Performance bond, lessee of airport property

Number: INFORMAL

Date: January 04, 2012

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

Dear Mr. Wright:

As counsel for the Orlando Sanford Airport Authority, you have requested this office's assistance in determining whether a private, for-profit party (in this case The Orlando Sanford Airport Southeast Ramp Hangar Development, Inc.), which is occupying public land pursuant to a long term ground lease with the Orlando Sanford Airport Authority, in which the tenant is authorized to contract to construct a private building, is required by section 255.05, Florida Statutes, to obtain a performance and payment bond for such construction. Attorney General Bondi has asked me to respond to your inquiry.

After reviewing the information you have submitted and the terms of the Ground Lease, Number 2003-08 which you have provided,[1] I offer the following informal comments.

Section 255.05(1)(a), Florida Statutes, 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."

This statute relating to public contractors' bonds was patterned after the federal Miller Act [2] 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.[3] Florida's little Miller Act, is remedial in nature and thus, is entitled to a liberal construction, within reason, to effect its intended purpose.[4] The statue has existed as a part of the Florida Statutes since 1915.[5]

The answer to your question would appear to be controlled by the terms of Ground Lease Number 2003-08. Several sections appear to be significant, including section 20 relating to improvements and alterations, which 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 Orlando Sanford Airport Authority, a dependent special district and governmental entity. Further, 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. As that provision states:

"Lessee shall provide a payment and performance bond issued by an insurance company licensed to do business in the State of Florida to guarantee the payment and performance by its general contractor as to construction of any improvements on the Premises in accordance with Section 255.05, Florida Statutes."

This office must assume the validity and binding nature of this contractual provision.

I trust that these informal comments will be of assistance to you in resolving your questions.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/tsh

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[1] In addition, this office has been provided and has reviewed Addenda A - D to Lease No. 2003-08.

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

[3] *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).

[4] *See, e.g., Runyon Enterprises, Inc. v. S.T. Wicole Construction Corporation of Florida, Inc.*, 677 So. 2d 909 (Fla. 4th DCA 1996).

[5] *See* s. 1, Ch. 6867, Laws of Florida (1915).