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IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

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

Pctitioncr,

v.

CASE NO.: 88,842

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

Respondents.

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY STATEMENT OF THE CASE AND FACTS

1. The Contractor claims that: the County "does not dispute the fact that work was performed and accepted, without payment in return." (Answer Brief, p.1). This statement is absolutely inaccurate. Given the County's counterclaim and offset to the Contractor's contract-balance claim, the Contractor was paid for all work that had been authorized under the express written agreement and its properly executed amendments and change orders. As to the disputed extra claims in the Contractor's Third Amended Complaint, which are for so called extra work **outside** the contract and the properly executed amendments and change orders, the original contract sum included all this work. (Initial Brief, p.10)

2. Throughout its answer brief, the Contractor falsely accuses *the* County of authorizing the work that is the subject of this lawsuit, **without the benefit of change order,** and then refusing to pay for it. The Contractor's foundation for this argument lies in Appendix 1 & 2 of its answer brief, which contains the County Commissioner's authorization for "extra work." To the extent the Contractor implies that the County authorized this work and did not pay for it because there were no change orders, the Contractor is plainly wrong. The County **issued change orders** [1/] for the authorized work that the Contractor refers to in its Appendix 1 and 2. To the extent the Contractor complains that the County refused to pay for alleged extra work which was never authorized and for which there is no change order, the Contractor

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[1/] See Supplemental Appendix filed herewith

is absolutely correct.

REPLY ARGUMENT

I. SOVEREIGN IMMUNITY BARS THE CONTRACTOR'S ADDITIONAL COMPENSATION CLAIM FOR DISPTJTED EXTRA WORK BECAUSE THE IMPLIED OBLIGATION OF GOOD FAITH AND FAIR DEALING IS LIMITED TO THE EXPRESS TERMS OF THE CONTRACT INTO WHICH TT IS IMPLIED, AND CANNOT BE USED TO CREATE NEW AND SEPARATE CONTRACTUAL OBLIGATIONS.[2/]

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

In Pan-American Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984), this Court ruled sovereign immunity was riot waived for actions based upon implied contracts. Pan Am is meaningful to this case because Counts II through XXVIII and portions of XXXII seek recovery €or breaches of alleged separate implied contracts. Under the Pan Am rational, these separate implied contract counts should all be barred.

As its first issue in this appeal, the County questioned whet-her the Contractor had presented to the lower courts any valid reason to alter the Pan Am rule. The County noted that there has been no change in either the statutory language or public policy underlying this Court's decision in Pan Am that would provide any motivation to recede from Pan Am. The Contractor has failed to

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2/ Pursuant to F.R.App.P. 9.210 (c), the answer brief is to be prepared in the same manner as the initial brief. The purpose of this rule is to ensure that the issues are joined. Dania Jai-Alai Palace Inc. v. Sykes, 450 So. 2d 1114 (Fla 1984). The Contractor nas violated this rule, thereby rendering it difficult, if not impossible, to follow the Contractor's response to the County's points on appeal. The County continues to follow its issues on appeal

dispute the County on this point.[3/] The Contractor thus implicitly concedes that the Pan Am rule -- that implied contract claims against the sovereign are barred -- is still viable and should not be changed. As such, Counts II through XXVIII and portions of XXXII, each premised upon a separate implied contract, are barred under the doctrine of sovereign immunity and Pan Am.

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

The Contractor spends considerable time complaining that the County has changed its position from that taken in the lower courts. This is not true. The County has merely offered a consistent approach in an area otherwise marked by chaos.

The County believes that the results of both Champagne-Webber, Inc. v. City of Ft. Lauderdale, 519 So. 2d 696 (Fla. 4th DCA 1988) and Southern Roadbuilders are consistent. Conversely, the rule of law enunciated by both courts to reach the result is inconsistent. Admittedly, if the Champagne-Webber rule is not limited to the facts of that case, there is a true conflict between the two decisions.

[3/] The Contractor does argue that Pan Am does not purport to change the law that allows covenants to be implied under certain conditions to both private and public contracts. The County disagrees with the Contractor's reference to public contracts. Pan Am admittedly does not affect contract law surrounding private contracts. But Pan Am certainly affects the law as to public contracts. Until Pan Am, a party could not sue the sovereign for breach of contract because of the doctrine of sovereign immunity and §768.28. Pan Am held that, if the claim against the sovereign were based upon an express written contract, sovereign immunity was waived. Pan Am never directly decided whether implied covenants of a written contract would be enforceable against the sovereign. Presumably, this is why the parties are now before this Court.

