

IN THE SUPREME COURT
STATE OF FLORIDA

AMERICAN HOME ASSURANCE COMPANY,

Petitioner,

v.

CASE NO. SC02-1257

PLAZA MATERIALS CORPORATION,

Respondent.

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AMICUS CURIAE BRIEF OF
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION
(Supporting neither party and filed by leave of Court)

ON PETITION FOR REVIEW OF A DECISION OF
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CASE NO. 2D00-4404

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FLORIDA STATUTES

§ 255.05, Fla. Stat. 1, 2, 4, 6, 8

§ 337.11(1), Fla. Stat. 3

§ 337.18, Fla. Stat. 1, 2, 4, 6, 7, 8

§ 337.18(1)(b), Fla. Stat. 6

§ 337.18(1)(c), Fla. Stat. 6

§ 337.18(1)(d), Fla. Stat. 6

§ 337.18(1)(f), Fla. Stat. 6, 8

OTHER AUTHORITIES

Chapter 2003-286, Section 44, at 2987-2990,
Laws of Florida 5

SUMMARY OF THE ARGUMENT

For the most part, state agencies, in general, are authorized to construct public works under Chapter 255, Florida Statutes, in general, and Section 255.05, Florida Statutes, specifically. Only the Department of Transportation (Department) has a separate construction statute, Chapter 337, Florida Statutes, specific to Department transportation activities. This chapter sets out many of the Department's duties, obligations, and authorities, including, but not limited to, bonding requirements and criteria for Department contracts, which are found in Section 337.18, Florida Statutes.

The surety bonds required for Department construction projects are not Section 255.05, Florida Statutes, bonds. The bonds required for Department projects are issued pursuant to the bonding requirements contained in Section 337.18, Florida Statutes. The Department uses a statutorily authorized bond that is not a Section 255.05 bond. The bond used by the Department is developed pursuant to Section 337.18, Florida Statutes, and well-established bond law in this state.

ARGUMENT

SECTION 337.18, FLORIDA STATUTES, AND NOT SECTION 255.05(2), FLORIDA STATUTES, ESTABLISHES THE BOND REQUIREMENTS FOR CONSTRUCTION AND MAINTENANCE CONTRACTS LET BY THE DEPARTMENT.

Chapter 255, Florida Statutes, applies generally to "PUBLIC PROPERTY AND PUBLICLY OWNED BUILDINGS." Therein, Section 255.05, Florida Statutes, applies to the "Bond of contractor constructing public buildings; form; action by materialmen." Section 255.05(1)(a), Florida Statutes, provides, in pertinent part:

Any person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall be required, before commencing the work or before recommencing the work after a default or abandonment, to execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer

While the term "public work" is not defined in Chapter 255, Florida Statutes, it is arguable that the term encompasses road and bridge construction and maintenance, as Florida courts have generally said that public works may include realty and fixed

works such as docks, railways, roads, etc. Demeter Land Co. v. Florida Public Serv. Comm'n, 128 So. 402, 406 (Fla. 1930). However, Florida courts have also recognized that the determination of what are public works is often a question of statutory construction. See Brown v. Saint City Church of God of Apostolic Faith, Inc., 717 So. 2d 557, 560 (Fla. 3d DCA 1998); Housing by Vogue, Inc. v. State, Dep't of Rev., 403 So. 2d 478, 479-480 (Fla. 1st DCA 1981).

All state agencies, with the exception of the Department, derive authority to construct public works from Chapter 255, Florida Statutes. Only the Department has a separate construction statute specific to Department transportation activities. Chapter 337, Florida Statutes, not Chapter 255, Florida Statutes, grants the Department the specific

authority to enter into contracts for the construction and maintenance of all roads designated as part of the State Highway System or the State Park Road System or of any roads placed under its supervision by law. The department shall also have authority to enter into contracts for the construction and maintenance of rest areas, weigh stations, and other structures, including roads, parking areas, supporting facilities and associated buildings used in connection with such facilities. . . .

§ 337.11(1), Fla. Stat. The project which is the subject of this appeal, and the projects in the related appeals, were Department

transportation projects constructed pursuant to Department contracts authorized by Section 337.11, Florida Statutes.

Chapter 337, Florida Statutes, applies only to the Department. This chapter sets out many of the Department's duties, obligations, and authorities, including, but not limited to, bonding requirements and criteria for Department contracts. The 2002 version of Section 337.18, Florida Statutes, titled its provisions as "Surety bonds; requirement with respect to contract award; defaults; damage assessments." The 2003 version describes the section's amended provisions as "Surety bonds for construction or maintenance contracts; requirements with respect to contract award; bond requirements; defaults; damage assessments." § 337.18, Fla. Stat. (2003).

It has been, and continues to be, the Department's position that the surety bonds required for road and bridge construction and maintenance projects are not Section 255.05, Florida Statutes, bonds. Rather, they are bonds issued pursuant to the bonding requirements contained in Section 337.18, Florida Statutes, of the Florida Transportation Code. The fact that the Department may utilize some of the provisions of Section 255.05, Florida Statutes, in its bond forms, does not change the fact that the bonds are developed under and controlled by the provisions of Section 337.18, Florida Statutes, nor convert them

to Section 255.05, Florida Statutes bonds.

