Airport Authority, payment and performance bond

Number: AGO 2012-12

Date: April 25, 2012

Subject:
Airport Authority, payment and performance bond

Mr. Kenneth W. Wright
Shutts & Bowen LLP
300 South Orange Avenue
Suite 1000
Orlando, Florida 32801

RE: AIRPORT AUTHORITY--PUBLIC PROPERTY--BONDS--LITTLE MILLER ACT--CONTRACTORS--whether payment and performance bond may be required for construction on airport authority property. s. 255.05, Fla. Stat.

Dear Mr. Wright:

As counsel for the Sanford Airport Authority, you have requested my opinion on substantially the following question:

Is a private for-profit party, which is occupying public land pursuant to a long term lease with the public land owner, the Sanford Airport Authority, in which the tenant is authorized to contract to construct a private building, required to obtain a performance and payment bond for such construction pursuant to section 255.05, Florida Statutes?[1]

In sum:

A private for-profit party occupying public land pursuant to a long term lease with the Sanford Airport Authority must obtain a performance and payment bond pursuant to section 255.05, Florida Statutes, for construction of improvements which will be owned by the airport authority.

The Sanford Airport Authority was created by special act of the Legislature as a dependent special district to the municipality.[2] Its members are appointed by the city commission which has the authority to remove the members for misfeasance, malfeasance or willful neglect of duty.[3] In addition, the authority is required to submit its budget to the city commission for approval.[4] In reviewing its duties and responsibilities, this office concluded that the Sanford Airport Authority was an agency of the city.[5] You have asked whether the airport authority may amend its lease with a private party to remove a requirement that a payment and performance bond be obtained by the private party for construction on airport property and whether such action would expose the airport authority, and consequently the municipality, to potential liability for not requiring compliance with 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.[6] 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."[7] 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 mechanics' lien cannot be perfected against public property.[8]

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

"Any 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, 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 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.[9]

The statute relating to public contractors' bonds was patterned after the federal Miller Act[10] 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.[11] The statute is also designed to afford protection to both the surety on the project and the public. The bond itself 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.[12] 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."[13]

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.[14] Florida's little Miller Act is remedial in nature and thus, is entitled to a liberal construction, within reason, to effect its intended purpose.[15] The statute has existed as a part of the Florida Statutes since 1915.[16]

Your question is whether the construction project contemplated to be undertaken by the private for-profit party in this case involves construction of a public building or a public work or repairs to a public building or public work. Because it appears that the improvements made to property owned and leased by the Sanford Airport Authority are the property of the airport authority, it is my opinion that any such project is subject to section 255.05, Florida Statutes.

The terms "public building or public work" are not defined by section 255.05, Florida Statutes. You have indicated by the terms of your question that the construction contemplated is a building constructed for private use on public land owned by the Sanford Airport Authority. A "public work" within the scope of the federal Miller Act has been defined as "project[s] carried on either directly by public authority or with public aid to serve the interests of the general public." The Eleventh Circuit, in a recent federal Miller Act case,[17] commented that the court had not yet defined what makes a construction project a "public work" within the meaning of the Miller Act, nor does the Miller Act itself provide a definition. In attempting to identify what may constitute a "public work" for Miller Act purposes, the Eleventh Circuit looked to a U. S. Supreme Court case involving a project authorized under federal recovery legislation. In that earlier case, *United States ex rel. Noland Co. v. Irwin*,[18] the U. S. Supreme Court concluded that a library constructed on the campus of Howard University was a "public work" within the meaning of the Miller Act because it was constructed with funds from the federal government and was established to serve the interest of the general public, despite the fact that Howard University was a private institution and held title to the land and the buildings.

There is no clearly articulated test identified by the courts for determining whether a project is a "public work of the United States," within the scope of the federal Miller Act, but several factors have been identified as indicia of such a project. Court cases suggest that factors relevant to this determination include: whether the United States is a contracting party, an obligee to the bond, an initiator or ultimate operator of the project; *whether the work is done on property belonging to the United States*; or whether the bonds are issued under the Miller Act.[19]

A number of these factors which have been identified by the courts are absent from the Orlando Sanford Airport Southeast Ramp Hangar Development, Inc., project under consideration here. For example, you have indicated that this construction project is to be privately funded. However, government funding has never been the determinative factor in considering whether the Miller Act applies. Rather, "[i]t must be true that either (1) the subcontractors and suppliers of material could assert an action for equitable recovery against the United States or one of its agencies, or (2) normal state labor and material lien remedies are unavailable because of federal ownership of the lands."[20] The terms of the lease between the Sanford Airport Authority and the lessee clearly make any improvements made, the property of the airport authority. As public property cannot be the subject of a labor and material lien remedy under Chapter 713, Florida Statutes, the assertion that this project is not a "public work" would appear to foreclose any claim a subcontractor or materialman might have against this property which is clearly owned by a governmental entity.