Although the Contractor criticizes the County's analysis of Champagne-Webber, Southern Roadbuilders, Inc. v. Lee County, 495 So. 2d 189 (Fla. 2d DCA 1986), Interamerican Engineers & Constructors Corp. v. Palm Beach County Housing Authority, 629 So. 2d 879 (Fla. 4th DCA 1993) and Phillips & Jordan, Inc v. Florida Department of Education, 602 So. 2d 1310 (Fla. 1st DCA 1992) the Contractor notably fails to provide any contrary analysis. The Contractor rests its laurels on its belief[4/] that it has three district courts of appeal on its side (Champagne-Webber, Interamerican and Phillips & Jordan) and that the County only has one (Southern Roadbuilders) and that, therefore, the Contractor wins by sheer numbers. The Contractor presumably overlooks that these three intermediate appellate decisions are not binding on this Court. More importantly, the Contractor conveniently refuses to explain why the rationale of Champagne-Webber is right and that of Southern Roadbuilders is wrong.

Conversely, in its initial brief, the County analyzed the public policy behind the Pan Am rule, the reason to permit a limited exception to Pan Am under the Champagne-Webber facts, and why public policy demands that Interamerican be rejected by this Court. The sum of this explanation is that there are valid public policy reasons to treat the sovereign differently than an ordinary party to a contract. These policies range from the need for fiscal

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4/ In actuality, the Contractor's belief is erroneous. As explained, infra, three of the district courts of appeal's decisions are consistent with the County's proposed rule of law. Interamerican is the only decision which fails to comport with the County's proposed rule of law.

certainty to protecting the treasury from unscrupulous contractors arid unprincipled government officials

Understandably, the Contractor ignores the fact that it is dealing with the sovereign, as well as important public policy considerations. Instead, the Contractor focuses its attention on expounding the virtues of implied covenants. The County is riot before this Court to argue that this Court should abolish the concept *of* implied covenants recognized in numerous cases. See e.g. Broomer v. Florida Power & Light Co., 45 So. 2d 658 (Fla. 1950); Sharp v. Williams, 141 Fla. 1, 192 So. 476 (1939); McGill v. Cockrell, 88 Fla. 54, 101 So. 199 (1924). Rather, the County believes there are unique considerations, all of which this Court recognized in Pan Am, that require a different treatment of implied covenants when addressing the sovereign.

The Contractor also argues that courts have long held that certain warranties will be implied into **construction** contracts against both private entities and the sovereign. (Answer Brief, p.10-11) The County does not dispute this authority. Each of the Florida cases addresses facts where the originally agreed-upon work was made either more difficult or costly through some act of the owner.[5/] Indeed, this authority is consistent with the rule of law

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5/ See, e.g., Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So, 2d 878 (Fla. 4th DCA 1989) (increased costs for original work resulting from improper site preparation and erroneous information); James A. Cummings, Inc. v. Young, 589 So. 2d 950 (Fla. 3d DCA 1991) (increased costs for original work of filling and compacting soakage pits which proved to be deeper than indicated by plans); Davis v. Department: of HRS, 461 So. 2d 210 (Fla. 1st DCA 1984) (increased costs for original work directly related to misinformation); City of Miami v. Nat Harris &

proposed by the County.

Conversely, the Contractor has failed to cite one case from this Court that allows a contractor to sue a sovereign for new work under an implied term. [6/]

The Contractor seeks to skirt this unfavorable law by intentionally misleading this Court as to the facts in this case. More specifically, the Contractor strains to convince this Court that the County's actions were somehow wrongful:

> [T]he record shows that the County's Board of Commissioners acknowledged receipt of numerous of these enhancements, and authorized payrnents for these claims without benefit of change orders.
>
> ..
>
> This trial must include an analysis of MEI's claims of bad faith and unfair dealing. At that time, the fact that MEI's work was requested and accepted by the County will be heard - and the jury will also hear that payment

