IN THE SUPREME COURT OF THE STATE OF FLORIDA

OBS COMPANY, INC.,

Petitioner,

SUPREME COURT CASE NO. 73,296

vs

PACE CONSTRUCTION CORPORATION, TRANSAMERICA INSURANCE COMPANY, and SEABOARD SURETY COMPANY,

APPEAL NO. FROM SECOND DISTRICT COURT OF APPEALS: 87-2954

Respondents.

RESPONDENTS' ANSWER BRIEF

Attorneys for Petitioner:

J.D. Humphries, III, Esq.
VARNER, STEPHENS, WINGFIELD, McINTYRE & HUMPHRIES
1000 Grant Building
44 Broad Street
Atlanta, Georgia 30303
(404)522-2020

and

J.M. Crowder, Esq.
CROWDER & O'FRIEL
Suite 1006
315 East Madison
Tampa, Florida 33602
(813)224-9888

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ALPHABETICAL LISTING OF CASES — PAGES

FLORIDA STATUTES:

FLORIDA CONSTITUTION:

MISCELLANEOUS:

PREFACE AND RELATED LITIGATION

Petitioner, OBS COMPANY, INC., a subcontractor, will be referred to as "Petitioner" in this brief. Respondent PACE CONSTRUCTION CORPORATION will be referred to as "Pace" or "general contractor". Respondents Seaboard Surety Company and Transamerica Insurance Company will be referred to collectively as "Surety". The subcontract between Petitioner and Pace appearing at Petitioner's Appendix p. 1 will be referred to as "Subcontract".

Pace and Surety have been involved in another lawsuit involving the same subcontract clause, the same bond, and same construction project, but with a different subcontractor. Such case is currently before the United States Eleventh Circuit Court of Appeals styled Scarborough Constructors, Inc. v. Pace Construction Corporation, et al., Cases No. **87-3760** and **88-3671.** The decision in that appeal is being deferred until this Court's decision on this review, and is an appeal from a Memorandum Opinion of the United States District court for the Middle District of Florida, Tampa Division, decided in late **1987.** Such trial court reached the same result as the Second District Court of Appeals in their unanimous decision now before this Court on review. A copy of that unpublished decision of the Middle District of Florida is found at p. 1 of Respondents' Appendix.

Additionally, and as supplemental authority, some of the same subcontract language as is being reviewed by this Court was considered by the United States Fifth Circuit Court of Appeals in an unpublished decision captioned Lambert Electric Co., Inc. v. HCB Contractors, Summary Calendar **87-3791** (5th Cir. **1988).** A copy of such appellate decision and the decision of the federal district court leading to such appeal are found in Respondents' Appendix. Such decisions will hereinafter be referred to collectively as "Lambert". They contain an excellent analysis of the "unless and until" language this Court now addresses.

STATEMENT OF CASE AND OF THE FACTS

STATEMENT OF THE CASE

Respondents take issue with Petitioner's statement that this Court took jurisdiction of this case due to a conflict of district court of appeal decisions. No such finding has been made by this Court. Respondents do not know of the reason(s) for this Court's review and grant of discretionary review.

Respondents point out two important procedural matters: (1) the bond in question was contended to be a common law bond by Respondents at all times; and (2) Count II of Petitioner's Complaint on such bond is directed totally to Surety and does not seek independent, or joint and several relief against Pace on the bond.

STATEMENT OF THE FACTS

Respondents take issue with Petitioner's Statement of the Facts because it is both argumentative and mischaracterizes documents. The facts are simple.

Pace was the general contractor who built a shopping center now known as Bayonett Point in Pasco County, Florida. Pace and Petitioner negotiated and entered into a Subcontract (Petitioner's Appendix, p. 1) whereby Petitioner agreed to do some of the work required to build the shopping center. Both Pace and Petitioner finished their work to the satisfaction of the owner and the architect and applied for final payment.

Final payment was not made to Pace. Pace has not paid Petitioner in reliance on 6.3 of the Subcontract. Pace has liened the shopping center and sued the owner and the construction lender in the Circuit Court of Pasco County. Petitioner sued Pace on the Subcontract and Surety on the AIA, 1970 edition, 311 Payment Bond furnished by Pace to the owner. (Petitioner's Appendix, p. 12).

The terms of the bond speak for themselves, but clearly do not make a "guaranty" of payment as contended by Petitioner. The bond gives Petitioner the right to sue Surety for "sums as may be justly due" Petitioner. (Petitioner's Appendix, p. 13 at ¶ 2). There is no "guaranty" of payment by either Pace or Surety contained in the bond as contended by Petitioner, but rather the right to file suit if payment is not made. "Prompt payment" is a meaningless concept until a debt is "due". In the context of this case, "prompt payment" is measured from the time the general contractor is paid. § 713.23(1)(a) Fla. Stat. does not require a contrary result.

SUMMARY OF ARGUMENT

Paragraph 6.3 of the Subcontract was voluntarily agreed to, is clear and unambiguous, and enforceable under numerous Florida decisions. Peacock Construction Co., Inc. v. Modern Air Conditioning, Inc., 353 So. 2d 840 (Fla. 1977) ("Peacock"), DEC Electric, Inc. v. Raphael Construction

Corp., 538 So. 2d 963 (Fla. 4th DCA 1989) cert. pending; Dyser Plumbins Co. v. Ross Plumbins & Heating, Inc., 515 So. 2d 250 (Fla. 2d DCA 1987) ("Dyser"); Robert F. Wilson, Inc. v. Post-Tensioned Structures, Inc., 522 So. 2d 79 (Fla. 3d DCA 1988) ("Wilson"); Mathews Corp. v. Tutten Enterprises, Inc., 343 So. 2d 902 (Fla. 4th DCA 1977) ("Mathews"); as well as the decision being reviewed in Pace Construction Corporation v. OBS Company, Inc., 531 So. 2d 737 (Fla. 2d DCA 1988) reh'g denied 1988, and an unpublished decision of federal Judge Elizabeth Kovachevich in the case of Scarboroush Constructors, Inc. v. Pace Construction Corporation, (M.D. Fla. 1987) found in Respondent's Appendix at p. 1 and currently on appeal to the United States Eleventh Circuit Court of Appeals. The Subcontract creates a contractual condition precedent to payment being due Petitioner which is binding upon Petitioner. No payment is yet due Petitioner under the terms of the Subcontract, and consequently Petitioner's bond claim is not ripe.

