IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

COUNTY OF BREVARD, a Political subdivision of the State of Florida,

Petitioner,

:

CASE NO.: 88,842

MIORELLI ENGINEERING, INC., and HARTFORD FIRE INSURANCE COMPANY,

:

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Decisional Authority

Statutory Authority

STATEMENT OF THE CASE AND FACTS

The Petitioner, County of Brevard, a political subdivision of the State of Florida, entered into a contract with the Respondent, Miorelli Engineering, Inc., to design and construct a baseball stadium for a specified contract sum.[1/2/] (A.1:2) The stadium was to be used by the Florida Marlins. (A.1:8) The design-build contract required the Contractor to totally design and build the stadium project, providing all professional design and construction services for the specified contract sum. (A.1:3) The contract specifically and repeatedly prohibited any modifications to the contract unless they were supported by written instrument signed by the County. (A.1:18, 7:270, 326)

The Contractor submitted to the County for approval plans prepared by the Contractor's architectural sub-contractor. (A.13:2) The County approved the plans and authorized the Contractor to build the stadium as designed and submitted by the Contractor. (A.13:2) Sometime later, the Contractor questioned whether the County would be willing to increase the contract sum for the stadium project as submitted. (A.13:2) The County

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1/ The Petitioner, County of Brevard, will be referred to as the "County." The Respondent, Miorelli Engineering, Inc., will be referred to as the "Contractor." All other entities and individuals will be referred to by name.

2/ This initial brief on the merits is accompanied by an appendix, comprised of all pleadings and documents contained in the County and the Contractor's appendix before the Fifth District, as well as relevant pleadings before and orders emanating from the Fifth District. All references to the appendix will be referred to by the symbol "A." followed by the appropriate document number and page number of that document.

responded that it expected the Contractor to construct the stadium pursuant to the parties' contract, in accordance with the plans the Contractor submitted to the County, and for the previously agreed upon contract sum. (A.7:270, 331; 12:235) The County specifically informed the Contractor that the County would not pay additional sums for the Contractor's performance of work required by the parties' contract. (A.7:270, 331; 12:235) No written change orders to the Agreement were issued by the County to the Contractor for this purported and disputed extra work. (A.1:18, 7:270, 326)[3/] The Contractor performed the work knowing, in advance, that the County would not pay any extra sums far the work because the County believed it was included within the scope of the parties' original contract and the contract sum. (A.7:325, 331, 382, 429; 12:235)

After allegedly reaching substantial completion of the stadium, the Contractor filed suit against the County. The Contractor sought payment for the purported and disputed extra work mentioned hereinabove. (A.2) The Contractor admits being **told prior to performing the alleged disputed work that it would not receive extra payment for the work** because it was included within the original contract sum. (A.7:270, 325, 331, 382, 429) At the time, the Contractor also failed to follow contractual procedures required if it thought it wa5 performing extra work in order to receive payment therefore. (A.7:270) Again, no change orders were ever issued as required by the contract.

3/ On several occasions, the parties mutually agreed to change orders, in accordance with the express contract requirements. (A.7:269)

At approximately the same time, multiple and significant engineering and construction defects, omissions, and deficiencies in the Contractor's work at the stadium began to manifest themselves. (A.3:19-20) The County was ultimately forced to terminate the Contractor from the project. (A.2:34) The County also withheld from the Contractor remaining amounts allegedly due under the contract, consisting mainly of retainage. (A.2:3)

Eventually, the Contractor filed its Third Amended Complaint raising thirty-seven claims. (A.2) In several counts, the Contractor sought payment for the remaining balance it contended the County owed under the express written terms of the contract. (A.2:3) Counts 11 through XXVIII and portions of XXXII, in the Third Amended Complaint, enumerated the Contractor's many claims for purported and disputed extra work which, according to the Contractor's pleadings and sworn testimony, was "neither contemplated by nor included within the terms of the Agreement." (A.2:4-34)[4/]

In response to the Contractor's Third Amended Complaint, the County filed a Motion for Summary Judgment based, in part, upon its sovereign immunity defense. (A.3:13, 4:1-2) With respect to the claims for alleged extra work, Florida decisional authority only waives sovereign immunity for contract claims founded upon express written instruments; either claims based upon express contract

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4/ As to counts XX, XXVII, and XXVIII, summary judgment was granted by the lower court on other grounds and are not in dispute in this appeal. (A.5:5) From hereinafter, the remaining disputed counts will be referred to as the disputed extra claims.

terms or terms reasonably implied from express written instruments. (A.4:1-2)