Associates, Inc., 313 So. 2d 99 (Fla. 3d DCA 1975) (increased costs for original work associated with failure to provide required engineering and survey data called for in the contract); Southern Gulf Utilities, Inc. v. Boqa Ciega Sanitary District, 238 So. 2d 458 (Fla. 2d DCA 1970) (increased costs for original work associated with failure *to* speedily obtain right-of-way); Jacksonville Port Authority v. Parkhill Goodloe Corp., 362 So. 2d 1009 (Fla. 1st DCA 1978) (increased costs for original. work associated with furnishing misleading information); Town of Lcnqboat Key v. Carl E. Widdell & Son, 362 So. 2d 719 (Fla. 2d DCA 1978) (increased costs for original work resulting from inaccurate report included in bid information); Miami-Dade Water and Sewer Authority v. Inman, Inc., 402 So. 2d 1277 (Fla. 3d DCA 1981) (increased costs for original work resulting from false or misleading information); Hendry Corp. v. Metropolitan Dade County, 648 So. 2d 140 (Fla. 3d DCA 1994) (increased costs for original work associated with inaccurate misrepresentation); Diana Stores Corp. v. M & M Electric Co., Inc., 108 So. 2d 487 (Fla. 3d. DCA 1959) (increased costs for original work resulting from inaccurate information contained in plan specifications).

[6/] Interamerican is the **only** authority cited by the Contractor that permits recovery under such a theory.

> was authorized for this work, but never given. That being the case, the County should have to go far to explain its actions, and it should not be permitted to reap the benefits of a completed contract, without being required to make payment when due. (Answer Brief, p.1-2, 15-16).

These statetnents are false and misleading. First, the Contractor implies that all the extras in Counts II through XXVIII and portions of XXXII were "authorized" by the County, but that the County then wrongfully refused to issue a change order. The undisputed evidence shows otherwise. The County Commission agendas included in the Contractor's Appendix 1 & 2 only authorize 5 items out of the approximately 26 extra claims raised by the Contractor.

More telling, the Contractor's statements are also false because it claims that the County refused to sign change orders for these 5 items. To the contrary, the **County did sign** change **orders** for **these 5** items. (S.A.)

Finally, the Contractor implies that these agenda items are claims for "extra" work. They are not. The evidence shows that. even the Contractor understood these "extra" items to be amendments to the contract. In response to the trial court's orders to file copies of what the parties believed constituted the contract documents, the Contractor filed the agenda reports contained in its appendix **as part of** the **contract.** Because these items are part *of* the contract, they are subject to the County's setoff defense. See supra, p.l. No payment is owed the Contractor for these contract items.

Not only does the Contractor wish to avoid the law by misstating the facts, the Contractor refuses to recognize the logic

for the rule proposed by the County. If contractors could unilaterally impose upon sovereigns change orders that were never authorized, or obtain increased payments for work they were already obligated to perform, the very foundation for sovereign immunity would be undermined. There could be no fiscal certainty. Government contracts would be subject to abuse by crooked contractors or unscrupulous government officials. The treasury would be subject to raid by contractors who envisioned an unlimited deep pocket. These are valid concerns. And, these public policy concerns explain why this Court concluded the legislature only waived sovereign immunity for express written contracts. What the Florida Legislature intended must be the cornerstone of any decision in this case. Nothing has transpired since Pan Am to call into question the Florida legislature's intent.

Simply put, the rule that the County advocates is this: if facts such as those in Champagne-Webber are present, i.e., where the sovereign's alleged wrongful conduct makes the originally agreed-upon work more difficult or costly, then there is a valid reason to imply a term for payment into the express written contract with the sovereign.[7/] But where the claim is simply for new work which has never been agreed to by the parties in writing,

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7/ It should be noted that the Contractor has asserted claims premised upon the County's conduct that purportedly made the originally agreed-upon work more difficult or costly, such as its delay claim. (A. 2:31) If the Contractor was able to prove this delay claim at trial and should this Court reject the second point on appeal raised herein, then there would be a valid reason to imply a term for payment into the express written contract with the County.

the contractor is unentitled to extra compensation under an implied "covenant" theory. [8/] This rule of law would adequately protect the interest of the sovereign in ensuring fiscal certainty, while simultaneously preventing improper raids on the public treasury. At. the same time, this rule of law would assist contractors by providing remedies for most wrongful acts of the sovereign. Equally important, a clear line of demarcation for the construction industry would be created by unequivocally requiring written contracts, such as change orders, for new work.

