Municipalities -- Construction Contractors -- Bond

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Subject:
Municipalities -- Construction Contractors -- Bond

Mr. Patrick G. Gilligan
Gilligan, Gooding & Franjola, P.A.
1531 Southeast 36th Avenue
Ocala, Florida 34471

Dear Mr. Gilligan:

As City Attorney for the City of Ocala and on behalf of the City Council, you have asked for my opinion on substantially the following question:

Does section 255.05(7), Florida Statutes, require that a municipality accept alternate forms of security from a contractor for public construction projects?

In sum:

Section 255.05(7), Florida Statutes, authorizes a contractor to file alternative forms of security with the city for public construction projects and provides no discretion in the municipality to refuse to accept the alternate forms of security authorized in that subsection provided these alternate forms of security are determined to be of sufficient value.

According to the information you have forwarded to this office, the City of Ocala issues numerous invitations to bid for public construction projects that require the successful bidding contractor to purchase and provide a payment and performance bond pursuant to section 255.05, Florida Statutes, prior to beginning construction. Subsection (7) of the statute states that "[i]n lieu of the bond required by this section, a contractor may file with the state, county, city, or other political authority an alternative form of security in the form of cash, a money order, a certified check, a cashier's check, an irrevocable letter of credit, or a security of a type listed in part II of chapter 625."[1]

You advise that the city would prefer not to be involved in evaluating alternate forms of security to ensure that such security satisfies statutory requirements and is of sufficient value to serve the same purpose as a bond. Further, the city would prefer that suppliers and subcontractors in payment disputes with the contractor look to the payment bond for compensation and not to the municipality holding the alternate form of security.

The city has asked for this office's assistance in determining whether it is authorized to only accept a payment and performance bond pursuant to section 255.05(1), Florida Statutes, and to make clear in its bid documents that it will not accept the alternate forms of security set forth in

subsection (7) of section 255.05, Florida Statutes.

Florida law has long recognized the rights of laborers, materialmen, and subcontractors to seek payment through statutory bonding requirements for a contractor's failure to furnish compensation.[2] The current statutory mechanisms for enforcing that policy are payment and performance bonds for public works projects under section 255.05, Florida Statutes, and payment bonds and construction liens for private property under Part I, Chapter 713, Florida Statutes, Florida's "Construction Lien Law."[3] The legislative scheme set out in section 255.05, Florida Statutes, is designed to provide protection for those providing work and materials on public projects because a mechanic's lien cannot be perfected against public property.[4]

Section 255.05(1), Florida Statutes, about which you have specifically inquired, provides, in part, that:

"A person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority or private entity, 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 and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety."

Thus, the statute requires that a contractor for the construction of a public building or public works project generally guarantee the prompt payment of persons who furnish labor, services, or materials through the use of a payment bond.

The statute relating to public contractors' bonds was patterned after the federal Miller Act[5] and was intended to establish for Florida a little Miller Act whose general aim is to equate suppliers to public projects against which materialmen's liens are not available with those suppliers to private projects enjoying the security of a lien.[6] The statute is also designed to afford protection to both the surety on the project and the public. The bond protects the public, as project "owner," from two distinct defaults by a builder: the payment portion of the bond contains the insurer's undertaking to guarantee that all subcontractors and materialmen will be paid and the performance part of the bond guarantees that the contract will be fully performed.[7] Further, Florida court's have recognized that "section 255.05 places a corresponding duty on the public agency, as well as the contractor, to see that a bond is in fact posted for the protection of the subcontractors before construction commences."[8]

As a statute designed to protect various interests, including those of subcontractors, contractors, sureties, and the public, the straightforward language of the statute sets forth a clear and simple method of bonding payment for, and performance of, public construction projects.[9] Florida's little Miller Act is remedial in nature and thus, is entitled to a liberal construction, within reason, to effect its intended purpose.[10] The statute has existed as a part of the Florida Statutes since 1915.[11]

Subsection (7) of section 255.05, Florida Statutes, authorizes contractors constructing public buildings to file alternative forms of security to satisfy the statutory requirements for a payment

and performance bond. Subsection (7) states:

"In lieu of the bond required by this section, a contractor may file with the state, county, city, or other political authority an alternative form of security in the form of cash, a money order, a certified check, a cashier's check, an irrevocable letter of credit, or a security of a type listed in part II of chapter 625. Any such alternative form of security shall be for the same purpose and be subject to the same conditions as those applicable to the bond required by this section. The determination of the value of an alternative form of security shall be made by the appropriate state, county, city, or other political subdivision."

