

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMERICAN HOME ASSURANCE :
COMPANY, :
 :
 Petitioner, :
 :
 v. : CASE NO. SC02-1257
 :
 PLAZA MATERIALS CORPORATION, :
 :
 Respondent. :
 :
----- :

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA

PETITIONER'S BRIEF IN RESPONSE TO
AMICUS CURIAE BRIEF OF STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION

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RESPONSE

DOT now apparently takes the position that bonds issued for its road projects have never been subject to section 255.05, Florida Statutes (1995). Instead, DOT posits that bonds for such projects were governed solely by section 337.18, Florida Statutes 1995).

Section 255.05 itself refutes DOT's position. The statute applies to any "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." § 255.05(1)(a), Fla. Stat. (1995). DOT admits that roads are "public works" (Amicus Curiae Br. of DOT, at 2 (citing Demeter Land Co. v. Florida Public Serv. Comm'n, 128 So. 402 (Fla. 1930))).

Despite this admission, DOT argues that section 337.18 -- which requires bonds for road and bridge projects -- should trump section 255.05 because section 337.18 is more specific. That would be true, however, only if the statutes were "hopelessly inconsistent." See Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1068 (Fla. 1995); see also Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959) (holding that specific statute controls over general statute "to the extent only of the repugnancy, if any").

DOT ignores the fact that section 255.05 and section 337.18 are not "hopelessly inconsistent." Section 255.05 establishes requirements -- including the time and notice requirements at issue in the present case -- for **all** bonds for public works projects. The operative version of section 337.18, on the other hand, requires bonds for road and bridge projects, but does not provide any requirements for the form of such bonds. More generally, section 337.18 governs the relationship between DOT and its contractors. Section 255.05 adds protections for subcontractors and materialmen.

Thus, section 255.05 and section 337.18 both apply to road and bridge projects without creating any conflict, with section 337.18 imposing the bond requirement and section 255.05 laying out the requirements for the form of the bond. Where possible, statutes should be harmonized so as to give full effect to their terms. See, e.g., Pichowski v. Florida Gas Transmission Co., 857 So. 2d 219 (Fla. 2d DCA 2003) (citing Howarth v. City of DeLand, 158 So. 294 (1934), and Moonlit Waters Apts., Inc. v. Cauley, 666 So.2d 898 (Fla.1996)).

Such a reading of section 255.05 and section 337.18 is not only possible; it is eminently reasonable. See Florida Crushed Stone Co. v. American Home Assurance Co., Case No. CI98-6252

(Fla. 9th Cir. Ct. 2000).¹ Indeed, Florida courts have had no difficulty applying both section 255.05 and section 337.18 to bonds for road and bridge projects. See American Cas. Co. v. Coastal Caisson Drill Co., 542 So. 2d 957 (Fla. 1989); Troup Bros., Inc. v. State, 135 So. 2d 755 (Fla. 2d DCA 1961).

Evidently, DOT also believes that both statutes can be consistently applied. Its bond forms at issue in the present case reference both statutes (R.1:74-76). Moreover, Mary Dorman, a DOT attorney involved in drafting the bond form at issue, testified under oath that DOT intended the form to comply with section 255.05. See Deposition of Mary J. Dorman, Esq., Florida Dep't of Transp. v. American Home Assurance Co., Case No. GCG-01-486 (Fla. 10th Cir. Ct.), at 25-28, 44.²

Counsel for American Home was aware of Ms. Dorman's testimony that DOT intended its form to conform with section 255.05. Although the record does not reflect whether counsel for Plaza Materials was also aware of the testimony, counsel for the Florida Transportation Builders Association -- which has appeared as amicus for Plaza Materials in the present case --

¹A copy of the circuit court's order in Florida Crushed Stone, which specifically rules that section 255.05 and section 337.18 must be read together, is included as Appendix A to this response.

²A copy of Ms. Dorman's deposition is included as Appendix B to this response.

was present at Ms. Dorman's deposition and was therefore fully aware of her testimony that DOT intended its bond form to comply with section 255.05.