Given the foregoing authority, the County maintained, at the trial court level, that payment of additional sums for the purported and disputed work was in no manner appropriate. The County noted that if the work was included within the express terms of the original contract, it could not be extra and was included within the contract sum. (A.2; A.3) Conversely, the County noted that, if the alleged extra work constitutes separate contracts as alleged by the Contractor, any claim therefore is barred by sovereign immunity. (A.4:1-2) The County also submitted that to somehow imply a duty to pay additional sums for alleged additional work would permit an implied term to overrule an express term in the parties' contract (A.8:23); that the Contractor provided sworn testimony that the County told it, prior to performance of any disputed work, that it would not receive extra compensation for the alleged extra work (A.8:23); and that the Contractor's own pleadings and admissions recognize that the alleged extra work was not included in or even contemplated by the parties' express written instrument. (A.2:4-34)

The trial court concluded that the Contractor's claims for the alleged and disputed extra work were not barred by the doctrine of sovereign immunity." (A.5) The County appealed the trial court's

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5/ In addition to the claims for extra work, the Contractor also raised claims for fraudulent inducement, quantum meruit, and breach of fiduciary duty. The trial court did grant summary judgment as to the quantum meruit and fiduciary duty claims. (A.5) The Fifth District reversed the lower court's denial of summary judgment on

decision to the Fifth District Court of Appeals.[6/] The Fifth District affirmed that part of the trial court's order which held that the Contractor's right to pursue its claims for alleged and disputed extra work. (A.17) Upon receipt of this opinion, the County filed a Motion for Clarification and Certification. (A.18) The Fifth District denied the motion. This timely appeal followed. (A.20)

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the fraudulent claim. (A.17:5-6) The Contractor has not cross-appealed these rulings.

[6/] The Fifth District originally accepted jurisdiction of and rendered its decision in this matter prior to this Court's decision in Department of Education v. Roe, 679 So. 2d 756 (Fla. 1996). The Fifth District concluded that its decision was nevertheless valid because Roe was rendered after the Fifth District's decision in this case. (A.19)

POINTS ON APPEAL

I.

WHETHER SOVEREIGN IMMUNITY BARS THE CONTRACTOR'S ADDITIONAL COMPENSATION CLAIM FOR DISPUTED EXTRA WORK BECAUSE THE IMPLIED OBLIGATION OF GOOD FAITH AND FAIR DEALING IS LIMITED TO THE EXPRESS TERMS OF THE CONTRACT INTO WHICH IT IS IMPLIED, AND CANNOT BE USED TO CREATE NEW AND SEPARATE CONTRACTUAL OBLIGATIONS.

A. Whether In Pan Am, This Court Correctly Limited The Waiver Of Sovereign Immunity To Actions Founded Upon Express Written Contracts.

B. Whether Champagne-Webber Properly Created A Limited Exception To The Pan Am Rule.

C. Whether Other Courts And The Contractor Seek To Inappropriately Expand The Limited Exception To The Pan Am Rule.

II.

WHETHER IN ANY CONTRACT, THE OBLIGATION OF GOOD FAITH AND FAIR DEALING CAN NOT CONTRADICT THE EXPRESS TERMS OF THAT CONTRACT.

SUMMARY OF THE ARGUMENT

This Court has recognized that contract claims, founded upon an express written contract, are not barred by sovereign immunity. This conclusion is premised upon the rationale that the government empowers its agencies to enter into contracts. It would be unfair for the party who entered into a valid contract with the State to have no remedy for breach of this agreement by the State.

A limited exception to this Court's Pan Am rule was created to allow claims founded upon implied terms of an express written contract. In other words, if a party has a contract with the State, and a term can reasonably be implied from the express words of that written contract, then that party may pursue its claim despite the existence of sovereign immunity. Such an exception is validly premised upon the rationale that, if the State is authorized to enter into express written contracts, then a citizen should have the right to sue for any breaches of implied terms emanating from that express written contract.

Despite the limited exception, other courts have impermissibly extended the Pan Am rule to effectively allow parties to pursue claims founded upon implied contracts. Apparently, some courts have failed to recognize the distinction that, to survive sovereign immunity, the implied term must reasonably and logically emanate from the express written contract. For instance, as in this case, where a contract expressly provides that a contractor will not be compensated for alleged extra work unless so provided in writing and signed by the State, claims for extra work cannot reasonably be

implied from the original contract between the parties and, as such, fall outside the contract. To the extent that the term cannot be reasonably implied from the express written contract but, instead, falls outside the express written contract, the claim violates Pan Am and public policy and should be barred by sovereign immunity.