The terms of Ground Lease Number 2003-08 between the Sanford Airport Authority and the Orlando Sanford Airport Southeast Ramp Hangar Development, Inc., clearly address the nature of improvements and alterations to airport authority property. Section 20 of the lease provides that:

"All such improvements hereinafter made or placed on the Premises (including any fixtures purchased by Lessee) shall immediately become the property of the Lessor, subject to the terms of the Lease and shall remain upon and be surrendered with the Project as a part thereof at the termination, by lapse of time or otherwise, of the term hereby granted. Lessee shall not enter into any agreement whatsoever, nor do or permit the doing of anything, which would create,

constitute or impose any cloud on the title to or lien upon the Land, the Project, or the Premises, or any part of or interest in any of them."

Thus, improvements to the leased property are the property of the Sanford Airport Authority, a dependent special district of the City of Sanford and a governmental entity. While section 22.J. of the Ground Lease specifically requires lessee Orlando Sanford Airport Southeast Ramp Hangar Development, Inc., to provide a payment and performance bond in accordance with section 255.05, Florida Statutes, for any improvements it may make to the property, you advise that this provision may be eliminated from the lease. Regardless of the removal of the payment and performance bond requirement, however, section 20 of the lease appears to control the determination of the nature of the improvements made and whether this construction project is a "public work." In reading the little Miller Act liberally to effectuate its purpose to provide protection for those providing work and materials on projects involving public property and to protect public property from liens, I am compelled to conclude that section 255.05, Florida Statutes, would require a performance and payment bond for construction to be undertaken on land owned by the Sanford Airport Authority.

In sum, it is my opinion that a private for-profit party occupying public land pursuant to a long term lease with the Sanford Airport Authority must obtain a performance and payment bond for such construction under section 255.05, Florida Statutes, for construction of improvements which will be owned by the airport authority.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

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[1] I would note that you posed this question to my office in November 2011 and received an informal response concluding that the ground lease for this property, which contained a provision requiring the lessee Orlando Sanford Airport Southeast Ramp Hangar Development, Inc., to provide a payment and performance bond in accordance with s. 255.05, Fla. Stat., for any improvements made to the property, would control. *See* Inf. Op. to Wright, dated January 3, 2012. You have resubmitted your question and advised this office that the authority is considering a request to remove the provision requiring a performance bond from the lease. Thus, you ask for reconsideration of this question.

[2] *See* Ch. 71-924, Laws of Fla., as amended by Ch. 05-306, Laws of Fla.

[3] *See* Ch. 71-924, Laws of Fla.

[4] *See* s. 12, Ch. 71-924, *supra.*

[5] *See* Inf. Op. to Rep. Starks, dated March 25, 1997, and concluding that, because the authority was an agency of the city, a position on the airport authority board would be subject to

the constitutional dual office-holding prohibition.

[6] *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.

[7] *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. *See* s. 713.01(26), Fla. Stat., defining "real property" for purposes of this part to exclude governmental property.

[8] *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).

[9] The statute also provides that, in lieu of the bond required by s. 255.05, Fla. Stat., a contractor may file an alternative form of security which may include cash, a money order, a certified check, a cashier's check, or an irrevocable letter of credit. *See* s. 255.05(7), Fla. Stat.

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

[11] *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).

[12] *See American Home Assurance Company, supra* n.8 at 363; and *Coastal Caisson, supra* n.8 at 793.

[13] *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).

[14] *American Home Assurance Company, supra* n.8.

[15] 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).

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

[17] *Scarborough v. Carotex Const., Inc.*, 420 Fed. Appx. 870 (11th Cir. 2011).

[18] *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23, 28-30, 62 S.Ct. 899, 902, 86 L.Ed. 1241 (1942).

[19] *Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 675 (9th Cir. 1998), cited by the 11th Circuit in *Scarborough v. Carotex Const., Inc.*, 420 Fed. Appx. 870 (11th Cir. 2011).

[20] *See United States ex rel. Mississippi Road Supply Co. v. H.R. Morgan, Inc.*, 542 F.2d 262, 265 (5th Cir. 1976), *cert. denied*, 434 U.S. 828, 98 S.Ct. 106, 54 L.Ed.2d 86 (1977), citing *U.S. ex rel. Miller v. Mattingly Bridge Co.*, 344 F.Supp. 459, 462 (W.D. Ky. 1972), *overruled on other grounds*, 554 F.2d 164 (5th Cir. 1977); *FMI Contracting Corp. v. Fed. Ins. Co.*, 829 S.W.2d 907 (Tex.App.-Fort Worth 1992) (under the two-pronged test of the *Morgan* case, this case falls under the Miller Act because of the impossibility of any remedy in state court due to the federal ownership of the land), citing *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 122, 94 S.Ct. 2157 at 2161, 40 L.Ed.2d 703 at 709 (1974).