How Public Projects Differ from Private Work

John S. Vento, Esquire

TRENAM LAW

Government in the Sunshine

- Public elected body - decisions only at meetings that satisfy the Sunshine Act.
- Actions taken outside of a "sunshine" meeting are not binding on the public entity and are voidable.
- A proper "sunshine" meeting:
  - duly constituted quorum present, although this is not a requirement in the Sunshine Act itself;
  - held in a facility that is accessible to disabled individuals;
  - minutes taken;
  - advertised in advance; and
  - must afford the public a "reasonable" opportunity to speak.
- Two or more Board members may not discuss a matter that will be considered by the entire Board outside of a "sunshine meeting."
- FLA. STAT. § 286.011 et. seq. (2017).

TRENAM LAW

Public Records

- All records made or received in the conduct of public business are public records.
- Personal notes are not public records unless made or received in the official course of business.
- Public records may be on paper or may be electronic records, such as text messages, provided that the purpose of the record is:
  - (i) prepared in connection with official business;
  - (ii) and its purpose is to perpetrate, communicate or formalize knowledge.
- If it meets this test, the record is a public record regardless of whether or not it's in final form or the ultimate product of the agency. FLA. STAT. ch. 119.
- Mr. George Trovato, Fla. Att'y Gen. Informal Op., Fla. AG Lexis 364 (June 2, 2009).

TRENAM LAW

Public Records

- Plans and schematics of public facilities are among the exceptions to the Public Records Act, and may only be disclosed to the contractors working on the project.
  - FLA. STAT. § 119.071.

TRENAM LAW

Public Records

- The Public Records Act applies to private entities acting on behalf of a governmental body pursuant to a contract to the same extent as to the public body because public functions delegated to private entities remain public functions.
- Project records in the custody or control of a design professional or a contractor may be considered public records.
  - *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001);
  - *B&S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008).

TRENAM LAW

Public Records

- Public agency cannot avoid disclosure by delegating agency responsibility to a private entity.
- Case law establishes two general sets of circumstances in which documents in the possession of private entities must be produced as public records:
  - (i) When a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity's performance of that duty become public records.
  - (ii) when a public entity contracts with a private entity for the provision of certain goods or services to facilitate the public agency's performance of its duties.

TRENAM LAW

Public Records

- Courts use "totality of the factors" test to indicate a significant level of involvement by the public agency.
  - *Weekly Planet, Inc. v Hillsborough County Aviation Authority*, 829 So. 2d 970 (Fla. 2d DCA 2002) (citing *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999)).

TRENAM LAW

Solicitation Requirements – Design Services

- The Florida Consultants Competitive Negotiation Act, FLA. STAT. § 287.055.
  - Sets out the procedures that are to be followed for the engagement of professional architectural, engineering, landscape architecture, surveying and mapping services and design-build services by a state agency and by most local government entities.

TRENAM LAW

Solicitation Requirements – Design Services

- At a minimum, the CCNA requires:
  - (i) that the agency publicly announce each occasion when professional services must be purchased for a project the basic construction cost of which is estimated by the agency to exceed the threshold amount of $325,000.00 or, if for planning or study activity, when the fee for professional services exceeds the threshold amount of $35,000.00;

TRENAM LAW

Solicitation Requirements – Design Services

- (ii) the agency shall evaluate current statements of qualifications and performance data on file, together with those that may be submitted by firms regarding the proposed project, and shall conduct discussions with, and may require public presentations by, no fewer than three firms regarding their qualifications, approach to the project and ability to furnish the required services; and the agency shall select, in order of preference, no fewer than three firms deemed to be the most highly qualified to perform the required services.

TRENAM LAW

Solicitation Requirements – Design Services

- The agency shall negotiate a contract with the most qualified firm for professional services at compensation which the agency determines is fair, competitive, and reasonable.
  - Agency unable to negotiate a satisfactory contract with the firm considered to be the most qualified at a price the agency determines to be fair, competitive, and reasonable, negotiations with that firm must be formally terminated.
  - Agency shall then undertake negotiations with the second most qualified firm, and so on until the agency negotiates with the third most qualified firm.
  - If the agency is not able to negotiate a satisfactory contract with any of the three selected firms, the agency shall select additional firms in the order of their competence and qualification and continue negotiations until an agreement is reached.
  - Each contract entered into by the agency for professional services must contain a prohibition against contingent fees.