Moreover, in this case, the Fifth District misconstrued the effect of the obligation of good faith and fair dealing on express contract terms. Where a party seeks to use this implied obligation of good faith and fair dealing, it must arise from and apply to the obligations of the contract into which the party seeks to imply it. In other words, the obligation of good faith and fair dealing cannot be used by a party to imply a new contract. Rather, the implied obligation of good faith and fair dealing is limited to supplying a term otherwise absent from an existing contract. It certainly cannot be used to contradict the express terms of an existing contract.

All of these principles were violated when the Fifth District permitted the Contractor to pursue its contract claims for alleged extra work against the County. The Contractor admitted that it did not have an express written contract, as required by Pan Am. Further, the exception to Pan Am for implied terms was inapplicable because the Contractor did not seek to imply a term to the existing contract but, instead, sought to imply new and separate contracts. Even if the Pan Am exception was applicable, it would not be reasonable to imply a term that the County would pay for extra work

when the Contractor admitted that, prior to performing, it was told it would not be paid for such alleged extra work. Finally, the obligation of good faith and fair dealing cannot be used by the Contractor to override the contract's express written term that any extra work need be pre-approved, in writing, and signed by the County. This Court should partially quash the Fifth District's decision because of its conflict with Pan Am and its violation of public policy.

ARGUMENT

I.

SOVEREIGN IMMUNITY BARS THE CONTRACTOR'S ADDITIONAL COMPENSATION CLAIM FOR DISPUTED EXTRA WORK BECAUSE THE IMPLIED OBLIGATION OF GOOD FAITH AND FAIR DEALING IS LIMITED TO THE EXPRESS TERMS OF THE CONTRACT INTO WHICH IT IS IMPLIED, AND CANNOT BE USED TO CREATE NEW AND SEPARATE CONTRACTUAL OBLIGATIONS.

It is true that there is a factual conflict regarding the scope of the work to be provided by the Contractor under the contract sum. The County contends that the contract sum included all the work that is alleged as separate contract claims in the disputed extra claims of the Third Amended Complaint. conversely, the Contractor asserts that the extra work claims are for work not within the scope of the Agreement (i.e., the contract sum) and, therefore, that it is entitled to additional compensation above and beyond the mutually agreed upon contract sum. Assuming the disputed extra claims were actually work included within the contract sum, then the County is clearly entitled to summary judgment in its favor on all of the Contractor's extra work claims. Nonetheless, even if one were to accept the Contractor's assertion that the disputed extra claims are based upon separate contracts, summary judgment should have been entered in favor of the County because these implied contract claims for extra work are barred by the sovereign immunity doctrine.

A. In Pan Am, This Court Correctly Limited The Waiver Of Sovereign Immunity To Actions Founded Upon Express Written Contracts.

The common law doctrine of sovereign immunity traditionally allowed governments to operate without the distractions and monetary detriments accompanying lawsuits. Over time, society recognized that there are some claims against the government which should be permitted. So, like other sovereigns, the State of Florida partially waived its sovereign immunity, and decided that its treasury would be open to certain claims. §768.28(1), Fla. Stat. In so doing, the Legislature only obligated our treasury to pay for specific claims which it believed merited compensation. §768.28(1), Fla. Stat.

While Section 768.28 contains no statutory waiver of sovereign immunity against political subdivisions of the State for actions founded upon contracts, this Court recognized an implied waiver of sovereign immunity for statutorily authorized express written agreements. Pan Am Tobacco v. Department of Corrections, 471 So. 2d 4 (Fla. 1984). Nonetheless, this Court specifically limited its implied waiver of sovereign immunity to suits on express written contracts.

These limitations on the waiver of sovereign immunity must be strictly construed. Carlile v. Game & Fresh Water Fish Commission, 354 So. 2d 362 (Fla. 1977). Thus, if a plaintiff raises a cause of action that has not been waived, the claim remains barred.

To reach its conclusion in Pan Am, this Court found that the Legislature must have intended to waive sovereign immunity for

claims founded upon an express written contract because the Legislature allowed the State to enter into written contracts with its citizens. It would be unfair for the party who entered into a valid contract with the State to have no remedy for breach of this agreement by the State. This Court, therefore, concluded that the Legislature must have intended for Florida citizens to have a remedy for breach of express written contracts with the State.

The same cannot be said for implied contracts. The State obviously does not empower its agencies to enter into implied contracts. The Florida Legislature could not have intended there to be a waiver of sovereign immunity for implied contracts when, under the rationale of this Court in Pan Am, the State does not authorize implied contracts.

