcontractor disputes and the consequent delay of public works projects. Such a contractual waiver is in derogation of the public policy of the state and, therefore, unenforceable." The Second District went on, however, to certify the waiver issue as an issue of great public importance.

SUMMARY OF THE ARGUMENT

C-Way's boilerplate attempt to require Coastal to waive its statutory and contractual bond rights should not be enforced.

To permit C-Way to evade Sections 255.05 and 337.18 would flaunt Florida case law, as was noted in Collins v. National Fire Ins. Co., 105 So.2d 190, 193 (Fla. 2d DCA 1958): "The purpose of the provision contained in Section 255.05, that a contractor shall promptly make payments for labor, material, and supplies, is to protect laborers and materialmen whose labor and material are put into public buildings or projects . . . . A contractor's bond should be construed in light of this section and must be supposed to accomplish its purpose."

To enforce the waiver would be to deprive Coastal of its statutory rights to go against the bond.

To enforce the waiver would be to deprive Coastal of its rights, as a third party beneficiary, of the contract between C-Way and DOT.

To enforce the waiver would violate Florida public policy. Enforcing the waiver would place bidders willing to deprive subcontractors of their statutory rights (like C-Way) at a competitive advantage over bidders willing to recognize Florida public policy and the statutory rights of subcontractors.

Even if certain waivers could be enforced, American cannot enforce the purported waiver here because it is ambiguous and unclear.

In any event, American is estopped from enforcing any waiver because after Coastal told American that it was relying on the bond, American remained silent and Coastal proceeded with its work.

ARGUMENT

I. THE SECOND DISTRICT PROPERLY CONSTRUED THE WAIVER AS AMBIGUOUS, UNCLEAR, AND THEREFORE UNENFORCEABLE.

American claims that the Second District improperly reversed a finding of the trial court in determining that the purported waiver was ambiguous (American Brief 8). American also claims that the Second District could find ambiguity only if it found that the trial court's construction was clearly erroneous (American Brief 10-11).

What American forgets, however, is that the trial court dismissed the complaint. There has been no trial; there have been no findings. Williams v. Ray, 107 Fla. 327, 144 So. 679 (1932), Howard v. Howard, 467 So.2d 768 (Fla. 1st DCA 1985), Discount Drugs, Inc. v. Tulip Realty Co. of Florida, 396 So.2d 764 (Fla. 4th DCA 1981), petition dismissed, 412 So.2d 464 (Fla. 1982), and Albert v. Albert, 186 So.2d 809 (Fla. 3d DCA 1966), involved contract constructions where there had been testimony, not on a motion to dismiss. The "clearly erroneous" rule simply does not apply where the trial court dismisses a complaint on a motion to dismiss.

The Second District was clearly correct in finding that any waiver was ambiguous.

First, the "laws of this State are part of every contract." Noriega v. Schnurmacher Holding, Inc., 13 F.L.W. 1303 (Fla. 3rd DCA, opinion filed May 31, 1988), quoting Board of Public Instruction v. Town of Bay Harbor Islands, 81 So.2d 637, 643 (Fla. 1955).

Second, as previously noted, typed on the face of the subcontract was that "[p]erformance of this work is to be in accordance with all applicable Florida Department of Transportation plans, specifications and supplements." Florida DOT, Standard Specifications for Road and Bridge Construction (1982), specifically requires the contractor and surety to furnish a contract bond "that the Contractor will . . . pay all legal debts pertaining to the construction of the project" and that the surety "agrees to be responsible . . . for payment of all debts" pertaining to the contract (§§ 1-10, 1-46, 3-6, 3-7). The printed boilerplate on the back of the subcontract purports to waive bond rights. The boilerplate does not mention Section 255. Of course, the typed front of the contract prevails over the preprinted boilerplate on the back of the contract. See, e.g., Hurt v. Leatherby Ins. Co., 380 So.2d 432 (Fla. 1980); Planck v. Traders Diversified, Inc., 387 So.2d 440 (Fla. 4th DCA 1980), review denied, 394 So.2d 1153 (Fla. 1981). Also, any ambiguity is to be resolved against C-Way, which drafted the contract. See, e.g., Hurt v. Leatherby Inc. Co., 380 So.2d 432 (Fla. 1978).

Consistent with Coastal's claim that the "waiver" was insufficient to waive Coastal's statutory bond rights is Coastal's allegation that "C-Way, Coastal and DOT never considered the contract as waiving Coastal's statutory rights on the bond" (R. 195). As the Federal Circuit Court of Appeals has noted, it is a "a familiar principle of contract law that the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation." Blinderman Const. Co. v. United States, 695 F.2d 552, 558 (Fed. Cir. 1982).