TRENAM LAW

Solicitation Requirements – Construction Services

- Section 255.20 of the Florida Statutes requires that public construction contracts in excess of $300,000 be competitively selected, unless the project falls within one of the specific exceptions listed:
  - Replacement, reconstruction or repair of an existing public building, structure or other public construction works damaged or destroyed by sudden unexpected turn of events such as an Act of God, riot, fire, flood, accident or other urgent circumstances;
  - Such damage or destruction creates an immediate danger to the public health or safety;
  - Other loss of public or private property which requires emergency governmental action;
  - Interruption of an essential governmental service.

TRENAM LAW

Solicitation Requirements – Construction Services

- The solicitation may be on the basis of an Invitation For Bid, awarded to the lowest responsive and responsible bidder;
- or by a "best value" Request for Proposal, where cost is only one of the selection criteria, where award is based on an evaluation of several selection criteria, including price, qualifications of the proposers, and the proposers' approach to the project.
- The selection criteria must be articulated in the solicitation documents, and may not be modified after the time for submitting proposals has passed.

TRENAM LAW

Solicitation Requirements – Construction Services

- Waivers of competitive solicitations are allowed under only specified circumstances, and in accordance with statutorily defined procedures.
- This statute expressly allows contracts for construction management services, design/build contracts, continuation contracts based on unit prices, and any other contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution or by state law.
  - *See* FLA. STAT. §§ 255.20, 287.055.

TRENAM LAW

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- The broad discretion granted to a public body in the award of its contracts "must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously."
  - *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982).

TRENAM LAW

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- *See Marriot v. Metropolitan Dade County*, 383 So. 2d 662 (Fla. 3rd DCA 1980), where the court voided an award that was based upon selection criteria not included in the solicitation documents.
- *See also City of Sweetwater v. Solo Construction Corp.*, 823 So. 2d 798 (Fla. 2d DCA 2002), where the court voided a contract award by a City Commission because it found that the Commission's award to the "most responsible" bidder (rather than to the lowest, responsive and responsible bidder) was arbitrary and capricious.

TRENAM LAW

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- Solicitations for construction contracts based on price alone "must be awarded to the lowest qualified and responsive bidder in accordance with the applicable county or municipal ordinance or district resolution and in accordance with the applicable contract documents."
  - FLA. STAT. § 255.20(1)(d).

TRENAM LAW

Solicitation Requirements –

Limitations on Authority of Public Owner to Award a Contract

- "A responsible, or qualified, bidder is one 'who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance.'" FLA. STAT. § 255.248(6).
- A responsive bidder is one "that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." FLA. STAT. § 255.248(8).
  - *American Engineering and Development Corp. v. Town of Highland Beach*, 20 So. 3d 1000 (Fla. 4th DCA 2009).

TRENAM LAW

Solicitation Requirements – Licenses

- If the solicitation requires bidders to hold a Florida license or certification such as an architect, professional engineer or contractor, the license must be effective at the time of bid opening (and not at contract award).
- Single exception is bidders who are joint ventures containing at least one member which is a licensed contractor, pursuant to section 61G4-15.0022 of the Florida Administrative Code.
- Joint venture bidder need only furnish the public owner with a letter from the Department of Business and Professional Regulation indicating that the joint venture has applied for state licensure prior to bid opening.

TRENAM LAW

Mandatory Contract Provisions -

Termination for Convenience for Multi-Year Contracts

- Public owners are prohibited from committing to expenditures that extend beyond one fiscal year.
- Contract for purchase of services or tangible personal property for a period in excess of one fiscal year must have the following statement included in the contract: "The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature."
- If contract contemplates that the public body will be making payments on the contract exceeding one fiscal year, the contract must contain provisions that give the public body an annual opportunity to terminate for convenience without penalty.