This restriction was obviously intended to serve the fundamental policy underlying sovereign immunity: protection of the public treasury. By limiting governmental liability to breaches of express written contractual obligations, courts provide fiscal certainty and predictability to governmental bodies. At the same time, parties dealing with governmental bodies are adequately protected because they are free to refuse additional work in the absence of a written contract or authorization.

If the rule were otherwise, it would adversely impact vital fiscal and public policies affecting citizens of this State. It is one issue for our State to be liable for obligations it owed to a party and breached under an express and binding contract. It is another issue for a party to argue that the State is liable for

breach of a contract it never authorized. To protect the State from such meritless claims, as well as to ensure fiscal predictability, courts require the existence of an express written contract **before** there can be any waiver of sovereign immunity. **The** State's day-to-day operations should not be disrupted by claims which neither the State, nor the party allegedly contracting with the State, thought important enough to reduce to writing. If the rule were otherwise, parties could freely raid **the** State's treasury by the mere allegation of a verbal or implied contract.

This public policy was subsequently followed by the Second District in Southern Roadbuilders, Inc. v. Lee County, 495 So. 2d **189 (Fla.** 2d DCA 1986). In Southern Roadbuilders, the court held that a contractor, who performed alleged extra work without first obtaining a written change order, was not entitled to pursue its action because the claim for extra work was barred by sovereign immunity. The court reasoned that the claim for extra work was not founded upon an express written contract and, therefore, was barred by sovereign immunity. In doing *so,* the Second District reiterated the public policy behind the doctrine:

> Sovereign immunity is a doctrine designed to protect the public treasury from what would otherwise be countless claims filed by the vast number of **citizens** affected **by the** actions of **a** government. Though it germinated in the monarchical maxim, "The King Can Do No Wrong," Prosser, Law of Torts 971 (4th ed. 1971)--an odious concept by modern standards--sovereign immunity, at least to the extent retained by the legislature and courts, is a positively necessary and rational safeguard of taxpayers' money.

Id. at n. 1

To date, the Legislature has **not** changed the express language of §768.28(1), which provided the support for the underlying rationale of Pan Am and Southern Roadbuilders. Nor is there any reason to alter Pan Am based upon changes in public policy. To the contrary, this Court's rule that requires contracts with the State to **be** in writing to avoid the sovereign immunity doctrine has even more relevance in today's world than it did 13 years ago when this Court issued Pan Am. The world is even more litigious than it was in 1984. In this day and age, the State and its agencies have every reason to wisely spend the tax dollars of its citizens. Permitting only claims founded upon express written contracts with the State prevents a deluge of groundless lawsuits based upon alleged implied contracts and ensures that more taxes will not be needed to fund the defense of unwarranted lawsuits. Here, the Contractor's contract claims for extra work are barred because the express language of §768.28, Fla. Stat., reveals the Florida Legislature did not intend to permit compensation for claims based upon implied contracts.

B. Champagne-Webber Properly Created A Limited Exception To The Pan Am Rule.

In Champagne-Webber, Inc. v. City of Ft. Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988), the Fourth District created a limited exception to the Pan Am rule requiring claims against the State to be founded upon an express written contract. **There,** the Fourth District determined that the State could be liable for implied obligations which arose from express agreements. In Champagne-Webber, the contractor sought recovery based upon the city's

alleged **misrepresentation** of soil conditions at the construction site. The court concluded that there was "justified reliance" on these alleged **misrepresentations.** Given these limited facts, the Fourth District held:

> where a suit is brought on an express, written contract entered into by a **state** agency under statutory authority, the defense of sovereign immunity does not protect the state agency from an action arising out of a breach of either an express or implied **covenant** or **condition of that contract.**

Champaqne-Webber at 698. (emphasis in original). More importantly, the Fourth District recognized that the contractor's claim for implied **contract** was barred under Pan Am **and** Southern Road Builders. Id. at 697.

This exception to the Pan Am rule, as limited to the facts of Champaqne-Webber, makes sense. In Champaqne-Webber, the court was confronted with a misrepresentation by the State concerning subsurface soil conditions. The compensation claim related directly to the misrepresentation. It is reasonable, under those facts and circumstances, that an implied covenant of good faith and fair dealing should be grafted onto the express written contract so that the State should pay to the contractor those additional sums of money resulting from that misrepresentation.