Because C-Way drafted the "waiver" and because the parties did not consider the waiver as waiving Coastal's statutory rights, the Second District properly held that the Circuit Court erred in dismissing, on a motion to dismiss, Coastal's claim against the bond.

II. THE PURPORTED WAIVER VIOLATES FLORIDA STATUTES 255.05 AND 337.18 AND FLORIDA PUBLIC POLICY

As the Second District recognized, the Legislature has specified "certain exceptions to bond requirement and clearly could have included express provisions for individual waiver, just as it did in Section 713.18 concerning mechanic's liens." But the Legislature did not do so. Thus, the waiver violates Florida Statutes 255.05 and 337.18 and Florida public policy.

Section 255.05(1)(a) provides that:

> Any person entering into a formal contract with the state. . . shall be required, before commencing the work, to execute a payment and performance bond with a surety insurer authorized to do

> business in this state as surety. Such bond shall be conditioned that the contractor. . . promptly make payments to all persons. . . whose claims derive directly or indirectly from the prosecution of the work provided for in the contract. . . The claimant shall have a right of action against the contractor and surety for the amount due him. Such amount shall not involve the public authority in any expense.

Section 337.18 similarly requires a bond.

Because subcontractors cannot lien public property, the Legislature required Chapter 255 and 337 bonds to protect the subcontractors. See School Board of Palm Beach County v. Vincent J. Fasano, Inc., 417 So.2d 1063, 1064-1065 (Fla. 4th DCA 1982). Chapters 255 and 337 establish specific rules and public policy concerning bonds for public works. Chapters 255 and 337 also establish certain procedures to exempt a project from a bond -- but C-Way did not follow, and could not follow, those statutory procedures (R. 194).

To permit a waiver (such as C-Way attempts here) violates public policy because bidders could circumvent the exemption process in Sections 255.05 and 337.18 (R. 194, para. 25); because Sections 255.05 and 337.18 are remedial and designed to protect subcontractors; because waivers could involve governmental agencies in litigation; because waivers would permit certain bidders to obtain a competitive advantage in the bidding process; and because DOT, as the administrative agency charged here with implementing Sections 255.05 and 337.18, does not consider the waiver as effective (R. 194-195).

A. Limited exceptions from bond requirements. Section 255.05 provides that the Department of General Services may exempt certain persons contracting with the State for monies less than $200,000 from executing the payment bond, but C-Way's contract was for $7.8 million (R. 7). Section 255.05(7) provides that a contractor may furnish a certified check, money order, certified cashier's check or irrevocable letter of credit, in lieu of a bond, but C-Way furnished no check, money order, or letter of credit.

Section 277.18 provides that a bond need not be furnished where the contract price is $25,000 or less; but, even there, the statute requires the contractor to furnish security in the form of a cashier's check, certified check, or money order. Again, the exemption was inapplicable because C-Way's contract was for $7.8 million (R. 7), and C-Way furnished no check or money order.

Rule 13D - 11.041, Florida Administrative Code, "Waiver of Bond Requirements," implements the statutory exemption process for contracts less than $200,000. In doing so, Rule 13D-11.041 includes safeguards to ensure that subcontractors, such as Coastal, are paid; more specifically, Rule 13D-11.041 specifically requires that, prior to being paid, the contractor (who has received an exemption) "furnish proof of payment for all materials, labor and subcontractor charges incurred by him in performing the work. . ."

C-Way did not attempt to comply with the exemption process - nor, more importantly, could C-Way comply. C-Way's contract was

for substantially more than $200,000. Even on contracts less than $200,000, only the Executive Director of the Department of General Services may grant a waiver or exemption. On contracts less than $100,000, the State Agency may grant a waiver or exemption. Neither the Executive Director nor the State Agency, then, would have any authority to grant a waiver or exemption here.

As the Attorney General has opined, the statute provides that the executive director "alone may exempt the contractor from otherwise required payment and performance bond," and "the Executive Director of the Department of General Services alone is granted authority to exempt certain contractors who are working on state public works projects and that this authority does not vest in any other officer when the project is not under the control of the Department of General Services." AGO 079-68 (July 27, 1979).

Nonetheless, the circuit court dismissed Coastal's claim against the bond because the provision in Section 255.05 permitting the Executive Director to exempt contracts less than $200,000 from the statutory bond requirement "[led] me to believe" that "a subcontractor can waive it also and that provision is not against public policy" (R. 271). What the circuit court did was to extend the exemption process beyond the statutory exemption in violation of the principle of expressio unius.

Rather than attempt to comply with Florida law and procedures, C-Way attempted to use boilerplate language on the back of

its standard form contract to circumvent Florida law and procedures. This Court cannot sanction such circumvention.