Because Petitioner itself agreed by the Subcontract that it was not due payment from Pace unless and until Pace is paid by the owner, Petitioner has no ripe claim against Surety on the statutory payment bond unless and until such condition precedent occurs. A surety has no greater obligation on its bond than its principal does on the underlying contract, and has any defense available to it that is available to its principal, including contractual defenses. A statutory bond

does not create an unconditional promise to pay irrespective of when an obligation becomes "due" by the terms of the underlying contract.

Fla. Stat. § 713.23 creates a discretionary option for an owner to substitute collateral for his land as security for lien claimants. It is special interest legislation that does not create any public policy which prevents a bond claimant from voluntarily entering a contract which modifies its own private rights as to when and if it is entitled to payment. Such a voluntary contractual modification of payment terms affects its statutory bond rights on a private construction project. A party is free to so contract. To hold otherwise would clearly violate public policy as established by Art. I, § 10 of the Florida Constitution which assures, as a matter of supreme public policy, the right of all citizens to contract as they wish.

There is no public policy which prevents a person from limiting their liability by contract, or which prevents a party from eliminating or modifying a claim it has by operation of common law or statute. No public good or settled social policy is involved in a private construction contract.

Lastly, Petitioner for the first time argues that it should recover on the payment bond as against Pace, the general contractor, contending that Pace's execution of the

bond created a separate cause of action independent of the Subcontract. Petitioner did not make such a claim in its complaint and such issue was neither presented or decided by either the trial court or the Second DCA. As such, such argument cannot be asserted to this Court at this time.

ARGUMENT

Today's construction industry involves billions of dollars of construction work on an annual basis involving many very substantial companies, and many very small companies. In many instances subcontractors are companies doing business on a national basis and are financially much larger companies than the general contractors for whom they work. Whether a company is a general or a subcontractor is not dispositive of its financial worth, its ability to sustain loss, or its negotiating power or abilities.

Today's typical commercial construction projects, e.g., shopping centers or office buildings, are built by general contractors who subcontract substantial portions of the work involved, commonly up to eighty-five percent (85%) or more of the work. In order to earn a typical fee of a net one percent (1%), a general contractor must give an owner a fixed price and assume unlimited downside risk of loss. For such reason it is not only common, but prudent, for a general contractor to desire to have that risk shared with those who will profit from the work; namely subcontractors who stand to profit from

the construction project. Because the profits are being shared, the risks of loss should likewise be shared.

The risk of non-payment can be shared through payment shifting, or so called "pay when paid" clauses which condition a subcontractor's right to payment to such time as the general contractor is paid by the owner. Such a contract provision gives rise to this Court's review of the case of Pace Construction Corporation v. OBS Company, Inc., 531 So. 2d 737 (Fla. 2d DCA 1988) reh'g denied 1988 in which a clause which provided that Petitioner was not entitled to payment "unless and until" and as a "condition precedent" Pace was paid, was enforced as written.

I. THE SUBCONTRACT'S "PAY WHEN PAID" CLAUSE IS CLEAR, UNAMBIGUOUS AND SHOULD BE ENFORCED AS WRITTEN.

The questions being reviewed are created by the express terms of the Subcontract between Petitioner (subcontractor) and Pace. The Subcontract was voluntary and freely entered into, and as such its express terms are binding on both Pace and Petitioner. Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District, 238 So. 2d 458 (Fla. 2d DCA 1970), cert. denied 240 So. 2d 813 (Fla. 1970). It is clear that payment can be conditioned upon the realization of a particular fund. Balles v. Lake Weir Light & Water Co., 100 Fla. 913, 130 So. 421 (1930); Cohen v. Mohawk. Inc., 137 So. 2d 222, 224 (Fla. 1962); Mathews.

Final payment is at issue in this case. Neither Pace nor Petitioner have received final payment on this construction work. Pace has liened the project in its behalf and Petitioner's behalf and has sued the owner and construction lender in the Circuit Court of Pasco County, Florida. Such suit is pending and set for trial on October 30, 1989. Since Pace has not been paid its final payment by the owner it contends that final payment is, accordingly, not due Petitioner by virtue of the clear and unambiguous risk shifting final payment clause of the Subcontract which provides:

ARTICLE 6
FINAL PAYMENT

> Final Payment of the balance of the Subcontract Price shall be made as follows:
>
> . . .
>
> **6.3** . . . Final Payment shall not become due unless and until the following conditions precedent to Final Payment have been satisfied:
>
> . . .
>
> (c) Receipt of Final Payment for Subcontractor's work by Contractor from Owner, ...

[Emphasis Added]. Petitioner's Appendix, p. 7.

The pivotal contractual question is whether section 6.3 of the Subcontract is ambiguous. Does a court have the discretion to interpret its express words of "condition precedent" as vague, and therefore judicially create a reasonable time provision, as opposed to an enforceable

payment shifting clause? Is the intent clear?[1] This Court unequivocally held that parties may shift the burden of payment failure by an owner from a general contractor to a subcontractor in the case of Peacock Construction Co., Inc. v. Modern Air Conditionins, Inc., 353 So. 2d 840 (Fla. 1977): "[I]n order to make such a shift the contract must unambiguously express that intention." Id. at 842-43.

Peacock is the definitive case on this issue. Peacock is not an anti-general contractor decision, but places the burden on the general contractor to clearly shift the risk of non-payment contractually to the subcontractor, by judicially resolving ambiguous language in the subcontractor's favor. Peacock at 842.

The clear language of the Subcontract clause at issue shifts the risk of non-payment to Petitioner in certain terms. A treatise on Florida construction law discusses payment risk shifting clauses stating:

> Where it is clear and unambiguous that payment to the subcontractor is not earned and is not payable at all unless payment for the subcontractor's work is received by the contractor from the owner, then such a clause is enforceable. The result is that

---

[1]Construction of contracts entails the determination of the legal operation of a contract, and is peculiarly a function of courts. Nat Harrison Associates, Inc. v. Gulf States Utilities, Inc., 491 F.2d 578, 584 (5th Cir. 1974). The parties' intention is deduced from the language of the contract, and such language is controlling. Clark v. Clark, 79 So. 2d 426 (Fla. 1955).

the subcontractor becomes subject to the risk of non-payment by the owner to the contractors.

L.R. Lieby, Florida Construction Law Manual, § 7.09 Payment at p. 96 (2d ed. 1988) ("Lieby").