Conversely, Champaqne-Webber provides no support to the Contractor's argument. In this case, there was no misrepresentation by the County that it would pay for the extra work. To the contrary, the Contractor admits that it was expressly told, in advance of performing the allegedly extra work, it would

not be paid for what it claimed was extra work. (A.7:270, 325, 331, 382, 429) Champagne-Webber never addressed the right of a contractor to use the obligation of good faith and fair dealing to override express terms of the written contract. The implied obligation of good faith and fair dealing should not be extended beyond the facts in Champagne-Webber to allow a contractor to unilaterally use tax dollars to create and pay for a new State contractual obligation.

c. Other Courts And The Contractor Seek To Inappropriately Expand The Limited Exception To The Pan Am Rule.

Despite the Fourth District's statement to the contrary, the rule in Champagne-Webber has been improperly extended to, in effect, encompass implied contracts. In InterAmerican Engineers and Constructors Corp. V. Palm Beach Housing Authority, 629 So. 2d 879 (Fla. 4th DCA 1993), the Fourth District took the rule of law of Champagne-Webber and applied it to an implied contract claim, resulting in a decision that conflicts with Pan Am. Unlike Champagne-Webber, InterAmerican did not involve a misrepresentation by the State. Rather, as here, InterAmerican involved a claim for payment of additional work outside the original contract. The InterAmerican trial court, following Southern Roadbuilders, held that the claims were barred under the doctrine of sovereign immunity. The Fourth District reversed the lower court's judgment, ostensibly under the authority of Champagne-Webber. In *so* doing, the InterAmerican court broadly held:

> As long as an express written agreement exists, the basis for a breach of contract

> suit exists and may include claims based upon implied covenants within the agreement.

InterAmerican at 881-882.

InterAmerican provides very little guidance to the courts of this State in addressing the issue at hand. First, the factual basis for the court's decision is unclear. For instance, there is no mention of the specific contractually required procedure for submitting change orders. The opinion only states that the contractor failed "to comply with contractual provisions requiring submissions for additional time and expense in a prescribed manner." Id. at 880. Nor does it appear that the contractor was proceeding under a good faith and fair dealing theory. Also absent is any mention of conversations between the housing authority and the contractor about payment for the extra work. Without any discussion of facts that would either align itself with Champagne-Webber or distinguish it from Southern Roadbuilders, the InterAmerican court held that, as long as an express contract existed, the basis for a breach of contract suit existed, based upon implied covenants **within the** agreement. Notably, there was no mention by the Fourth District as to what these "implied" covenants were that emanated from the written agreement that would justify a new contract by the housing authority to pay for this additional work.

Thus, InterAmerican fairly can be read to broadly hold that, once a party has entered into a written agreement with the State, all subsequent verbal claims against the State, emanating fromthat contractual relationship, are not subject to a sovereign immunity

defense. This rule of law conflicts with both Pan Am and public policy. InterAmerican should be rejected.

Although no Florida court, before this case, has directly addressed the issue of whether sovereign immunity bars extra work claims, one court has, within the context of contract interpretation, correctly recognized that a claim for extra work is not an implied term of a contract but is instead a claim for new work under a new contract. In Phillips & Jordan, Inc. v. Florida Dep't of Transportation, 602 So. 2d 1310 (Fla. 1st DCA 1992), a contractor sued the Florida Department of Transportation for extra work in performing certain road clearing. The extra work had not been authorized by a written change order to the contract, and the contract required that all extra work be authorized by written change orders. In granting summary judgment on behalf of the State and against the contractor, the First District held that the contractor's claim was barred by the terms of the express contract itself. In doing so, the court stated:

> Appellant could have sought written authorization for payment for such work, in effect, a reformation of the contract, under a contractual provision providing for such a reformation where it appears necessary. In fact, under the terms of the contract, appellant is precluded from seeking payment for work performed outside the contractual specifications without first seeking a written reformation of the contract. Therefore, appellant's claim is barred by the express terms of the contract.

Id. at 1313. The court also noted that there were no implied conditions which arose from such contractual terms which would justify payment. Although recognizing the Champagne-Webber

exception, the court held that the trial court had properly concluded that the **contractor's claim for extra work was outside both the terms of the express contract and any implied conditions of that contract.** Id. at **1313**, n.2.