B. Protected class. The purported waiver also violates public policy because Sections 255.05 and 337.18 are remedial and designed to protect subcontractors, such as Coastal.

As the Second District noted, Section 255.05 was designed to protect subcontactors and workmen. Accord, Johnson Electric Co. v. Columbia Casualty Co., 101 Fla. 186, 133 So. 850, 851, 77 A.L.R. 1 (1931); Gorman Co. of Fort Lauderdale, Inc. v. Frank Maio General Contractor, Inc., 438 So.2d 1018 (Fla. 4th DCA 1983); School Board of Palm Beach County ex. rel. Major Electric Supplies of Stuart, Inc. v. Vincent J. Fasano, Inc., 417 So.2d 1063, 1065 (Fla. 4th DCA 1982); Trustees, Florida West Coast Trowel Trades Pension Fund v. Quality Concrete Co., 385 So.2d 1163, 1166 (Fla. 2d DCA 1980); Southwest Florida Water Management Dist. ex. rel. Thermal Acoustic Corp. v. Miller Const. Co., 355 So.2d 1258 (Fla. 2d DCA 1978); Winchester v. Florida Electric Supply, Inc., 161 So.2d 668, 669 (Fla. 2d DCA 1964); Clutter Const. Corp. v. Baker Brothers, 168 So.2d 576, 578 (Fla. 1st DCA 1964), cert. denied, 173 So.2d 146 (Fla. 1965); Collins v. National Fire Ins. Co., 105 So.2d 190, 193 (Fla. 2d DCA 1958); State of Florida ex. rel. Westinghouse Electric Co. v. Marvin, 280 F. Supp. 1019 (S.D. Fla. 1967); AGO 079-88 (July 27, 1979).

Indeed, American candidly admits that a public payment bond is "of great benefit to those persons falling within the protected class. . . " (American Brief 21).

C. Waivers could involve government in contractor/subcontractor disputes. Permitting waivers also would violate public policy because, as the Second District noted below, permitting private waivers could risk state involvement in contractor/subcontractor disputes. One of the purposes of Sections 255.05 and 377.18 and payment bonds is to minimize any involvement of the State in contractor/subcontractor controversies. Section 255.05 specifically provides that the subcontractor "shall have a right of action" against the surety, but that "[s]uch action shall not involve the public authority in any expense."

The Fifth District Court of Appeal has noted that a payment bond is "an agreement to protect the owner of a building" by "guarantee[ing] that all subcontractors and materialmen will be paid. . . " Florida Board of Regents v. Fidelity & Deposit Co., 416 So.2d 30, 31 (Fla. 5th DCA 1982).

The Legislature has been concerned with the possibilities that subcontractors may be unpaid and that governmental agencies become involved in contractor/subcontractor controversies. In considering amendments to Section 255.05 to authorize the Department of General Services to waive bonds for projects less than $25,000, the Senate Staff Analysis and Economic Impact Statement noted that "[i]f a contractor defaults, laborers and vendors of supplies could be without recourse for losses incurred," and that "the total savings could have been consumed in costs if only one of the contractors defaulted and the state was required to compensate supply vendors and other persons having related claims."

Because the subcontractor may pursue the bonding company, the government has been able to avoid becoming involved in withholding monies from a contractor where a subcontractor claims he has not been paid. Board of County Commissioners of Okaloosa County v. Gulf Pipeline Co., 168 So.2d 757 (Fla. 1st DCA 1964); AGO 061-13 (January 27, 1961). Indeed, DOT was dismissed here in light of Section 255.05(1), which provides that "any action brought by a claimant [under Chapter 255] shall not involve the public authority in any expense" (R. 12-13, 17-18).

Apart from eliminating the possibility that the government would become involved in contractor/subcontractor controversies, a bond also guarantees that all subcontractors and materialmen will be paid, thereby protecting the government's interest in ensuring that the project will be completed. Florida Board of Regents v. Fidelity & Deposit Co. of Maryland, 416 So.2d 30 (5th DCA 1982).

D. Bidding process. As the Second District noted below, and as Coastal alleged, permitting waivers also would adversely affect the bidding process (R. 194). If a potential bidder requires its subcontactors to waive bond rights, its bond premium would be reduced (because the risk to the bonding company would decrease), and it will have a competitive advantage in bidding over bidders who play by the rules. Certainly, the legislature did not intend any such result. See Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So.2d 1190, 1192-1193 (Fla. 2d DCA 1977).

Moreover, if a contractor could require subcontractors to waive bond rights, subcontractors would be unwilling to bid, and the competitive bidding process would be harmed. See Clutter Const. Corp. v. Baker Bros., 168 So.2d 576, 578 (Fla. 1st DCA 1964), cert. denied, 173 So.2d 146 (Fla. 1965).