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

If this Court accepts the logic and public policy behind the rule of law advocated by the County, then it is clear that Interamerican must be overruled. Interamerican allows a contractor, such as here, to argue that a sovereign should be liable for new work that is unsupported by an express written ayreement. To the extent that such a result could be upheld under the authority of Interamerican, it is abhorrent to the rationale of Pan Am and public; policy.

The Contractor's defense of Interamerican contravenes both logic and the express language of the sovereign immunity statute. If this Court were to accept the Contractor's argument, then in effect, this Court would be doing something which the Legislature

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[8/] Even if this Court were to allow a claim for new work for which there was no written contract, the Contractor's disputed extra claims would still be barred because they violate the express terms of the agrccmcnt requiring all change orders to be in writing, as explained in Point II, infra, and Phillips & Jordan, p.1313

never approved. Pan Am was premised upon the belief that, since the Legislature empowered the state to contract with its citizens, it necessarily followed that the Legislature intended for these citizens to have contract remedies. But, this Court noted that these remedies would be limited to remedies based upon express written contracts.

One of the probable reasons behind this limitation is that the, sovereign may riot and should not "do deals" on a handshake basis. Because the taxpayers representative may not conduct its business through oral agreements, there cannot be a remedy for what the sovereign may not do. If this Court now allows private citizens to make claims for damages not founded upon express written obligations, it would completely undermine sovereign immunity principles, public bidding statutes and §768.28.

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

In its initial brief, the County noted that the Contractor seeks to use an implied term -- the obligation of good faith and fair dealing -- to override an express term -- that all change orders must be in writing. The Contractor circumvents this appellate issue by simply ignoring it. Instead, the Contractor argues that express terms of a contract. may be waived. The County agrees: express terms of a contract may be waived. But that issue has nothing to do with the issue of whether one party can simply use the obligation of good faith and fair dealing to override express terms of a written contract, as the Contractor seeks to do

with its Third Amended Complaint.

This point is demonstrated by the undisputed facts in this case. At no time did the County engage in any conduct that could constitute a waiver of the contractual written change order requirement.[2/] Even the Contractor does not dispute that the Contractor, when it questioned whether the County would be willing to increase the contract sum for the stadium project as submitted, was told by the County, before the work was done, 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; 13:2) 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) Notably, the Contractor's brief does not dispute that the County always insisted that it would not pay the Contractor additional sums for this disputed extra work. In sum, there can be no waiver of the contract terms because the County's conduct cannot remotely be construed as constituting a waiver. To the extent the Contractor is arguing pure "waiver," the undisputed

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2/ The Contractor cites several cases that allegedly stand for the proposition that a contractor may orally modify a contract even though the contract purports to prohibit such modifications. None of the cases cited by the Contractor, however, address the obligation of good faith and fair dealing. King Partitions and Drywall, Inc. v. Donner Enterprises, Inc., 464 So. 2d 715 (Fla. 4th DCA 1985); Pan-American Engineering Co. v. Poncho's Construction Co., 387 So. 2d 1052 (Fla. 5th DCA 1980); Broderick v. Overhead Door Co. of Ft. Lauderdale, Inc., 117 So. 2d 240 (Fla. 2d DCA 1959); E.H. Ladum v. United States, 5 CL.Ct. 219 (1984).

fact:; refute this defense. Conversely, if the Contractor believes it can overcome its failed waiver defense through use of the covenant of good faith and fair dealing, it is wrong.

The Contractor fails to recognize that its waiver defense is legally distinguishable from the obligation of good faith and fair dealing argument. In the former, it is the **conduct** of the parties that can be used to imply a term and to override an express term. In the latter situation, it is not the conduct of the parties, but rather the obligation itself, that is used to impose a new term on the parties. Eased upon this distinction, there is a logical reason why the obligation of good faith and fair dealing should not be used to override express contract terms. If one party were able to contradict. express terms of a written contract through the obligation of good faith and fair dealing, then contract terrns would rarely have meaning. Every time one party concluded the express terms of a contract were not to his liking, he would merely assert the obligation of good faith and fair dealing to override these undesirable express terms.