Chapter 255, Florida Statutes, in general, and Section 255.05, Florida Statutes, specifically, are general statutory provisions as they contain contracting, construction, bonding, and other provisions relating to all state agencies in general constructing public works. On the other hand, Chapter 337, Florida Statutes, which similarly authorizes the construction of so called "public works," only applies to Department transportation projects. "It is a well-settled rule of statutory construction that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in more general terms" Floyd v. Bentley, 496 So. 2d 862, 864 (Fla. 2d DCA 1986)(citing Adams v. Culver, 111 So. 2d 665 (Fla. 1959); Stewart v. DeLand-Lake Helen Special Road & Bridge Dist., 71 Fla. 158, 71 So. 42 (1916); State ex rel. Loftin v. McMillan, 55 Fla. 246, 45 So. 882 (1908)). Thus, if there were any doubt which statute applies to Department transportation contracts and bond requirements, or which provisions control if the provisions of Section 255.05, Florida Statutes, and Section 337.18, Florida Statutes, conflict, this principle of statutory construction resolves the issue in favor of the provisions of Section 337.18, Florida Statutes, specifically, and Chapter 337, Florida

Statutes, generally.

The Department's interpretation and understanding of the operation of Section 255.05, Florida Statutes, vis-a-vis Section 337.18, Florida Statutes, was confirmed in its entirety by the Legislature during the 2003 regular session. The transportation bill passed by the Legislature in Chapter 2003-286, Section 44, at 2987-2990, Laws of Florida, adopted a number of amendments to Section 337.18, Florida Statutes. Subsection(1)(f) was added to the statute and states:

The bonds provided for in this section are statutory bonds. The provisions of s. 255.05 are not applicable to bonds issued pursuant to this section.

§ 337.18(1)(f), Fla. Stat. (2003).

In addition to the above-quoted provision, Section 44 added a number of other subsections which address concerns voiced by this Court at oral argument. The 2003 amendments to Section 337.18, Florida Statutes, include a requirement that the contractor record the bond in the public records of the county where the improvement is located (337.18(1)(b)); notice requirements for claimants who are not in privity with the contractor (337.18(1)(c)); and, a requirement that an action against the bond by a claimant, whether in privity with the contractor or not, must be instituted within 365 days after the final acceptance of the contract work by the Department

(337.18(1)(d)).

Comments of counsel at oral argument that, despite continued efforts, the Department simply refuses to change its form cannot be supported in the record before this Court, because they are simply not true. As previously stated, it has been, and continues to be, the Department's position that the surety bonds required for Department construction projects are not Section 255.05, Florida Statutes, bonds. Rather, they are bonds issued pursuant to the bonding requirements contained in Section 337.18, Florida Statutes. The Department's adherence to the use of a particular bond form, or its failure to include certain language, is not the product of a refusal to take heed of an express statutory mandate or direction from the courts. The simple fact of the matter is that the Department uses a statutorily authorized bond that is not a Section 255.05 bond. Instead, the bond used by the Department is developed pursuant to Section 337.18, Florida Statutes, and well-established bond law in this state.

It would appear from the opinion in Houdaille, that the Department had an opportunity to explain, but apparently did so inadequately or unconvincingly, the Department's position on and understanding of the inapplicability of Section 255.05, Florida Statutes, to Department contracts and bonds. State, Dep't of

Transp. v. Houdaille Indus., 372 So. 2d 1177, 1178 (Fla. 1st DCA 1979). In most cases, as in the instant case, in which the issue is the legal consequence of particular bond language and the bond's relationship to Section 255.05, Florida Statutes, and the common law, the Department is not a party. See Martin Paving Co. v. United Pacific Ins. Co., 646 So. 2d 268 (Fla. 5th DCA 1994). The parties to such disputes are a surety and a claimant under the surety's bond; the Department is not involved and may not even know about the dispute or the ensuing lawsuit.

Perhaps naively, the Department believed that because it had complied with the law as set out in the Transportation Code, and because at least one of the attorneys in the instant case was aware of the Department's reliance on and adherence to Section 337.18, Florida Statutes, the issue before this Court would not become the propriety of the Department's actions in allegedly not complying with Section 255.05, Florida Statutes. Therefore, the Department reasoned, the misconception regarding the Department's bonding authority would not be perpetuated.

The Department initially stood silent on the issue of whether its bond form is a statutory bond or a common law bond. Because the misconception has been perpetuated before this Court in the subject appeal as to the law at the time the bond was

executed, it is the Department's position that the bond, and other bonds previously required by the Department, are statutory bonds in the sense that they are authorized by statute. Whether it was as clear then, as it is now, the Department believes that because its statutory authority to require specific bonds is derived from Chapter 337, Florida Statutes, the subject bonds are not controlled by Section 255.05, Florida Statutes. The Department's position is bolstered by the recent amendments to Chapter 337, Florida Statutes, and, specifically, the addition of Section 337.18(1)(f), Florida Statutes, declaring bonds provided for under that section are statutory bonds and stating that the provisions of Section 255.05, Florida Statutes, do not apply.

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 United States Mail on this ____ day of December, 2003, to **ROBERT E. MORRIS, ESQUIRE**, Robert E. Morris, P.A., 5020 West Cypress Street, Suite 200, Tampa, Florida 33607-3804, and **HALA A. SANDRIDGE, ESQUIRE**, Fowler, White, Boggs & Banker, 501 East Kennedy Boulevard, Suite 1700, Tampa, Florida 33601, counsel for AMERICAN HOME ASSURANCE COMPANY; **JAMIE BILLOTTE MOSES, ESQUIRE**, Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A., Post Office Box 712, Orlando, Florida 32802, counsel for PLAZA MATERIALS CORPORATION; **DANA G. TOOLE, ESQUIRE**, Dunlap & Toole, P.A., 2057 Delta Way, Tallahassee, Florida 32302-4227, counsel for Florida Transportation Builders Association; and **BRETT D. DIVERS, ESQUIRE**, Mills Paskert Divers, P.A., 100 North Tampa Street, Suite 2010, Tampa, Florida 33602, counsel for SURETY ASSOCIATION OF AMERICA.

MARIANNE A. TRUSSELL

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing has been prepared using
12 point Courier New.

MARIANNE A. TRUSSELL