American speculates that permitting waivers would not adversely affect the bid process (American Brief 11-14). American goes on to incorrectly claim that the record contains nothing to support the district court's "assumptions" concerning the impact on the bid process (American Brief 12). American's speculation and claim is improper. Coastal alleged and those allegations must be accepted on a motion to dismiss that permitting waivers would adversely affect the bidding process.

E. DOT position. DOT, as the administrative agency charged here with implementing Sections 255.05 and 337.18, does not consider the waiver as effective because, inter alia, it violates the statutes and public policy (R. 195, para. 29). As this Court has noted, "[c]ourts should accord great deference to administrative interpretations of statutes which the administrative agency is required to enforce." Department of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985). See also Paisley v. Department of Insurance, 13 F.L.W. 1256 (Fla. 1st DCA, opinion filed May 25, 1988); Tri-State Systems, Inc. v. DOT, 491 So.2d 1192, 1193 (Fla. 1st DCA 1986).

Even a negotiated waiver of bond rights would be unenforceable. Certainly, the purported waiver here is unenforceable.

C-Way, a Michigan-based contractor using its standard-form contract, told Coastal during contract negotiations that the improvements would be for a DOT project, but did not tell Coastal that it would be required to waive its bond rights (R. 191, para. 5). The subcontract specifically references that Coastal's "performance . . . is to be made in accordance with all applicable Florida Department plan, specifications and supplementals." Unbeknownst to Coastal and clearly in derogation of its reasonable expectations, there was a fine-print boiler plate provision (paragraph 6 on the back of the subcontact) purporting to waive "all rights under any bond or bonds executed by [C-Way]" (R. 191, para. 6).

F. Legislative Process. As the Second District noted below, whether to permit waivers is "an issue more appropriately determined in the legislative process than in a judicial forum." See Fulghum v. State, 92 Fla. 622, 109 So. 644 (1926); William H. Gulsby, Inc. v. Miller Construction Co. Inc., 351 So.2d 396, 397 (Fla. 2d DCA 1977) (noting that it is for the legislature, rather than the courts, to extend bond coverage); City of Fort Lauderdale ex. rel. Bond Plumbing Supply, Inc. v. Hardrives Co., 167 So.2d 339, 341 (Fla. 2d DCA 1964) (id.); Santa Rosa County ex. rel. J.E. Daniels, Inc. v. Raymond Blanton Const. Co., 138 So.2d 518, 520 (Fla. 1st DCA 1962) (id.). As this Court held in Bankston v. Brennan, 507 So.2d 1385, 1387 (Fla. 1987),

> when the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this court to defer to the legis-

> lative branch. The issue. . . has broad ramifications, and as we recently observed, of the three branches of government, the judiciary is least capable or receiving public input and resolving broad public policy questions. . .

Finally, American claims that if bond rights cannot be waived, any statutory right cannot be waived (American Brief 20-21). American is wrong.

The public policy here is clear. The legislature has required contractor bonds on public works projects. The legislature has established a procedure -- which was inapplicable here -- for exemptions. The public policy here was that a bond would be required to protect subcontractors, such as Coastal. Thus, this Court certainly should refuse to enforce the purported waiver.

As the First District Court of Appeal noted in Title & Trust Company of Florida v. Parker, 468 So.2d 520, 523 (Fla. 1st DCA 1985), "courts have an 'affirmative duty' to avoid allowing a party who violates public policy to receive any substantial benefits from his or her wrongdoing. Thus, as a general rule, if the enforcement of a contract is contrary to the public policy of the forum state, the contract need not be enforced. . . ."

Contractual provisions are unenforceable if they "violate or obstruct or restrict the spirit, meaning and clear intention of the Legislature." Calio v. Equitable Life Assurance Society, 169 So.2d 502, 505 (Fla. 3d DCA 1964). Certainly, C-Way's fine-print, boilerplate waiver violates "the spirit, meaning and clear intention" of Sections 255.05 and 337.18.