Both Lieby and Peacock discuss two types of payment shifting clauses: (1) contingent "condition precedent" payment clauses which "shift" risk of non-payment from the general contractor to the subcontractor; and (2) mere payment deferral provisions which do not shift the risk of non-payment, but only the "time of payment" for a reasonable period. Id. Lieby provides examples of the types of clauses required to "shift" the risk of non-payment:

> "1. Payment is not due unless . . .
>
> 2. Payment is contingent upon . . .
>
> 3. As a condition precedent to payment . . ."

Lieby at p. 96 (Emphasis added).

The subcontract provision before this Court uses virtually all the language suggested by Lieby, and recognized in Dyser, Wilson, DEC Electric and this case, to create a payment shifting clause. The Subcontract effectively shifts the risk of non-payment by the owner from the general contractor to Petitioner subcontractor.

The "pay when paid" issue has been much litigated recently, in both Florida and in Louisiana. Following

Peacock, the Second DCA (in Pace and Dyser), the third DCA (in Wilson) and the Fourth DCA (in DEC Electric) have found enforceable payment shifting clauses in interpreting the clauses before them. The Middle District of Florida has also found the clause before this Court enforceable under Peacock. (See decision at Respondents' Appendix, p. 1).[2] Under Louisiana law, the contract language before this court has been judicially considered. (See Lambert cases in Respondents' Appendix - p. 10, et seq.). The Fifth Circuit's unpublished Lambert decision considered the "unless and until" language before this Court but did not consider the "condition precedent" language. The subcontract in Lambert was HCB's, a partnership affiliated with Pace and contains the same language here at issue. Louisiana law is identical to Peacock. Southern States Masonrv, Inc. v. J.A. Jones Constr. Co., 507 So. 2d 198 (La. 1987).

When the case of Scarboroush Constructors, Inc. V. Pace Construction Corp., (M.D. Fla. 1987) was recently argued before the Eleventh Circuit (decision still pending receipt of this Court's disposal of this review) Judge James C. Hill asked Scarborough's counsel what he contended was vague or ambiguous about 6.3 of the Subcontract. Scarborough's

---

[2]The First DCA has found one "pay when paid" clause a payment deferral clause under Peacock. Charles R. Perry Constr., Inc. v. C. Barry Gibson & Assoc., 523 So. 2d 1221 (Fla. 1st DCA 1988).

counsel stated that the provision was, in his own words, "crystal clear", but directed the court to the bond argument as being a totally separate and independent ground for recovery. The provisions of **6.3** are unambiguous and clear.

A. The Words "Condition Precedent" Are Clear And Unambisuous.

Paragraph **6.3** of the Subcontract, by its express terms, creates a condition precedent to Petitioner's right to final payment. A condition precedent is a provision which **". . .** calls for the performance of some act or the happening of some event after a contract is entered into, upon the performance of a happening of which its obligation is made to depend." 11 Fla. Jur. 2d, Contracts, § 138 **(1979),** citing Cohen v. Rothman, 127 So. 2d 243 (Fla. 3d DCA **1961).**

Black's Law Dictionary (4th ed. **1968)** defines the word "condition" more succinctly and to the point: A future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. (Emphasis added).

The words "condition precedent" are capable of precise definition, have been used since the days of Blackstone, and are quite clear and precise. See Dyser and Wilson. Dvser found the use of the words "condition precedent'' such that it was "hard to imagine a more clear expression of an intent to

shift the risk of payment failure by the owner to the subcontractor." Dyser at 252. Judge Ryder, writing Dyser, had not seen the words "condition precedent" coupled with the words "unless and until" as exist in Subcontract 6.3.

B. The Words "Unless and Until" Are Clear And Unambiguous.

Judge Morey L. Sear of the United States District Court of Louisiana discussed the "unless and until" language, stating:

> The word "until" as used in Article 5.1 might be taken to refer only to temporality and not conditionality, as it was in Dyer [Thomas J. Dyer Co. v. Bishop International Engineering Co., 303 F.2d 655 (6th Cir. 1962)]. The word "unless," on the other hand, seems to leave as little room for doubt as the word "if" in Conte [A.A. Conte v. Campbell-Lowrie-Laudermilch Corp., 132 Ill. App. 3d 325, 87 Ill. Dec. **429**, 477 N.E.2d 30 (1985)]. More importantly, since the word "unless" appears in addition to the word "until," were the word "unless" not there to impose a condition, it would be entirely superfluous. The combination of the words "unless and until" can leave no doubt that a suspensive condition was intended by the parties."

Lambert, Respondent's Appendix, pp. 13-14. Nothing is more clear, more certain and unambiguous than a contract provision that uses all three. Final payment is not due "unless and until" and as a "condition Precedent" the general contractor is paid for Petitioner's work. Subcontract 6.3. Petitioner's Appendix, p. 7.

c. Because The Subcontract Is Patently Clear There Is No Need To Refer To Other Documents Or Rules of Construction.

Petitioner cannot attack the clarity of the Subcontract directly so it attempts to attack it indirectly. Because no ambiguity or lack of clarity exists in subparagraph 6.3, Petitioner attempts to bootstrap through "attempted ambiguity" by reference to another contract, the general contract. There is no need to look at a different document to resolve an ambiguity, because the Subcontract is perfectly clear and reflects precisely the intent of the parties at the time of contracting, and there is no ambiguity to resolve. However, Petitioner argues that the conduit, or flow down clause of the Subcontract, paragraph **1.1**, is relevant. (Petitioner's Appendix, p. 1). It is not; the clause relates to substantive work, not administrative terms, such as payment. See generally, Lieby, **§ 7.13**, Flow Down Clauses (2d ed. **1988**). However, even if Petitioner's argument on the conduit clause had merit, an analysis of the general contract does not support Petitioner's argument.

Article 8 of the AIA general contract is merely a definitional section that defines those costs which the general contractor can include within the stated guaranteed maximum price. Such definitional provision does not deal with payments to or due the general contractor. Payment is clearly the issue (not to Pace, but to Petitioner).

Article 13 of the general contract deals with Applications for Payment and not payment itself. Importantly, Article 13.1 permits Pace to submit an application for payment for "all monies paid out or costs incurred." (Petitioner's Appendix, p. 23). Accordingly, to the extent that Pace incurs a cost that is defined under Article 8, Pace can make application for payment to the owner for same under Article 13.

However, what is clearly at issue is the Petitioner's final payment, not payments to Pace. Even if payments due Pace were at issue, Article 14 of the General Contract deals with "Payments to the Contractor". It is patently clear from Article 14.2 of the General Contract that 30 days after substantial completion the final payment is due Pace. (Petitioner's Appendix, p. 25).