TRENAM LAW

Mandatory Contract Provisions -

Indemnification for Construction Contracts

- In a contract for the construction of a public facility the public owner may require the indemnification set out in section 725.06(2) of the Florida Statues, which states:
  - "A construction contract for a public agency or in connection with a public agency's project may require a party to that contract to indemnify and hold harmless the other party to the contract, their officers and employees, from liabilities, damages, losses and costs, including but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party and persons employed or utilized by the indemnifying party in the performance of the construction contract."

TRENAM LAW

Mandatory Contract Provisions -

Indemnification for Design Contracts

- An agreement between a public owner and an architect or engineer may only contain the indemnification language set out in section 725.08(1) of the Florida Statutes , which states:
  - "Notwithstanding the provisions of s. 725.06, if a design professional provides professional services to or for a public agency, the agency may require in a professional services contract with the design professional that the design professional indemnify and hold harmless the agency, and its officers and employees, from liabilities, damages, losses, and costs, including but not limited to reasonable attorneys' fees, to the extent caused by the negligence, recklessness, or intentionally wrongful conduct of the design professional and other persons employed or utilized by the design professional in the performance of the contract."

TRENAM LAW

Mandatory Contract Provisions -

Other Mandated Contract Provisions

- Other mandatory provisions mandated by state law can be found in Chapter 255 of the Florida Statutes, including requirements for xeriscaping, for life-cycle cost analysis, energy efficiency and LEED or other sustainable construction verification.
- The State of Florida and many local governments also have False Claim legislation, which typically provide for treble damages for false or inflated claims asserted against the government owner.
- *See, e.g.*, Florida False Claims Act, FLA. STAT. ch. 68.

TRENAM LAW

Local Government Prompt Payment

- The Local Government Prompt Payment law, most recently revised in 2010, FLA. STAT. §§ 218.70–218.80, applies to counties, municipalities, school boards, school districts, authorities, special taxing districts, other political subdivisions, or any office, board, bureau, commission, department, branch, division or institution thereof, or any project supported by county or municipal funds.

TRENAM LAW

Local Government Prompt Payment

- If payment requests must be approved by an agent, architect or engineer, then payments are due within 25 business days after the date the payment request was received.
- If payment requests need not be approved by an agent, then payments are due within 20 business days after the date the payment request was received.

TRENAM LAW

Local Government Prompt Payment

- Undisputed sums must be timely paid.
- For disputed sums, the governmental entity must establish a dispute resolution procedure (referenced in the contract) that requires the dispute resolution process to be commenced within 45 days after the date the payment request was received and concluded by final decision of the governmental entity within 60 days of receipt of the payment request.

TRENAM LAW

Local Government Prompt Payment

- Prompt payment obligations flow downstream to subcontractors, sub-subcontractors and suppliers.
- Funds flowing downstream from a contractor to a subcontractor must be paid within 10 days of receipt of the funds.
- Contractors may withhold sums that may be due to another party, such as a vendor who has not furnished a release that is working under the subcontractor.
- Disputed funds may also be withheld.
- To avoid interest, notice of the dispute must be given along with actions required to cure the dispute.
- Subcontractors must pay sub-subcontractors and suppliers within 7 days after the subcontractor's receipt of payment.

TRENAM LAW

Local Government Prompt Payment

- PPA also covers the withholding of retention.
- Except for contracts of $200,000.00 or less, or projects which are federally funded, local governments may not hold retainage from progress payments to contractors of more than 10%, exclusive of any amounts based on the good faith dispute.
- The 10% may be withheld up to 50% completion of the project, after which retainage is not to exceed 5% of subsequent payments.
- A governmental entity is never required to withhold retainage.

TRENAM LAW

Local Government Prompt Payment

- The local government Prompt Payment Act is to be contrasted with the private work Prompt Payment statute, FLA. STAT. § 715.12, which provides that where there is a written contract entered into for the work and for which a construction lien is authorized, all persons defined as lienors in section 713.01 of the Florida Statutes have a right to interest after 14 days from when payment is due under the Act.