In accordance with Parker and Calio, Florida courts have often refused to enforce contract terms which violate public policy. See, e.g., Thomas v. Ratiner, 462 So.2d 1157 (Fla. 3d DCA 1984), review denied, 472 So.2d 1182 (Fla. 1985) (refusing to enforce attorney-client retainer agreement that was obtained in violation of statute); Nizzio v. Amoco Oil Company, 333 So.2d 491 (Fla. 3d DCA 1976) (refusing to enforce contract that franchisor had to approve assignee where assignee claimed that refusal violated state policy against racial discrimination); Points v. Barnes, 301 So.2d 102, 104 (Fla. 4th DCA 1974), cert. denied, 312 So.2d 751 (Fla. 1975) (refusing to enforce agreement which precluded reasonable use of property as violating public policy); D.L. Harrod, Inc. v. U.S. Precast Corp., 322 So.2d 630, 631 (Fla. 3d DCA 1975) (refusing to enforce hauling contract where plaintiff had no carrier's certificate); Frye v. Taylor, 263 So.2d 835 (Fla. 4th DCA 1972) (refusing to enforce contract involving "pyramid" sales); Bond v. Koscot Interplanetary,Inc., 246 So.2d 631, 634 (Fla. 4th DCA 1971) (refusing to enforce contract involving "pyramid" sales); Standard Accident Ins. Co. v. Gavin, 184 So.2d 229, 232 (Fla. 1st DCA 1966), cert. dismissed, 196 So.2d 440 (Fla. 1967) (holding that insurance companies cannot insert language "which would restrict the coverage afforded by the policy in a manner contrary to the intent of the statute"); Davis v. Ebsco Industries, 150 So.2d 460, 464 (Fla. 3d DCA 1963) (refusing to enforce unreasonably long non-compete as violating public policy).

In Lynch-Davidson Motors v. Griffin, 171 So.2d 911 (Fla. 1st DCA 1965), quashed on other grounds, 182 So.2d 7 (Fla. 1966), the First District Court of Appeal held that the automobile financial responsibility law prevailed over an insurance policy because

> [i]t is settled law of this state that where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered their engagements with reference to such statute, and the same enters into and becomes part of the contract . . . We further hold that the owner of an automobile liability insurance policy issued in this state has the right to presume that such policy meets the minimum requirements of the financial responsibility law . . . . We further hold that such right may not be impaired, circumscribed or restricted by any provisions of the insurance policy which fail to meet the minimum requirements of the financial responsibility law. Although this holding may be subject to the criticism that it impairs the constitutional rights of Florida citizens to freely contract with each other, it must be remembered that we are here dealing with the public policy of Florida as pronounced in its duly constituted legislature.... A contract otherwise valid may be required to yield when it collides with the public policy of the state validly pronounced by its duly constituted lawmaking body. 171 So.2d at 917.

Here, Coastal could certainly presume that C-Way's contract and bond would meet "the minimum requirements" of Sections 255.05 and 337.18. Coastal could further presume that, to the extent C-Way's contract and bond did not meet those minimum requirements, that the contract and bond would "yield" to the public policy of Sections 255.05 and 337.18.

The Second District Court of Appeal in Department of Motor Vehicles v. Mercedes-Benz of North America, Inc., 408 So.2d 627

(Fla. 2d DCA 1981), refused to enforce a contract requiring a franchisor to approve changes in ownership where the statute provided that, if the franchisor did not approve within 60 days, his approval would be deemed granted. Judge Schoonover wrote that

> since the clause contravenes the [statute] it must be severed. . . . On grounds of public policy, clauses in a contract which violate a statutory provision are nugatory and will not be given effect. The New Jersey statute endeavored to equalize the bargaining power between the parties and to promote fair dealing. A manufacturer will not be permitted to evade or circumvent those provisions by the use of contracts providing different methods for transferring a franchise. 408 So.2d at 630.

Here, the waiver must be "severed" because it violates Florida public policy. C-Way cannot be permitted to "evade" or "circumvent" Sections 255.05 and 337.18.

In Asbury Arms Development Corp. v. Florida Department of Business Regulation, 456 So.2d 1291 (Fla. 2d DCA 1984), the Second District Court of Appeal similarly held that the purported waiver of statutory rights to cancel or rescind a condominium sale was unenforceable as violating public policy. Judge Ott noted that the legislature "has mandated procedures for the creation, sale, and operation of condominiums. . . . The protection of a statute designed to protect the public as well as the individual cannot be waived by the individual." 456 So.2d at 1293. Here, the legislature has "mandated" procedures in connection with state contracts and Coastal, as the intended beneficiary of those protections, cannot waive those protections.

More recently, in Canal Insurance Company v. Continental Casualty Co., 489 So.2d 136, 138 (Fla. 2d DCA 1986), the district court held that an administrative rule prevailed over the parties' agreement. The rule (which the court noted had "the force and effect of a statute") provided that the lessee assumes primary responsibility; the lease provided that the lessor assumed primary responsibility. The court reasoned: "The regulation became part of the lease agreement and superseded that provision. Consequently, neither Turner nor Wimpy were free to contract between themselves regarding which would provide the liability insurance." 489 So.2d at 138. Similarly, C-Way was not free to contract away Section 255.05.