The general contract's General Conditions also support the proposition that no payment is due Petitioner at this time. General Condition 9.5.2 clearly provides that "the Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's work." (Petitioner's Appendix, p. 40). Petitioner was paid and accepted payment in this fashion, customarily during the course of the project and never objected to such. The course of conduct of payments was, once Pace was paid, Petitioner

was paid (not in the record, but for confirmation, see Subcontract 5.1 dealing with progress payments). Such conduct clearly reflected the intent of the parties at the time of contracting.

The project is complete and final payment was and is due Pace. The Petitioner's brief at p. 2 admits the work was satisfactory to the architect who, pursuant to 9.9.1 of the General Conditions (Petitioner's Appendix, p. 40), issued his certificate making final payment due Pace (not in record). Petitioner has not been paid only because Pace has not been paid. This result is exactly what the Subcontract requires and the parties bargained for.

If Petitioner's argument had merit as to an alleged conflict between the general contract and the Subcontract, Article 13.1 of the Subcontract specifically requires application of the more "stringent" requirement in cases of conflicts of documents. (Petitioner's Appendix, p. 11). The general contract does not deal with Petitioner's right to payment from Pace. The Subcontract expressly does, and its terms are not only quite clear but more "stringent."

Where, as in this case, the language of a contract is unambiguous, the legal effect of such language is a question of law for determination by the Court, and not a jury. Orkin Exterminating Co., Inc. v. F.T.C., 849 F.2d 1354, 1360 (11th Cir. 1988); Mason Drug Co., Inc. v. Harris, 597 F.2d 886, 887

(5th Cir. 1979). The Second DCA, the Middle District of Florida and Lambert have held that there is no need for judicial interpretation of the "pay when paid" clause before this Court at all because (a) there is no ambiguity and (b) no conflicting provisions exist. However, "when a conflict arises under a contract, and such conflict requires construction of possibly inconsistent provisions . . ., the general rule of construction requires that provisions stated in general terms must yield to those stated in specific terms." Cypress Gardens Citrus Products. Inc. v. Bowen Bros., Inc., 223 So. 2d 776 (Fla. 2d DCA 1969). Specific or particular provisions of an agreement always supersede conflicting provision which have been stated in general terms. Suncoast Building of St. Petersburs. Inc. v. Russell, 105 So. 2d 809 (Fla. 2d DCA 1958). The individual terms of a contract are to be considered not in isolation but as a whole, in relation to one another, with specific language always controlling the general. Bystra v. Fed. Land Bank of Columbia, 72 Fla. 472, 90 So. 478 (1921); see also, 4 S. Williston, A Treatise on the Law of Contracts § 618 (3d ed. 1961).

Here, no conflicting provisions are at issue. In the face of a clear provision directly on point, Petitioner seeks to create ambiguity where none exists by referring to other documents.

> [I]t must be assumed that each clause has some purpose, and if the question is . . . whether clauses are compatible or contradictory, the court should interpret the contract in such a way as to give effect to every provision.

Hillsborough County Aviation Authority v. Cone Bros. Contracting Co., 285 So. 2d 619, 621 (Fla. 2d DCA 1973).

A court may not violate the clear meaning of a contract provision by judicially creating an ambiguity by "interpretation" when there is no ambiguity, and no interpretation is necessary. Voelker v. Combined Ins. Co. of America, 73 So. 2d 403, 408 (Fla. 1954). The corollary is that a court must give clear and unambiguous language no meaning other than that expressed. Hamilton Constr. Co. v. Board of Public Instruction of Dade County, 65 So. 2d 729 (Fla. 1953); Bay Manasement, Inc. V. Beau Monde, Inc., 366 So. 2d 788 (Fla. 2d DCA 1979). Contract words must be accorded their natural and common sense meaning. See Ennis v. Warm Mineral Springs, Inc., 203 So. 2d 514 (Fla. 2d DCA 1967) reh'g denied, 210 So. 2d 870 (1968).

The language of paragraph 6.3 of the Subcontract is plain, crystal clear and unambiguous. Such language does not require judicial construction. For such reason, the Second DCA court did not err by giving effect to the Subcontract's plain words. The decisions of this Court in Peacock, Cohen v. Mohawk, Inc., 137 So. 2d 222 (Fla. 1962) and Balles v. Lake Weir Light & Water Co., 100 Fla. 913, 130 So. 421, 423

(Fla. 1930) are directly on point. DEC Electric, Dyser, Wilson, Mathews and Lambert are also totally in accord and cannot be distinguished. Accord, the decision being reviewed by this Court and Scarborough (Respondents' Appendix, p. 1).

11. THE SURETY HAS NO GREATER LIABILITY THAN ITS PRINCIPAL, HAS ANY DEFENSE AVAILABLE TO ITS PRINCIPAL, AND HAS NO PRESENT LIABILITY ON THE PAYMENT BOND.

A. Introduction.

Petitioner has asserted that Pace and the Surety are liable under the terms of the bond: that the Surety has greater liability than Pace and that the Surety cannot assert its principal's (Pace's) contractual defenses. Petitioner asserts no cases in support of its position.

On the other hand, Respondents can demonstrate that the primary purpose of a contractor payment bond, common law or statutory, is that if the contractor defaults in its obligation to a lienor, then the surety is liable, not the owner. In other words, by agreeing to act as surety, the bonding company stands in the shoes of the contractor. If the contractor is liable, then the surety is liable. Conversely, if the contractor is not liable, then the surety is not liable. If the contractor has a valid defense against a subcontractor's claim, then a surety has the right to assert the contractor's defense. Numerous decisions in construction bond cases have upheld and applied common law suretyship principles, i.e., a surety liability is co-

terminus with its principal and a surety can generally assert the defense of its principal, specifically a principal's contractual defense.

B. The Surety Has No Greater Liability Than Its Principal.

Since Pace is not liable to Petitioner, the Surety is not liable.