The Phillips & Jordan rationale should be applied to the facts of this case. The Contractor's claims for extra **work** cannot reasonably be implied conditions of the contract. Like the contractor in Phillips & Jordan, the Contractor here had an express contract term that barred its claim. In its pleadings, affidavits, and deposition, the Contractor admits that its claims are separate contract **claims** (not implied terms of the express contract) which arose outside the terms of the express contract.[7/8/9/] Here, the

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7/ Counsel for the Contractor also admitted that the items of extra **work** were not within the Agreement. (A.8:28) Even more amazing, although the Contractor expected to be paid, it did not **know by** whom. (A.7:860, A.8:38)

8/ The Agreement expressly states:

> The Contractor understands that only modifications or change orders in writing are authorized under this Contract. (A.1:18)

and

> A Change Order is a written order signed by the Owner & Design/Builder, and issued after execution of Part 2, authorizing a change in the Work or adjustment in the contract sum or contract time. The **contract** sum **and contract time may be changed only by Change Order.** (A.1:13) (emphasis added)

9/ During his deposition, when asked about the alleged extras, Luke Miorelli, the Contractor's authorized representative, testified:

additional fact exists that the Contractor was advised, **prior** to **performing** the **work,** that it would not be paid for the alleged extra work, and yet performed the work anyway. On almost identical facts, the First District in Phillips & Jordan concluded that the

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Q. The other sums which you seek in Exhibit 65, what do they relate to? They are not covered by the express written contract, correct?

A. No, those are additional work.

Q. For matters that aren't covered by the express written contract?

MR. TOOLE: Object to the form.

A. I don't understand.

Q. That's what I am trying to figure out. Is it your contention that these other items that are claimed are owed as your part of the $1,095,364 that's due under the contract?

A. No, no, they are over and above that.

Q: Is there any written instrument that you're aware of that authorizes the payment of those sums under the contract as opposed to outside of the contract?

A: No. There is a term in the contract that allows -- that bans us from submitting change orders. The owner is the only one that's allowed to initiate them and they refused to. (A.7:270)

. . .

Q: Did anyone at the County ever agree to pay for it?

A: No, they never agreed to pay for anything. They only wanted it. (A.7:331)

Champaqne-Webber exception had no application and that the claims were in fact barred by the terms of the express contract itself.

In effect, the Contractor in this case seeks to further improperly expand the Champaqne-Webber limited exception to the Pan Am **rule.** There are several reasons why the Contractor's argument should be rejected. **The** Contractor's argument uses an implied obligation from an express contract to create an entirely new and separate contractual obligation which conflicts with the express terms of the original contract. The Contractor has cited no authority for the proposition that an implied covenant or condition of an express contract can require payment in the face of express contract terms requiring written change orders and where the contractor was advised further that it would not be paid extra sums for the work.[10/] By taking the steps that it did -- performing the work after it was told it would not get extra payment -- the Contractor is attempting to unilaterally rewrite its express agreement with the County, defeating both public policy and this Court's rule in Pan Am.

The Contractor's argument suffers from further defects. For instance, if this Court were to accept the Contractor's argument that the implied obligation of good faith and fair dealing could require the County to pay for extra work despite the express contract requirements of written authorization for extra work, such

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[10/] In fact, the Contractor's sworn testimony was that it relied upon the statements of its architect, the Contractor's own subcontractor, that the architect would somehow get the Contractor paid. (A.7:860)

a ruling would undermine every written term in every written contract. By imposing a conflicting term via the obligation of good faith and fair dealing, express terms of a written contract would be effectively rendered meaningless. Moreover, many contracts contain a clause which states that there will be no oral modifications to the contract unless in writing and signed by the parties. By using the obligation of good faith and fair dealing as suggested by the Contractor, this clause would never have any effect. Finally, the Contractor's argument would essentially invalidate sovereign immunity as to any contract claim -- express, verbal, or implied -- regardless of the complete absence of any legislative intent to do so. This would occur because every state contractor could simply alleged a payment obligation existed by virtue of the State's obligation to act in good faith, regardless of the express contract terms.

This last point brings the argument full circle to the primary issue in this appeal: whether sovereign immunity has been waived by the Florida Legislature for claims not founded upon express written contracts. There is no rational reason to conclude that the Florida Legislature has done so. As previously noted, the rationale behind the doctrine of sovereign immunity is premised upon protection of the public treasury. Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F.Supp. 186, 197 (S.D. Fla. 1981). To allow the Contractor to seek payment under these undisputed facts and circumstances is to allow vendors to unilaterally obligate the public treasury for disbursements of

funds which were never assented to, nor contemplated by, public officials.

Not only is this point consistent with general public policy, it is consistent with Florida laws limiting the circumstances under which the State and its governmental units can commit public funds. For example, Florida's Anti-Deficiency Act provides that "[n]o agency of the state government shall contract to spend . . . any moneys in *excess* of the amount appropriated to such agency . . . and any contract or agreement in violation of the chapter shall be null and void . . ." $216.311, Fla. Stat. Similarly, "[i]t is unlawful for the board of county commissioners to expend or contract far the expenditure in any fiscal year more than the amount budgeted in each fund's budget . . . and no suit or suits shall be prosecuted in any court in this state for the collection of same. . . " §129.07, Fla. Stat.