American suggests that C-Way complied with the statutory bond requirement by obtaining a payment bond, even if C-Way required all subcontractors to waive bond rights. (American Brief 11). Suffice it to say that American places form over substance.

In support of its argument, American continues to rely on Settacasi v. Board of Public Instruction, 156 So.2d 652 (Fla. 2d DCA 1963) (American Brief 25). Ironically, American places more significance on Settacasi than does the Second District which wrote it. As the Second District noted below, Settacasi "merely upheld the striking of an affirmative defense alleging waiver where no facts demonstrating waiver were set forth. [Settacasi] did not address whether waiver would have been a valid defense had it been properly pled."

American somehow argues that because Sections 255.05 and 337.18 contain no language expressly restricting the right of a subcontractor to waive its right to sue on a bond, waivers are permissible (American Brief 3). American's claim, however, flies in the face of Section 255.05 which provides that the prime contractor must execute a payment bond. As will be noted below, with mechanics liens, there is an explicit statute authorizing waivers. Here there is no such statute. Expressio unius.

The cases cited in American's brief are inapposite. Rader v. Prather, 100 Fla. 591, 130 So. 15, 17 (1930), and Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945), did not involve any statutory rights. Rader and Gilman involved contract rights, which clearly can be waived. Nelson v. Dwiggens, 111 Fla. 298, 149 So. 613 (1933), merely held that a seller's security interest could be waived.

International Erectors, Inc. v. Wilhoit Stel Erectors and Rental Service, 400 F.2d 465 (5th Cir. 1968), Fletcher v. LaGuna Vista Corp., 275 So.2d 579 (Fla. 1st DCA), cert. denied, 281 So.2d 213 (Fla. 1973), and National Health Laboratories, Inc. v. Bailmar, Inc., 444 So.2d 1078 (Fla. 3d DCA 1984), involved garden-variety contract interpretation; they did not involve any statutory claims or any claims that enforcing the contract would violate a statute.

No statutory policies or statutory violations were involved in Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So.2d 515 (Fla. 1983); Home Development Co. v. Bursani, 178 So.2d 113 (Fla. 1965),

Bituminous Casualty Corp. v. Williams, 17 So.2d 98 (Fla. 1944), and Aetna Casualty & Surety Co. v. Beare, 385 So.2d 1087 (Fla. 4th DCA 1980).

Finally, American misreads City of Leesburg v. Ware, 113 Fla. 760, 153 So. 87 (1934), and Colonial Penn Communities, Inc. v. Crosley, 443 So.2d 1030 (Fla. 5th DCA 1983), review denied, 450 So.2d 486 (Fla. 1984), to support the purported waiver here. Ware refused to enforce a transaction because it violated public policy. The waiver in Colonial Penn was the insurance agent's failure to enforce his rights for six years. Coastal's enforcement here was timely. Colonial Penn, in fact, supports Coastal. There, the court noted that "if the legislature fails to create an express statutory cause of action, courts will reluctantly imply such right if the plaintiff [such as Coastal here] is in the class of persons which the statute is intended to protect." 443 So.2d at 1032. Here, not only did the Florida legislature create an express statutory cause of action for subcontractors such as Coastal, but Coastal is clearly within the class of persons intended to be protected by Section 255.05.

Florida statutory and case law is clear -- this Court cannot sanction C-Way's attempt to violate Florida Statutes 255.05 and 337.18 and Florida public policy.

III. THE DISTRICT COURT DID NOT IGNORE THE MILLER ACT AND FLORIDA MECHANIC'S LIEN LAW.

Desperately, American claims that the district court "ignored" the Miller Act, Florida Statutes Chapter 713, and case law. American is wrong. The Second District considered the Miller Act,

the Florida Mechanic's Lien Law, and underlying case law. American simply disagrees with the Second District.

As for mechanic's liens, the Second District observed that there were "express provisions for. . . waiver" and "[t]he legislature could similarly specify certain exceptions to the provisions for waiving bond rights," but that the Legislature had not done so. The Second District's analysis was correct.

The circuit court primarily relied upon Orlando Central Park, Inc. v. Master Door Company of Orlando, Inc., 303 So.2d 685 (Fla. 4th DCA 1974), in dismissing American. Central Park does not support the ruling on appeal. Rather, Central Park supports Coastal. In Central Park, the Fourth District Court of Appeal held that a subcontractor had waived its claim to a lien against certain private property. It did so, however, because Section 713.20(2) specifically provides that: "Any person other than a laborer may waive his lien under this chapter at any time, either before or after furnishing services or materials. . . ." The Fourth District reasoned that: "Since the legislature has expressly provided for the waiver of liens, the waiver provision in the subcontract violates no public policy considerations." 303 So.2d at 686.