The Surety's liability to Petitioner is co-extensive, co-terminus, equal to and not greater than Pace's liability to Petitioner. Aetna Cas. & Surety Co. v. Warren Bros. Co., 355 So. 2d 785 (Fla. 1978) ("Aetna") (construction payment bond); Cone v. Benjamin, 8 So. 2d 476, 480, 150 Fla. 419 (1942); Pace Construction Corporation v. OBS Company, Inc., 531 So. 2d 737 (Fla. 2d DCA 1988) reh'g denied 1988; U.S. Fidelity & Guar. Co. v. Miami Sheet Metal Prods., Inc., 516 So. 2d 29 (Fla. 3rd DCA 1987) (statutory bond); School Board of Pinellas County v. St. Paul Fire & Marine Ins. Co., 449 So. 2d 872, 874 (Fla. 2d DCA 1984); Cincinnati Ins. Co. v. Putnam, 335 So. 2d 855 (Fla. 4th DCA 1976); McGuire v. Consolidated Electrical Supply, Inc., 329 So. 2d 411 (Fla. 4th DCA 1976); National Union Fire Ins. Co. v. Robuck, 203 So. 2d 204 (Fla. 1st DCA 1967) cert. denied, 209 So. 2d 672 (Fla. 1968); Florida ex rel Westinghouse Electric Supply Co. v. Wesley Construction Co., 316 F. Supp. 490 (S.D. Fla. 1970); Scarborough Constructors, Inc. v. Pace Construction Corp., (M.D. Fla. 1987) (decision in Respondent's Appendix);

see also, 28 Fla. Jur. 2d, Guaranty and Suretyship, § 42 (1981).

C. The Surety Has Any Defense Available To Its Principal.

A surety has available to it all defenses that its principal has, including contractual defenses, and excepting only purely personal defenses. Bear v. Duval Lumber Co., 112 Fla. 240, 150 So. 614 (1933) (statutory lien transfer bond); United States Fidelity & Guaranty Co. v. Miami Sheet Metal Products, Inc., 516 So. 2d 29 (Fla. 3rd DCA 1987) (statutory bond); L. Lieby, Florida Construction Law Manual, § 10.22 Surety Defense (2d ed. 1988); See also, Rhode Island Hosp. Trust Nat'l Bank v. Ohio Cas. Ins. Co., 789 F.2d 74, 78 (1st Cir. 1986); Cobb Bank & Trust Co. v. American Mfg's. Mut. Ins. Co., 624 F.2d 722, 726 (5th Cir. 1980) (Ga.); Central Stikstof VerKoopKantoor, N.V. v. Alabama State Docks Dept., 415 F.2d 452, 458 (5th Cir. 1969) (Ala.); Egyptian American Bank, S.A.E. v. U.S., 13 Ct. Cl. 337 (1987); Mason C. Day Excavating, Inc. v. Crowder Constr. Co., Inc., 676 F. Supp. 670, 675 (W.D.N.C. 1987).

Petitioner claims that the Second District Court of Appeals, in the underlying decision, "misunderstood" or "misapplied" common law suretyship principals. Petitioner asserts that a statutory bond creates an independent cause of action against Respondents on the bond itself immune from Florida suretyship principles in general and in particular,

from any defense created by Petitioner's Subcontract with Pace. Petitioner does not cite one case which holds that Florida suretyship principles do not apply to statutory bonds. Moreover, § 713.23 Fla. Stat. does not specifically abrogate common law suretyship principles asserted by Respondents herein and below.

This Court has specifically recognized and approved that a surety's liability to a subcontractor on a construction payment bond is determined by the liability of the contractor under the terms of the subcontract in Aetna Cas. & Surety Co. v. Warren Bros., 355 So. 2d 785 (Fla. 1978) ("Aetna"). Aetna held that a general contractor's liability to a subcontractor is determined by the subcontract's terms, which in turn resolves a surety's liability on the companion payment bond.

> In the case sub judice, [the general contractor] was obligated to render payment to respondent/subcontractor according to the terms of the subcontract. As surety of this obligation, petitioner, Aetna Casualty, stood in the shoes of [the general contractor] for the purpose of guaranteeing payment to [the subcontractor] according to the subcontract terms. . . . Because petitioner's obligation under its bond agreement was commensurate with that of [the general contractor] under the subcontract, the circuit judge correctly decided the issue of the parties' intention with respect to the payment provision in question as a matter of law on motion for summary judgment, consistent with this court's recent decision in Peacock.

Aetna at 787-88 (emphasis supplied) (citations omitted).

Lieby specifically addresses the question now before this Court stating: "The defense of failure to properly comply with the terms of the contract is available to the surety. This would include the defense of a condition precedent to payment clause." [Emphasis Added]. Liebv, § 10.22, Surety Defenses at 277.

The logic of Aetna has also been recognized by the Florida legislature. The Florida legislature has recognized the fundamental and basic requirement of liability on the underlying contract as a predicate for surety liability in enacting § 627.756 Fla. Stat. dealing with attorney's fees on construction surety bond claims such as present in this case. Such statute requires as a condition precedent to surety liability for attorney's fees on a construction payment bond that there be a breach of the underlying "construction contract". Such statute therefore expressly recognizes the causal relationship between the surety's liability on its bond and the contract it relates to.

Moreover, Petitioner has admitted by its pleadings that the Subcontract is necessary and essential to its bond claim. Petitioner specifically plead as an element of its bond claim the Subcontract in question. See paragraphs 13 and 6 of the Complaint. Moreover, in paragraph 15 of its Complaint, Petitioner alleges that the Subcontract governs the relationship of Pace and Petitioner. It is clear by

Petitioner's own pleadings that the Surety's liability under the bond is based upon Pace's and Petitioner's contractual relationship.

D. Neither Pace Nor The Surety Are Liable Under The Terms Of The Bond Or § 713.23 Fla. Stat.

Petitioner asserts that both Pace and the Surety are liable under the bond contract and § 713.23(1)(a) Fla. Stat. because the bond's condition is that Petitioner be paid sums "justly due" "within ninety days," and the bond statute provides that Petitioner shall be "paid promptly".

There is one monumental insurmountable problem with Petitioner's claim that Pace is liable in this case under the terms of the bond or § 713.23 Fla. Stat. As Petitioner admits, Pace was never sued under the terms of the bond or § 713.23 Fla. Stat. Apparently Petitioner believes it can amend its Complaint and move for Summary Judgment against Pace in its Brief to the Florida Supreme Court. Petitioner asserts no authority for this novel proposition.

Petitioner argues that the Surety is liable under terms of the bond and § 713.23 Fla. Stat. The quoted bond provisions in Petitioner's Brief are either taken out of context or considered in a vacuum.

Petitioner ignores extremely relevant and illustrative provisions in the bond. Petitioner totally fails to discuss

or explain the import to the Court of the following pivotal payment bond language: "[C]laimant, may sue on this bond for § 6the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon." [Emphasis added]. (Petitioner's Appendix, p. 13, ¶ 2).

How can sums "justly due" be quantified, or the time of payment ascertained, absent reference to the Subcontract? Unless there is a present liability on the Subcontract for labor and materials, there is no bond claim to make. Cf. Advance Alarm Technology, Inc. v. Pavilion Assoc., 536 N.Y.S.2d 127, 129 (N.Y. 2d App. Div. 1988).