TRENAM LAW

Sovereign Immunity

- The doctrine of sovereign immunity prevents a written document from being modified by a verbal comment, so reliance on verbal information not found in the written text of a public solicitation is unreasonable and legally irrelevant.
  - *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1997).

TRENAM LAW

Sovereign Immunity

- *See Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County,* 488 F. Supp. 2d 1231 (S.D. Fla. 2007) ("[A]s a matter of law, any reliance on oral promises that contradict the terms of the parties' written agreement is unreasonable.") (citing *Harris v. School Bd. of Duval County,* 921 So. 2d 725, 735 (Fla. 1st DCA 2006) ("Reliance on any promise to make payments not called for by the comprehensive, integrated written contracts . . . would not . . . be reasonable as a matter of law")).
- *See also Dept. of Health & Rehabilitative Services v. Law Offices of Donald W. Belveal,* 663 So. 2d 650, 651 (Fla. 2d DCA 1995) (detrimental reliance on the verbal promise of an agency employee as to future extensions of the parties' contract was deemed unreasonable where the written contract only provided for a one year term).

TRENAM LAW

Sovereign Immunity

- *Florida Department of Environmental Protection v. ContractPoint Florida Parks, LLC*, 986 So. 2d. 1260 (Fla. 2008) ("Under the principles announced in *Pan-Am*, a contract that grants one party the right to sue, but also affords the other party the right to declare that it has no legal obligation to pay, is void for lack of mutuality of remedy.").
- An entity contracting with the State may be assured of receiving its demonstrated entitlement. When a judgment is entered, the public entity is required to pay, whether or not a specific appropriation is made for that amount. However, no lien will attach to specific public property to satisfy the judgment.
- FLA. STAT. § 55.11.

TRENAM LAW

Sovereign Immunity—Limitations Regarding Claims to Public Property

- If the public owner breaches, contractor's remedy is limited to an action for money damages, and assuming the solvency of the public entity, public property may not be involuntarily sold to satisfy a public debt.
- It is for this reason that public projects are required to be bonded, both to protect laborers and subcontractors in the event of non-payment and to protect the public owner in the event of non-performance.
- *See* FLA. STAT. § 255.05.
- *Little River Bank & Trust Co. v. Johnson*, 141 So. 141 (Fla. 1932).

TRENAM LAW

Sovereign Immunity—Limitations Regarding Claims to Public Property

- Despite some recent major State projects being labeled as "public-private partnerships," a non-governmental entity cannot become a true partner with a Florida local governmental entity.
- Article VII, section 10 of the Florida Constitution restricts governmental entities from pledging credit, lending their taxing power or entering into partnerships with private entities.
- As a matter of law, a partnership is defined as a relationship where, among other attributes, the parties share in the profits as well as in the losses of an enterprise.
  - *Florida Tomato Packers, Inc. v. Wilson*, 296 So. 2d 536 (Fla. 3d DCA 1974).

TRENAM LAW

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- Article X, section 13 of the Florida Constitution authorizes suits against the state only to the extent that sovereign immunity has been waived by general law. Pursuant to section 768.28 of the Florida Statutes, sovereign immunity has been waived up to the statutory limit (currently $200,000), or up to the amount of liability insurance purchased, for tort claims seeking damages for personal injury, wrongful death, and loss or injury of property arising out of the negligent acts of public employees.
- *See Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968).
- FLA. STAT. § 768.28(5).

TRENAM LAW

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- Prior to March 2013, when the Florida Supreme Court decided *Tiara Condominium Assn., Inc. v. March & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013), tort claims arising out of contract were barred by the Economic Loss Rule.
- The Economic Loss Rule was a legal principle that limited parties to a contract to the remedies provided by the contract. It prevented actions for negligence in the performance of the contract, leaving the parties to the terms of the agreement to provide remedies for the failure to perform any duty contemplated by the agreement. Exceptions to the ELR included fraud in the inducement to the contract and for professional services, such as engineering services.