However, there is no legislative sanctioning of waiver of bond rights. The legislature certainly knew how to authorize waivers. It did not do so. As the Second District noted below, if the legislature wanted to authorize waivers of bond rights, "it could have been easily stated." S & J Transportation, Inc. v.

Gordon, 176 So.2d 69, 72 (Fla. 1965). In fact, the legislature has established explicit procedures to waive bond rights. Those procedures were not followed here. Expressio unius. In Tower-house Condominiums, Inc. v. Millman, 475 So.2d 674 (Fla. 1985), this Court noted that

> It is a general principle of statutory construction, well established in Florida's jurisprudence, that the mention of one thing implies the exclusion of another. This rule of expressio unis est exclusio alterius leads to the conclusion that no other power to purchase real property was intended to be within the association's authority. Had the power to purchase real property been inherent in the association, there would have been no necessity for a legislative grant of such power. The legislature did find it necessary to authorize that particular purchase and, in allowing the association sufficient power to accomplish that specified end, implicitly refused to grant any broader exercise of the power.

475 So.2d at 676. See also Russello v. United States, 464 So.2d 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (where statute includes particular language but another does not, it is generally presumed that the disparate inclusion or exclusion is intentional); Finkelstein v. North Broward Hospital District, 484 So.2d 1241, 1243 (Fla. 1986); Thayer v. State, 335 So.2d 815, 817 (Fla. 1976) ("[i]t is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius"); S & J Transportation, Inc. v. Gordon, 176 So.2d 69, 71-72 (Fla. 1965) ("[t]he well-recognized rule of construction found in the maxim 'expressio unius est exclusio alterius' requires that where one method or means of expressing a power is prescribed . . . it excludes

its exercise in other ways. . . ."); Bussey v. Department of Health & Rehabilitative Services, 13 F.L.W. 1297 (Fla. 1st DCA, June 1, 1988); Department of Professional Regulation v. Pariser, 483 So.2d 28, 29 (Fla. 1st DCA 1985); 49 Fla. Jur. 2d "Statutes" § 126 (1984).

American cannot argue that, because mechanics liens may be waived, bonds may be waived. Chapter 255 and 713 are not necessarily identical. As this Court noted in Winchester v. Florida Electric Supply, Inc., 161 So.2d 668 (Fla. 2d DCA 1964), Section 255.05 and Chapter 713 are not to be construed in pari materia. In Winchester, this Court noted that Chapter 713 and Section 255.05 were "two separate fields which are mutually exclusive" and held that a mechanic's lien law provision did not apply to a bond claimant. Similarly, the statute authorizing mechanic's liens to be waived does not extend to statutory bonds. More recently, in Blosam Contractors, Inc. v. Joyce, 451 So.2d 545, 548 (Fla. 2d DCA 1984), the Second District wrote that "reliance on the mechanic's lien law and/or the Miller Act as interpretative aids of Section 255.095 is not always necessary nor is it mandated by the statute." Similarly, the Second District noted in City of Fort Lauderdale ex rel. Bond Plumbing Supply, Inc. v. Hardrives Co., 167 So.2d 339 (Fla. 2d DCA 1964), that there was no such ambiguity in Chapter 255 to require resort to mechanics lien law for the definition of "subcontractor."

In any event, Committee Substitute for Senate Bill 361 provides, effective October 1, 1988, that "[A] right to claim a lien

may not be waived in advance. A lien right may be waived only to the extent of labor, services, or materials furnished. Any waiver of a right to claim a lien that is made in advance is unenforceable." Thus, the Legislative policy, even for mechanics liens, is clearly against waivers in advance. The amendment to Section 713.20(2) certainly undercuts any argument of American at page 24 of its brief.

As for the Miller Act, the Second District correctly noted that this case raised issues of Florida statutes and public policy, not federal policy. The Second District was correct. See, e.g., Blosam Contractors Inc. v. Joyce, 451 So.2d 545, 5848 (Fla. 2d DCA 1984). Moreover, American relies only on dictum from United States ex rel. Koppers Co. v. Five Boro Const. Corp., 310 F.2d 701 (4th Cir. 1962), United States ex rel. B's Co. v. Cleveland Electric Co., 373 F.2d 585 (4th Cir. 1967), Warrior Constructors, Inc. v. Harders, Inc., 387 F.2d 727 (5th Cir. 1967), and United States ex rel. Youngstown Welding and Engineering Co. v. Travelers Indemnity Co., 802 F.2d 1164 (8th Cir. 1986). The dictum is of no help to American because the holdings in Five Boro, Cleveland, Warrior Constructors, and Youngstown were that the subcontractors could pursue their claims under the Miller Act. Moreover, the appeals court in Five Boro, though acknowledging weakly that "[c]onceivably the supplier may waive his rights," noted that "[s]uch waiver occurs if he fails to comply with the Act." 310 F.2d at 703. Here, Coastal has complied with

Sections 255.05 and 337.18. Thus, there has been no effective waiver.