Aetna clearly holds that a necessary predicate to a surety's liability under a payment bond is a finding that the principal's obligations under the subcontract have ripened into a present and due claim. Pace's payment obligation under the Subcontract is directly dependent and conditioned upon payment by the owner. Accordingly, the Surety's obligation remains inchoate in this case because performance was not due under Aetna.

The "prompt payment" language under § 713.23 Fla. Stat. is absolutely meaningless unless one asks, "prompt payment of what?" That question can only be answered by referring to the contract of the claimant and a determination of what is due under such contract. Unless it is "due" there is nothing to

"promptly pay". The claimant is free by his contract, without running afoul of § 713.23 Fla. Stat., to determine not only what is due, but if it is due. He can also fix the method, time and risk of payment as he chooses. Section 713.23 Fla. Stat. does not require "prompt payment" unless and until a payment is "due". Any bond issued pursuant to the statute must necessarily be considered in connection with the underlying subcontract to which the claim relates to.

Construing either the bond or § 713.23 Fla. Stat. without reference to the underlying subcontract is impossible. Two questions must be answered that the bond's four corners do not address: What is due? and, If it is due? Courts, including this one in Aetna, have addressed this question in the past with uniform results.

The statute cannot be judicially expanded to require payment irrespective of Petitioner's own Subcontract as Petitioner urges. If the legislature had intended to limit Petitioner's ability to determine what it was due, if it was due, it would have so stated by providing that payment would be due upon the furnishing of labor of materials, etc., anything to the contrary notwithstanding. No such legislative intent is manifest by the statute. It does define when "promptly" starts: i.e., furnishing of labor, payment to the general contractor, or any other event. Therefore, Petitioner is free to enter into a contract which establishes a "due

date" from which "promptly" can be measured. This makes sense because numerous issues such as extra work, backcharges and other claims need to be resolved before an amount "due" can be determined on every subcontract.

When considering a federal statutory bond dealing with sums "justly due", the "old" Fifth Circuit stated it this way: "Any obligation under the bond must derive from a contractual obligation, and an action on the bond cannot precede a determination of the contract debt." J.S. & H. Constr. Co. v. Richmond County Hosp. Auth., 473 F.2d 212, 217 (5th Cir. 1973). Subsequently, the "new" Fifth Circuit specifically addressed the question again, when responding to an argument that a statutory bond claim must be addressed independently and mutually exclusively of the underlying contract between a general and subcontractor:

> This argument proves too much. The Private Works Act does not obliterate the contract on which the underlying liability of both the contractor and the surety are based. A subcontractor can sue the surety for payment on the contract if the contractor does not or cannot fulfill its obligations, but that suit is still based on the contract between the contractor and subcontractor. It follows that the interpretation of the "pay when paid" clauses will determine the underlying liability and also, therefore, the liability of [sureties]. (Emphasis Added) (Louisiana statute and law).

Pacific Lining Co. v. Algernon-Blair Constr. Co., 812 F.2d 237 (5th Cir. 1987) at 241-42.

E. There Is No Conflict With The Underlying Decision And The Cohen And Guin Cases.

Notwithstanding Aetna's holding that a surety's liability is settled by the underlying contract, and the foregoing authority, Petitioner contends that two lower court cases compel a reversal of Aetna because a statutory bond is at issue. Those two cases are Cohen v. Lunsford, 362 So. 2d 383 (Fla. 1st DCA 1978) ("Cohen"), and Guin & Hunt, Inc. v. Hughes Supply, Inc., 335 So. 2d 842 (Fla. 4th DCA 1976) ("Guin"). Both cases were decided either before or at about the same time this Court decided Aetna. Neither case holds that a contractual defense created by a claimant's own contract is unavailable to a statutory surety.

Cohen can be an extremely confusing case to read because of copious dicta. Suffice it to say that neither a general contractor or a surety and its payment bond were at issue. A subcontractor sued an owner to foreclose a mechanic's lien. The First DCA held that since a statutory payment bond had been provided on the project, the subcontractor had no mechanic's lien to foreclose. That is the holding in this case: no more, and no less.

In reaching this less than startling result, the First DCA discussed via dicta the statutory payment bond's form, even though no bond claim was before it and no surety was a party to such case. The First DCA noted that a rider to the

statutory payment bond[3] received into evidence sought to limit recovery on the bond if the general contractor was not paid by either the owner or construction lender.

The relevant Cohen dicta is whether a seneral contractor, surety and owner can agree among themselves to limit a claimant's rights in a dual obligee rider, without the claimant's knowledge or consent. Not surprisingly, the Cohen dicta stated that limitation contained in the bond itself did not affect a claimant's rights under a statutory payment bond. Since the claimant had not agreed to it, it could not be deprived of its statutory claim by other:

> A reading of the condition in the payment bond here clearly shows that its only effect is to limit the surety's liability to the obligees (owners and lender). The condition does not limit the rights of the subcontractor. If it did, the limitation would be invalid and would be disregarded as surplusage.

Cohen 363 So. 2d at 384 (emphasis added).

In other words, since a subcontractor had a claim under the bond, the subcontractor's claim could not be waived or released absent the subcontractor's own consent. No unilateral action by the contractor, surety and owner could waive the subcontractor's bond claim absent the subcontractor's consent.

---

[3]An example of the type of rider discussed in Cohen is found at Petitioner's Appendix, p. 17. Such bond amendment is not an issue in this case.

The subcontractor then argued that because a "pay when paid" clause in its subcontract, the owner should not have the benefits of a statutory bond. The court held, that an owner's right to keep his property free from liens by requiring a statutory payment bond cannot be altered without the owner's consent.

> The restriction of the subcontractor's rights against the general contractor does not increase the subcontractor's rights against the owner. The subcontractor cannot unilaterally alter or eliminate the owner's statutory exemption by inserting a provision in the contract between him and the general contractor.

Cohen 362 So. 2d 383, at **384**.

Cohen stands for the proposition that the subcontractor cannot restrict an owner's rights absent the owner's consent. Perfectly consistent is that a surety cannot restrict a subcontractor's rights without the subcontractor's consent. There is nothing in Cohen that prohibits a subcontractor from altering its own rights. This is exactly what Petitioner has done in the instant case. Petitioner has contractually agreed to assume the risk of owner nonpayment in its Subcontract and voluntarily assumed the risk of owner nonpayment. Cohen relied upon Guin where a statutory payment bond was genuinely at issue.