For this reason, courts have enunciated a rule of law that the obligation of good faith and fair dealing cannot be used to contradict express terms of a written contract. Riedel v. NCNB National Bank of Florida, 591 So. 2d 1038 (Fla. 1st DCA 1991); Flagship National Barik v. Gray Distribution Systems, Inc., 485 So. 2d 1336 (Fla. 3d DCA 1986). The Contractor', recognizing that it could not completely ignore these decisions, claims that these cases construe the UCC, and therefore are inapplicable to this non-

UCC matter. The Contractor fails to provide any analysis as to why this rule of law should only apply to UCC matters

During the pendency of this appeal, the Fourth District applied this rule of law to a non-UCC matter. In City of Riveria Beach v. John's Towing, 22 Fla. L. Weekly D721 (Fla. 4th DCA, March 19, 1997), the Fourth District concluded that there is no difference between UCC and non-UCC cases with respect to applying the obligation *of* good faith and fair dealing to contradict express terms of a written contract. In concluding the rule applied to both UCC and non-UCC matters, the Court stated:

> While the principle is a good one, there is an exception to it. The implied obligation of good faith cannot be used to vary the terms of an express contract. Indian Harbor Citrus, Inc. v. Poppell, 658 So. 2d 605 (Fla. 4th DCA), rev. denied, 666 So. 2d 144 (Fla. 1995). Although Indian Harbor was a case decided under the Uniform Commercial Code's implied obligation of good faith, we find no difference when the implied term attempts to vary the express terms of a contract not under the UCC. See Pine Lumber Co. v. Crystal River Lumber Co., 65 Fla. 254, 61 So. 576 (1913). Here, the contract explicitly absolved the city of responsibility and liability "in any manner whatsoever for either the collection or payment of any charges for services rendered, including towing and storage," unless the services were rendered in regard to city-owned vehicles. The contract provision is unambiguous. The city is not liable for storage charges on vehicles it does not own, no matter how those storage charges were caused to be incurred. (emphasis deleted)

Thus, the Contractor's sole defense to this issue has been expressly rejected by one court who recognized that there was no logical reason to differentiate between UCC and non-UCC cases. This Court should similarly reject this illogical distinction

The Contractor's argument also flies in the face of the parole evidence rule. The rule prohibits one party from altering or

contradicting the express language of a written contract through the use of parole evidence. Sears v. James Talcott, 174 So. 2d 776 (Fla. 2d. DCA 1965). The Contractor should not be allowed to accomplish through the obligation of good faith and fair dealing what it. could not do through the parole evidence rule. Indeed, if the Contractor were to evade the express requirement that all change orders be in writing, the parole evidence rule would be nullified. The Contractor's attempt to circumvent the express contract term requiring written change orders through the use of the obligation of good faith and fair dealing should be rejected for the same policy reasons underlying the parole evidence rule.

Even if this Court were to conclude that the obligation of good faith and fair dealing could be used to contradict the express contract term requiring written change orders, the Contractor is nonetheless unentitled to recover on its disputed extra claims because, as argued in Point I, supra, these claims are barred by the sovereign immunity doctrine. In other words, neither the Contractor's waiver defense nor the obligation of good faith and fair dealing may be used to overcome the failure of the Contractor to comply with Pan Am. If this Court were to conclude that the Contractor could use the covenant of good faith and fair dealing to circumvent the written change order requirement, sovereign immunity's requirement for a written contract would still destroy the Contractor's claim.

CONCLUSION

This appeal simply involves the issue of what the Florida

Legislature intended when it empowered the sovereign to contract with its citizens. This Court once concluded that the Legislature must have intended to provide breach of contract remedies if the breach were founded upon an express written contract. It does not follow, however, that the Legislature intended contractors to be able to sue the sovereign for new work that was not supported by an express written agreement. Although there is room in the sovereign immunity doctrine to imply covenants where the sovereign's alleged wrongful conduct makes the originally agreed-upon work more difficult or costly, public policy demands that contractors should riot be allowed to unilaterally rewrite the terms of an agreed-to contract with the sovereign for new work which has never been agreed to by the parties in writing. The County therefore requests this Court to fashion a rule that respects the intent of the Legislature, protects the interests of the public treasury, but permits contractors to recover where the sovereign's alleged wrongful conduct makes the originally agreed-upon work more difficult or costly.

Respectfully submitted,

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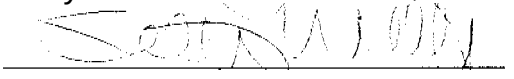
BY: 

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 May 12, 1997.