Moreover, the result advocated by the County is in conformity with a long line of cases that refuse to reward a party's failure to comply with Florida law. In Town of Boca Raton v. Raulerson, **146** So. 576 (Fla. 1933), this Court squarely put itself among those jurisdictions that hold that a court will not entertain an action on a contract expressly prohibited by law. In doing so, this Court relied upon its prior decision in Lassiter & Co. V. Traylor, **128 So.** 2d 14, 17 (Fla. 1930). There, this Court stated:

> If the charter or the statute applicable requires certain steps to be taken **before** making a contract, and it is mandatory in terms, a contract not made in conformity therewith is invalid, and ordinarily cannot be ratified and usually there is no implied

> liability far the reasonable value of the property or services of which the municipality has had the benefit. The settled rule is that persons contracting with a municipality to make improvements must act at their peril, inquire into the power of the municipality and its officers to make such contract.

Lassiter at 17. [Citations omitted] (Emphasis added).

Moreover, in Armco Drainage & Metal Products v. County of Pinellas, 137 So. 2d 234 (Fla. 2d DCA 1962), the Second District refused to enforce a contract made in violation of the county charter requiring an award of the contract to the lowest "responsible" bidder. In agreeing with the California Supreme Court, the Second District stated:

> This, then, is the undoubted rule that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its awn undoing. Says the Supreme Court of the United States in President, etc., [of Bank of United States] v. Owens, 7 L.Ed. 508]: "No court of justice can, in its nature, be made the handmaid of inequity. Courts are instituted to carry into effect the laws of the country. Armco at 237.

Thus, in Florida, the courts have consistently held that when a contract is prohibited by statute, there can be no enforcement or recovery thereon. Assuming, arguendo, that the Contractor's disputed extra work was, in part, a valid claim, it should nonetheless be barred by sovereign immunity.

Florida law recognizes numerous other situations where a party's failure to comply with the law results in a forfeiture of funds obtained in violation of that law. For instance, a broker

unlicensed by this State, who claims a commission as the procuring cause of the sale of real property, will be denied that commission by the courts of this State. See 5475.41, Fla. Stat. And, other professionals, similarly unlicensed, will also be denied claims for compensation. See §489.128, Fla. Stat. (contractors); O'Kon and Co., Inc. v. Riedel, 588 So. 2d 1025 (Fla. 1st DCA 1991) (unlicensed architect firm not entitled to fee because of lack of license). See also Rolls v. Bliss & Nyitray, Inc., 408 So. 2d 229, 234-235 (Fla. 3d DCA 1982). State laws would be rendered meaningless if a party is rewarded for its failure to comply with the laws. As such, refusing to pay the amounts claimed by the Contractor prevents the Contractor from thwarting the law, as well as the express contract terms, that required the Contractor to obtain written authorization for new contract claims against the County for the claims to be effective.

Enforcement of this rule likewise deters unscrupulous contractors from conspiring with an unprincipled state employee to verbally order changes to a written contract with the State. In other words, a contractor, restricted by the express contract terms, but wanting more money or work from the State, could bribe a lone state employee to "authorize" the work, resulting in the use of taxpayer dollars unauthorized by the State itself. This unsavory scenario is but one of many reasons why it is incomprehensible that the State could do business any other way than through express written contracts.

Moreover, to do otherwise would create a perfect vehicle for contractors to totally undermine Florida's public bidding statutes and would encourage low-ball bids, subsequent contract award, a unilateral obligation of the public treasury by the contractor's performance of public work never assented to and, the resulting increase in the contract price over the originally low bid price. Such ambush tactics on the public treasury are exactly what the Contractor seeks in this case. Such tactics encourage litigation rather than resolution through the contractually specified procedure to amend or reform the contract to which all parties originally agreed. This analysis provides further reason why the sovereign immunity doctrine should not be waived unless the claim is founded upon an express written contract.

II.

IN ANY CONTRACT, THE OBLIGATION OF GOOD FAITH AND FAIR DEALING CANNOT CONTRADICT THE EXPRESS TERMS OF THAT CONTRACT.

In addition to the conflict amongst the district courts regarding the application of the sovereign immunity doctrine to implied terms of an express contract, there is also a conflict surrounding the right of a party to use the common law doctrine of the covenant of good faith and fair dealing to override an express term of a written contract. This issue is, in actuality, a non-sovereign immunity issue. That is, even if the sovereign immunity doctrine does not apply to this case to bar the term the Contractor seeks to imply to the contract with the County, the Contractor is not entitled to use the covenant of good faith and fair dealing to

override the express terms of the contract that require all changes to the contract to be in writing and signed by the County.