Guin is a 1976 case. Guin did not involve a "pay when paid" clause in a subcontract and left that question open. Guin did involve a statutory payment bond attached to which, as in Cohen, was a dual obligee rider in which the contractor, surety and construction lender AS BETWEEN THEMSELVES sought to modify the terms of the statutory bond by conditioning both the contractor's and surety's obligation to pay bond claimants. The Fourth DCA found such attempt a nullity for the same reasons set forth in the Cohen dicta; the claimant had not consented to the modification of its statutory rights. Other parties cannot modify a party's contractual or statutory rights without the consent of the affected party.

Importantly, Guin specifically noted that the underlying contract had no "pay-when-paid" clause in it and specifically did not rule on that question. The next year it did. In 1977 the case of Mathews Corp v. Tutten Enterprises, Inc., 343 So. 2d 902 (Fla. 4th DCA 1977) was decided. It held that a contract clause restricting payment to a certain fund would be enforced as written. In 1988, the Fourth DCA again came to the same conclusion, without relying on Mathews, in the case of DEC Electric, Inc. v. Raphael Construction Corp., 538 So. 2d 963 (Fla. 4th DCA 1989) (cert. pending).

Both Guin and Cohen are distinguishable because neither involved a defense created by the claimant's own contract.

The issue here is quite different because the claimant's own contract is at issue and it governs.

The Second District Court of Appeals found in this case that when there was an enforceable "pay when paid" clause in the Subcontract, actually consented to and aareed to by Petitioner, Petitioner itself had affirmatively contracted and agreed at the time of contracting that if the owner did not pay Pace, Pace did not have to pay Petitioner. The Second District Court of Appeals reasoned:

> Because Pace is not liable to OBS unless and until it receives payment from the owner of the project, the trial court also erred in ruling that they were liable on their payment bond. A surety's obligation to the subcontractor under a payment bond is no greater than the contractor's obligation to the subcontractor under the subcontract agreement.

Pace at 531 So. 2d **738.**

This decision, as decided by the Second DCA, is correct and in accordance with settled suretyship law that a surety has no liability greater than its principal's, and also has all defenses, including contractual defenses, available to its principal. A statutory bond does not create the same rights in a bond claimant as are enjoyed by a holder in due course of a promissory note.

111. THERE IS NO PUBLIC POLICY WHICH WOULD RENDER PETITIONER'S OWN AGREEMENT AND CONTRACT UNENFORCEABLE.

To prevail, Petitioner must convince this Court that as a matter of public policy an optional statutory payment bond relating to a private (not public) construction project confers an absolute, unconditional right to payment to a claimant, which absolute right cannot be modified, abridged, compromised or waived by the claimant's own contract. Given the irrefutable fact that the Constitution of Florida is the very embodiment of public policy, and grants to every person the freedom to contract, the Petitioner's burden is extremely heavy.

In enacting § 713.23 Fla. Stat., the legislature did not promulgate a policy, public or otherwise, mandating statutory payment bonds on <u>all</u> private construction projects. Such statute provides owners of real property with the option, but not the requirement, to insulate his property from the mechanic's liens of subcontractors and suppliers by requiring his general contractor to supply a statutory payment bond. It is special interest, not public interest, legislation. The special interest and the manifest injustice of Florida's statutory payment bond is evident in this case: the owner benefits from his own default. He has not paid the general contractor who has not paid the subcontractor for such reason. The subcontractor has no claim against the defaulting owner's property due to the statutory payment bond. The unpaid

general contractor becomes the uncompensated guarantor for the owner's non-payment to it. This anomaly may well deprive the general contractor of equal protection of the laws, but that is not the question here. Public policy is.

This Court has found that public policy is a fickle concept with no fixed rule by which to define it. However, generally, a contract is not void for public policy reasons unless it is injurious to the public or contravenes some settled social interest. Russell v. Martin, 88 So. 2d 315, 317 (Fla. 1956). To be void a contract must contravene some public right or the public welfare and must be shown to have a mischievous tendency with regard to the public.[4] Atlantic Coast L.R. Co. v. Beazley, 54 Fla. 311, 45 So. 761, 774 (1907). Nevertheless, every party has a right to contract beneficially in his own interest, and if not immoral, fraudulent or illegal, such contract will be enforced. Id. at 774. Accord, Prudential Insurance Co. of America v. Prescott, 176 So. 875, 881 (Fla. 1937).

Public policy does not prevent a party from exercising his right to limit his liability by contract, and such provisions will be enforced as written. Ivy H. Smith Co. v. Moretrench Corp., 253 F.2d 688, 690 (5th Cir. 1958) (Fla.); 11 Fla. Jur. 2d, Contracts § 88 (1979). A contract is a risk

[4]The public constitutes a broader class than one limited to freeholders and subcontractors.

allocation instrument. Vested contractual rights must be recognized and enforced as they are bargained for. 10 Fla. Jur. 2d, Constitutional Law § 290 (1979).

For instance, contracts providing for liquidated damages irrespective of negligence are enforceable irrespective of claims of unequal bargaining power and the argument that such waiver of a common law right is against public policy. Continental Video Corp. v. Honeywell, Inc., 422 So. 2d 35 (Fla. 3d DCA 1982); L. Luria & Son, Inc. v. Alarmtec International Corp., 384 So. 2d 947 (Fla. 4th DCA 1980).

Sometimes public policy is declared by the Constitution, sometimes by statute and sometimes by judicial decision. City of Leesburg v. Ware, 153 So. 87, 89 (Fla. 1934) (cit. omitted). When a contract is contrary to the Constitution, it is said to be prohibited by the Constitution, not by public policy. When a contract is contrary to a statute, it is said it is prohibited by a statute, not by public policy. Id. (cit. omitted). Here, the contract in question violates no statute and is prohibited by no statute. Petitioner argues that since its own contract modifies the due date of its statutory payment bond claim for "prompt payment", the Subcontract is void as being against public policy. What is at issue, however, is not the right of the public generally, as to all construction projects, but the private rights of Petitioner. It would indeed be a fickle public policy that

was applicable to some, but not **all**, private construction projects.

The legislature did not mandate that statutory payment bonds be furnished on **all** private construction projects. It is clearly optional and designed totally for the private land owner. It does not create rights for the public generally, or "the general public's welfare. There is no legislative intent expressed by **§ 713.23** Fla. Stat. to bond all private construction projects which manifests a policy of assuring all subcontractors of payment. Had the legislature done so, it would violate the "equal protection clause" of the Constitution unless general contractors were also so protected as to receiving payment from owners as a matter of public policy. If "prompt payment" means irrespective of contract, then the statute has "due process" and "unjust taking" problems.