IV. THE PURPORTED WAIVER VIOLATES THE CONTRACT WHICH C- WAY HAD WITH DOT.

DOT's invitation for bids specifically required bidders to furnish a bond in accordance with Florida Statutes 255.05. (R. 190, para. 1). C-Way's proposal provided that it would furnish a bond in accordance with Florida Statutes 255.05 (R. 190, para. 2). The contract between DOT and C-Way specifically provided that C-Way would provide a bond in accordance with Florida Statutes 255.05. (R. 191, para. 3).

As this Court has noted, Section 255.05 places the duty on the governmental agency to ensure that the bond has been executed, posted, and duly approved. Warren ex rel. Hughes Supply Co. v. Glen Falls Indemnity Co., 66 So.2d 54 (Fla. 1953). DOT met its duty here, but C-Way would use the fine-print boilerplate waiver to negate DOT's efforts.

C-Way's attempt must fail. In Johnson Electric Co. v. Columbia Casualty Co., 101 Fla. 186, 133 So. 850, 77 A.L.R. 1 (1931), this Court noted that a subcontractor could sue on the bond where the bond, in accordance with the contract, called for payment of persons having subcontractors for labor or material.

> It is true that [subcontractor] was not a formal party to the contract, . . . but, in the absence of such a statute, there can be no valid objection to parties sui juris contracting for the protection of other parties. The contract under review shows clearly that the principals intended that all subcontractors who furnished labor or material

thereon should be protected thereby . . . . 133 So. at 851.

In Delduca v. U.S. Fidelity & Guaranty Co., 357 F.2d 204, 207, Rehearing denied, 362 F.2d 1012 (5th Cir. 1966), the Fifth Circuit suggested that subcontractors would be third party beneficiaries of the contract and bond between the State and the contractor.

In Opler v. Wynne, 402 So.2d 1309 (Fla. 3rd DCA 1981), review denied, 412 So.2d 472 (Fla. 1982), the Third District Court of Appeal held that an express warranty of access in a land sales contract survived the delivery and acceptance of a warranty deed without access and of a title insurance policy exempting access. The court reasoned that the buyer "was entitled to accept the deed and acquiesce in the seller's performance secure in his knowledge that he was protected by the seller's express warranty of ingress and egress." 402 So.2d at 1311. Here C-Way's promise to DOT to provide a bond survives the C-Way/Coastal subcontract.

Because Coastal is a third party beneficiary of the DOT/C-Way contract, the benefits of the DOT/C-Way contract inure to Coastal. E.g., Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1939); Goodell v. K.T. Enterprises, Ltd., 397 So.2d 1087 (Fla. DCA 1981).

V. EVEN IF THE WAIVER DID NOT VIOLATE SECTIONS 255.05 AND 337.18 AND PUBLIC POLICY, AND EVEN IF THE WAIVER WERE SUFFICIENTLY CLEAR, UNAMBIGUOUS, AND UNEQUIVOCAL, AMERICAN WOULD BE ESTOPPED FROM ENFORCING THE WAIVER.

C-Way provided notice to American that C-Way had subcontracted with Coastal and that American would be liable for the

subcontract work. Coastal also provided notice to American that it intended to rely on the bond (R. 195, para. 28).

Rather than disavowing potential obligations to Coastal, American remained silent and Coastal proceeded with the work. Had American disavowed any obligation, Coastal would have notified DOT and stopped work until appropriate arrangements were made to ensure that Coastal would be paid (R. 195).

Under those circumstances, American is estopped to claim that the waiver was effective. "Estoppel in pais" or "equitable estoppel" is a doctrine by which a person may be precluded, by act, conduct, or silence when he has a duty to speak, from asserting rights which he otherwise would have had. Taylor v. Kenco Chemical & Mfg. Co., 465 So.2d 581, 582 (Fla. 1st DCA 1985). Estoppel is available to a party, such as Coastal, which has detrimentally relied upon another's act, conduct, or silence. Boulevard National Bank v. Gulf American Land Co., 189 So.2d 628 (Fla. 1966); In re Estate of McClenahen, 476 So.2d 1289 (Fla. 2d DCA 1985).

CONCLUSION

WHEREFORE, Coastal requests this Court to affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by Federal Express to Samantha Boge Cummings, Cummings, Lawrence & Vezina, P.A., 1004 DeSoto Park Drive , Tallahassee, Florida 32301, this 25th day of July, 1988.

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