DOT contends that a new 2003 law "confirms" that section 255.05 does not apply to bonds issued for its road and bridge projects. It is true that the new law provides that "[t]he provisions of s. 255.05 are not applicable to bonds issued pursuant to this section," ch. 2003-286, § 44, Laws of Fla. (creating § 337.18(1)(f), Fla. Stat. (2003)). However, contrary to DOT's argument, the 2003 law is not a confirmation of existing law.

The present case confirms that the change to section 337.18 is not a confirmation of existing law. Both the Second DCA and the Fifth DCA applied section 255.05 in the conflict cases leading to the present proceedings in this Court. See American Home Assurance Co. v. Plaza Materials Corp., 826 So.2d 358 (Fla. 2d DCA 2002); Florida Crushed Stone Co. v. American Home Assurance Co., 815 So.2d 715 (Fla. 5th DCA 2002). In doing so, the courts were following a body of case law that reflects that understanding that section 255.05 is applicable to bonds for DOT's road and bridge projects. See American Cas. Co. v. Coastal Caisson Drill Co., 542 So. 2d 957 (Fla. 1989); American Home Assurance Co. v. APAC-Fla., Inc., 834 So.2d 369 (Fla. 2d DCA 2003); Martin Paving Co. v. United Pacific Ins. Co., 646

So.2d 268 (Fla. 5th DCA 1994); Troup Bros., Inc. v. State, 135 So. 2d 755 (Fla. 2d DCA 1961).³

Again, DOT itself has, until now, had no problem with the proposition that section 255.05 applies to bonds for its road and bridge construction projects. In State Dep't of Transp. v. Houdaille, 372 So. 2d 1177 (Fla. 1st DCA 1979), the court applied the statute to one such bond with no complaint from DOT.

In short, the 2003 amendment to section 337.18 is not a "confirmation" of existing law, but a **change** to that law. The amendment evidences no legislative intent that the change is to be applied retroactively.

Finally, the strength of DOT's position should be measured by its timing. Consistent with prior case law (including at least one case in which DOT was a party), both the Second DCA and Fifth DCA applied section 255.05 in their respective conflict cases. The proceedings in this Court have proceeded on the same, well-founded understanding.

Counsel for American Home asked DOT to participate as amicus curiae in the appellate litigation, thereby making DOT aware that its bond form was at issue. Although DOT declined to

³Florida Crushed Stone, has been docketed in this Court as case number SC02-1227 and has been stayed pending disposition of the present case. APAC-Florida is pending in this Court on a petition for discretionary review.

appear as amicus at that time, counsel for American Home continued to keep DOT apprised of the appellate proceedings.⁴

DOT nevertheless chose to remain silent throughout the proceedings in the Second DCA. Only after the completion o of all briefs and oral argument in **this Court** did DOT inject into the proceedings an issue not raised in the trial court, not passed on by either the Second DCA or the Fifth DCA, and not briefed or argued to this Court.

⁴A copy of correspondence between counsel for American Home and DOT's Office of the General Counsel is included as Appendix C to this response.

CONCLUSION

Section 337.18, Florida Statutes (1995), is fully consistent with section 255.05, Florida Statutes (1995) Therefore, section 255.05 can and does apply to the bonds at issue in the present case. DOT's last-minute argument to the contrary should not detract from that conclusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Counsel for Appellee, **FRANCIS X. RAPPRIICH, III, Esquire**, and **JAMIE BILLOTTE MOSES, Esquire**, Post Office Box 712, Orlando, Florida 32802-0712; to Counsel for Amici Curiae Florida Transportation Builders Association and APAC-Florida, Inc., **DANA G. TOOLE, Esquire**, 2057 Delta Way, Tallahassee, FL 32302-4227; to Counsel for Amicus Curiae Surety Association of America, **BRETT DIVERS, Esquire**, 100 N. Tampa Street, Suite 2010, Tampa, Florida 33602; and to Counsel for Amicus Curiae State of Florida, Department of Transportation, **PAMELA S. LESLIE, Esquire**, and **MARIANNE A. TRUSSEL, Esquire**, Haydon Burns Building MS 58, 605 Suwannee Street, Tallahassee, Florida 32399-0458, on January _____, 2004.

Hala A. Sandridge, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2), the foregoing brief was printed in Courier New 12-point font.

Hala A. Sandridge, Esquire

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