Section **713.23** Fla. Stat. is clearly optional. An optional privilege hardly sounds in terms of public, as opposed to private interest. When such option arises and a statutory payment bond is issued, it creates a claim, or right, on the part of claimants such as Petitioner. Claims can be created by contract, common law, statute, or judicial notice. Clearly rights created by common law for negligence, etc., can be contractually waived or modified. See, e.g., Continental Video Corp. V. Honeywell, Inc., **422** So. 2d **35**

(Fla. 3d DCA 1982); L. Luria & Son, Inc. V. Alarmtec International Corp., 384 So. 2d 947 (Fla. 4th DCA 1980).

The outright waiver of a statutory right is not at issue. However, it is absolutely clear and beyond doubt that a right created by statute may be totally and absolutely waived unless the statute is designed to protect the seneral rights of the public rather than purely private interests such as are at issue here. 29 Am. Jur. 2d, Estoppel and Waiver § 164 (1966) citing Robertson v. State, 94 Fla. 770, 114 So. 534 (1927); Bellaire Secur. Corp. v. Brown, 124 Fla. 47, 168 So. 625 (1936). In the latter case, this Court held that a party may waive any statutory right he has. Id. at 639. See also, 22 Fla. Jur. 2d, Estoppel and Waiver § 87 (1979).

Here, the "pay-when-paid" clause is abundantly clear and set forth under bold print: FINAL PAYMENT. (Petitioner's Appendix, p. 7). Petitioner knew from the Subcontract and contracted that if the owner failed to pay Pace, it had assumed the risk and absolved Pace of liability in those limited circumstances. It thereby knew that it had likewise absolved the Surety of liability in such limited circumstances for the same reason; any release of a principal is also a release of the surety. Accord, Baker v. Peddie, 467 So. 2d 821 (Fla. 1st DCA 1985). There is no public policy to save one from one's own act and contract. If Pace

had been paid, and Petitioner not, then Petitioner's bond claim would be well taken.

The right to contract is not granted by the legislature, but is inherent, and is a primary prerogative of freedom. Atlantic Coast L.R. Co. v. Beazley, **54** Fla. **311, 45** So. **761, 773 (1907)** (cit. omitted.) Courts should be extremely cautious to declare a party's contract as being void as against public policy, and should not do so unless prejudice to the public interest, not private interest, clearly appears. **11 Fla. Jur.** 2d, Contracts **§** 88 **(1979).** The Subcontract does not involve public lands, it involves part of the work on a privately owned shopping center in Pasco County. This point was not lost on the Second DCA in the oral argument before them.

When this case was being orally argued before the Second DCA, Judge Schoonover asked Respondents' counsel what, if anything, public policy had to do with this case. Counsel did not know of the origin of the question and gave a rather honest but flat footed response -- "nothing." Counsel had not thought about it, as it had not been raised in the complaint, briefed or argued, and did not know at that time of the decision of the Second District Court of Appeals in Coastal Caisson Drill Co. v. American Casualty Co., 523 So. 2d **791** (Fla. 2d DCA 1988) ("Coastal"). Coastal involved a public construction project and a statutory payment bond

under § 255.05 Fla. Stat., a different statute than that now under consideration. Such case was actually certified by the Second DCA to this Court (523 So. 2d 794) which subsequently affirmed in American Casualty Co. v. Coastal Caisson Drill Co., 14 F.L.W. 111 (Fla. March 17, 1989) ("American Casualty").

Clearly, if the Second DCA had thought there to be a public policy question involved in this case they would have certainly addressed it having just decided and certified Coastal to this Court. The Second DCA did not address it either because the issue had not been properly raised by Petitioner, or more likely because it found no public, as opposed to private, interest to protect. Public statutory payment bonds under § 255.05 Fla. Stat. apply to all public construction jobs and are not optional. Private payment bonds under § 713.23 Fla. Stat. are clearly optional and do not apply to all private construction projects.

In this case a private construction job is at issue, and an optional payment bond conferring private, not public rights, is at issue. This Court found some public interest in § 255.05 Fla. Stat. in American Casualty. The public benefit found by this Court in American Casualty was "standardization of prices and wages and also of the quality of labor and materials" on public jobs. Id. at 112.

The public has an obvious financial interest in public jobs because the public pays the taxes which pay for public jobs and the public uses such public works. The same is not true on private jobs, and no purpose for the statute exists save the private interests of certain owners and subcontractors on those limited projects where the optional private bond is provided.

The other public benefit reason given by this Court in affirming Coastal in American Casualty was that keeping subcontractors secure lessened the risk of delay (presumptively of public projects) caused by litigation. Litigation over private projects, by private parties, is not of public concern as it does not affect "we the people."[5] There is no public benefit to completion of private construction projects in which "we the people" do not have a vested interest as they clearly do with public projects paid for and used by the public generally.

Exercising its freedom to contract, Petitioner executed the Subcontract. It now seeks relief from this Court from its own act and contract. Petitioner argues public policy, but can show only private interest. As this Court affirmed the Second DCA's opinion in Coastal, it should now also affirm such Court in Pace Construction Corporation V. OBS Company,

[5] "We the people" has included all citizens, not just property owners, since the time of Mr. Jefferson.

Inc., 531 So. 2d 737 (Fla. 2d DCA 1988).

CONCLUSION:

A unanimous Second District Court of Appeals decided the case on review and Coastal. Such unanimous court denied rehearing on this case without comment. Prior to such unanimous decision, applying Peacock and Aetna, the Middle District of Florida resolved these same legal issues in favor of Respondents. Four judges are unanimous in their decisions on these issues. Additionally, a united three judge appellate panel in Lambert, while addressing only the pay when paid language under Louisiana law, decided such case totally in support of Respondents' position before this Court.

Petitioner cannot show any public benefit or public purpose to prohibit it from voluntarily modifying or waiving its own statutory bond claim by its own contract for one simple reason. There is none. The Florida statute in question does not address all private construction jobs, but only that limited number where an owner through special interest legislation has opted for personal rather than public reasons to exempt his property from liens at the general contractor's expense. The interests involved are clearly private and personal.

This Court should affirm the Second District Court of Appeals for the reasons stated.

Respectfully submitted, this 29th day of June, 1989.

J.D. Humphries, III, Esq.
Florida Bar No. 699446

J.M. Crowder, Jr., Esq.
Florida Bar No. 291171