Among the purposes of section 255.05, Florida Statutes, is the protection of subcontractors and suppliers by providing them with an alternative remedy to mechanics liens on public projects. Legislative history for section 255.05, Florida Statutes, expresses the Legislature's intent that contractors be authorized to file an alternative form of security to address the concern that:

"Contractors which currently are unable to enter into construction and repair contracts because of an inability to obtain a perfomance [sic] bond would be able to do so, provided they could file an alternative form of security."[12]

Nothing in subsection (7) would authorize a local governmental agency to limit its acceptance of alternative forms of security or foreclose that option entirely. Rather, the statute requires, by use of the word "shall,"[13] local governments to develop a system for determining the value of alternative forms of security for public projects.

In sum, it is my opinion that section 255.05(7), Florida Statutes, authorizes a contractor to file alternative forms of security with the city for public construction projects in the manner provided therein, and, as such, provides no discretion in the municipality to refuse to accept the alternate forms of security authorized in that subsection.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

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[1] Chapter 625, Fla. Stat., is entitled "Accounting, Investments, and Deposits by Insurers" and Part II relates to investments by domestic insurers and commercially domiciled insurers.

[2] *See, e.g.,* Art. XVI, s. 22, Fla. Const. 1885, which provided that "[t]he Legislature shall provide for giving to mechanics and laborers an adequate lien on the subject matter of their labor[,]" and "History," s. 255.05 and Part I, Ch. 713, Fla. Stat.

[3] *See* s. 713.001, Fla. Stat., for the short title of Part I, Ch. 713, Fla. Stat. Projects involving real property and the improvements thereon owned by the state or any county, municipality, school board, or governmental agency, commission, or political subdivision are excluded from coverage

under Part I, Ch. 713, Fla. Stat. *And see* s. 713.01(26), Fla. Stat., defining "real property" for purposes of this part to exclude governmental property.

[4] *See American Home Assurance Company v. Plaza Materials Corp.*, 908 So. 2d 360 (Fla. 2005), *Coastal Caisson Drill Co. v. American Casualty Co. of Reading, Pa.*, 523 So. 2d 791, 793 (Fla. 2d DCA 1988), *approved*, 542 So. 2d 957 (Fla. 1989); *William H. Gulsby, Inc. v. Miller Construction Inc. of Leesburg*, 351 So. 2d 396, 397 (Fla. 2d DCA 1977).

[5] *See* 40 U.S.C.A. ss. 3131 - 3134 (formerly codified as 40 U.S.C.A. ss. 270a - 270d).

[6] *Delduca v. U.S. Fidelity & Guarantee Co.*, 357 F.2d 204, (5th Cir. Fla. 1966), *rehearing denied*, 362 F.2d 1012 (5th Cir. Fla. 1966). *And see City of Ocala v. Continental Casualty Co.*, 127 So. 326 (Fla. 1930); *Collins for Use and Benefit of Dixie Plywood Co. of Tampa v. National Fire Insurance Co. of Hartford*, 105 So. 2d 190 (Fla. 2d DCA 1958).

[7] *See American Home Assurance Company, supra* n.4 at 363 and *Coastal Caisson, supra* n.4 at 793.

[8] *See Palm Beach County v. Trinity Industries, Inc.*, 661 So. 2d 942 (Fla. 4th DCA 1995) (county liable to subcontractor which had supplied materials for public guardrail project where estimated annual amount of guardrail contract was $250,000, where county failed to ensure that contractor post a payment and performance bond before construction commenced, and where contractor had become insolvent, making it impossible for subcontractor to collect on default judgment against contractor) and citing *Warren v. Glens Falls Indem. Co.*, 66 So. 2d 54 (Fla. 1953) and *Pavex Corp. v. Broward County Board of County Commissioners*, 498 So. 2d 1317, 1318 (Fla. 4th DCA 1986), *review dismissed*, 509 So. 2d 118 (Fla. 1987).

[9] *American Home Assurance Company, supra* n.4.

[10] *See, e.g., Aquatic Plant Management, Inc. v. Paramount Engineering, Inc.*, 977 So. 2d 600 (Fla. 4th DCA 2007); *Runyon Enterprises, Inc. v. S.T. Wicole Construction Corporation of Florida, Inc.*, 677 So. 2d 909 (Fla. 4th DCA 1996); *Gergora v. R.L. Lapp Forming, Inc.*, 619 F.2d 387 (1980).

[11] *See* s. 1, Ch. 6867, Laws of Fla. (1915).

[12] Senate Staff Analysis and Economic Impact Statement on SB 907 (Ch. 84-288, Laws of Fla.), dated April 24, 1984.

[13] The word "shall" is normally used in a statute to connote a mandatory requirement. *See, e.g., Drury v. Harding*, 461 So. 2d 104 (Fla. 1984); *Holloway v. State*, 342 So. 2d 966 (Fla. 1977); *Neal v. Bryant*, 149 So. 2d 529 (Fla. 1962).