This Court has yet to address the issue of whether the covenant of good faith and fair dealing may be used to invalidate the express term of a written contract. The first court to do so was the Third District in Flagship National Bank v. Gray Distribution Systems, Inc., 485 So. 2d 1336 (Fla. 3d DCA 1986). In Flagship, a borrower and guarantors borrowed money from a bank. The note between them contained a due date and a clause that permitted the calling of the loan at any time by the bank, with or without reason. The bank called the note and the borrower and guarantors brought an action against the bank, alleging that the bank breached the statutory covenant of good faith and fair dealing contained in $671.203 and $671.208, Florida Statutes (1977) when it called the note. The Third District disagreed, holding this obligation of good faith and fair dealing could not be used to override the express terms in the contract. Id. at 1340.

In another lender liability action, Riedel v. NCNB National Bank of Florida, 591 So. 2d 1038 (Fla. 1st DCA 1991), the First District similarly concluded that the covenant of good faith and fair dealing could not override the express terms of a written contract. In Riedel, the borrower sued the lender, alleging that NCNB breached both the common law and the UCC statutory duty of good faith and fair dealing when NCNB refused to release corporate stock. The loan document authorized the bank to keep the stock as collateral even though the borrower was not in default. The

borrower claimed that the bank's refusal to release the stock was in "bad faith." Citing Flagship, the First District held that the borrower had failed to state a cause of action because the duty of good faith and fair dealing could not override the express terms of the written agreement.

The Fourth District's decision in Champagne-Webber is consistent with these holdings. There, the obligation of good faith and fair dealing was **not** used by the contractor to override express terms of a written contract. Rather, to the extent that the State had misrepresented the subsoil conditions under that express contract, the covenant of good faith and fair dealing was used to imply a term that the State would pay for the damages to the contractor resulting from that misrepresentation. **Champagne-Webber did not involve the use of the covenant of good faith and fair dealing to contradict express terms in the written contract.**[11/]

Conversely, the Contractor here seeks to use the covenant of good faith and fair dealing to imply terms which would directly contradict the express terms of the written contract with the County. It is undisputed that the contract expressly states that change orders will not be effective unless in writing and signed by the County. Yet, none of the Contractor's claims for alleged extra work are founded upon written change orders signed by the County. Despite the complete absence of any Florida authority, the

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11/ Neither Phillips & Jordan nor InterAmerican address the use of the covenant of good faith and fair dealing to override the express terms of the written contract.

Contractor seeks to unilaterally rewrite the contract through the use of the covenant of good faith and fair dealing.[12/]

This Court should reject a rule of law that permits such a result. The covenant of good faith and fair dealing was never intended to be used in such a manner. There is no legitimate reason why the Contractor should be allowed to pursue its extra work claims under the covenant of good faith and fair dealing. To do so would undermine the very sanctity of contracts and sovereign immunity would drown in the sea created by the covenant of good faith and fair dealing. And, within the context of the construction industry, complete chaos would reign if either owners or contractors could use the covenant of good faith and fair dealing to unilaterally rewrite the express terms of the contract between the parties. Regardless of the context within which it arises, the covenant of good faith and fair dealing should be rejected as a means to override the express terms of a written contract.

12/ Construing Florida law, the Eleventh Circuit held that a contractor "was not entitled to rely on general notions of good faith and mutual fair dealing" to override the express contractual procedure to obtain extensions to the construction contract. Marriott Corp. v. Dasta Const. Co., 26 F.3d 1057, 1069 (11th Cir. 1994)

CONCLUSION

The County, as a political subdivision of the State of Florida, enjoys a right not to be sued for matters protected by sovereign immunity. The undisputed facts **before** this Court establish that the Contractor's claims for extra work are barred by the doctrine of sovereign immunity, Alternatively, the Contractor's use of the covenant of good faith and fair dealing cannot override express contract terms. This Court should, therefore, partially quash the decision of the Fifth District as to the contract claims for extra work, with instructions to enter summary judgment in favor of the County on the Contractor's additional Compensation claims for disputed extra work.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DANA G. TOOLE, Esq., 608 W. Horatio Street, Suite B, Tampa, FL 33606, and to ROBERT A. HINGSTON, Esq., Penthouse Suite, 901 Ponce de Leon Blvd., Miami (Coral Gables), FL 33134-3009, on January 6, 1997.

Hala Sandridge