TRENAM LAW

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- The ELR was created by case law and removed by case law. In *Tiara* the Florida Supreme Court limited the ELR to product liability cases.
- However, in construction cases after *Tiara*, some courts have found that completed construction projects are "products"; therefore, even after *Tiara* the ELR often still applies.
  - *See Artisan Club Condo. Ass'n, Inc. v. The St. Joe Co.*, No. 2009-CA-10804, (Fla. 9th Cir. Ct. July 15, 2015) ("A building is a product and therefore even under Tiara, the economic loss rule applies.");
  - *Central Park LV Condo. Ass'n, Inc. v. Summit Contractors, Inc.*, 2013 Fla. Cir. LEXIS 2569, 2013 WL 12161475 (Fla. 9th Cir. Ct. May 24, 2013) (*Tiara* did not overturn *Casa Clara*, and the ELR bars tort claims because only damages "are to the homes, that is, the products themselves");
  - *Casa Clara Condo. Assn., Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

TRENAM LAW

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- Further, the *Tiara* Court arguably left intact the independent-tort doctrine. Where the ELR restricts based on a type of damage, the independent-tort doctrine analyzes the underlying duty—in order to sue in tort for matters arising during a contract, actions for negligence must be grounded in a duty flowing from the alleged tortfeasor to the person claiming tort damages, and the breaches of duty alleged in the tort claims have to be "independent" of any contractual duty.
  - *Tiara Condo. Ass'n Inc. v. Marsh & McLennan Cos.*, 110 So.3d 399, 408–09 (Fla. 2013) (Pariente, J., concurring).
  - *See, e.g., Certain Underwriters at Lloyd's of London, UK Subscribing to Policy No. B1230AP56189A14 v. Ocean Walk Resort Condo. Assn., Inc.*, 2017 WL 3034069, at *10 (M.D. Fla. July 18, 2017); *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004) (citing *Weimar v. Yacht Club Point Estates, Inc.*, 223 So. 2d 100, 103 (Fla. 4th DCA 1969)); *Casa Clara*, 620 So. 2d 1244.
  - *But see Epic Hotel, LLC v. Culligan Int'l Co.*, 159 So. 3d 1014 (Fla. 3d DCA 2015); *2711 Hollywood Beach Condo. Ass'n, Inc. v. TRG Holiday Ltd.*, No. 2013-035751-CA-01 (Fla. 11th Cir. Ct. Sept. 2, 2015).

TRENAM LAW

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- If a contractor is in privity with the public owner, its ability to assert a negligence claim will be tempered by the independent tort doctrine, and its damages may be limited to its breach of contract claims. *Casa Clara,* 620 So. 2d 1244.

TRENAM LAW

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- A construction claim against the government sounding in negligence may only be made either:
  - (a) by a subcontractor, supplier, or laborer not in privity with the public owner; and/or
  - (b) if the negligent act is unrelated to a contract duty;
- Further, such an action will lie only if there is a negligent governmental act that causes personal injury, wrongful death, or property damage.
- If these are met, ensure that your client sends the mandatory pre-suit notices required by section 768.28 of the Florida Statutes to enable the public owner to investigate and possibly resolve your client's claim before suit is filed.

TRENAM LAW

Sovereign Immunity – Claims Against a Public Owner for Negligence or Intentional Torts

- Sovereign immunity has not been waived for intentional torts.
- Thus, whether or not your client is in privity with the public owner, no claim for fraud, fraudulent misrepresentation, or fraud in the inducement will lie against the State of Florida or its agencies, instrumentalities or subdivisions.
  - FLA. STAT. § 768.28(9).
  - *See Manatee County v. Town of Longboat Key*, 365 So. 2d 143 (Fla. 1978).
  - *See Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County*, 488 F. Supp. 2d 1231 (S.D. Fla. 2007).

TRENAM LAW

Contract Administration and Changes

—Right to Recover for Changes from the Original Contract Terms

- When the Legislature adopted statutory authorization for state agencies to enter into written contracts, "it must have intended such contracts to be valid and binding on both parties."
- Florida Supreme Court established that a public entity waives sovereign immunity to the extent that it entered into an express written contract.
- When a public owner awards a contract or approves a change order, sovereign immunity is waived for breach of express provisions in written contracts, and their amendments if duly authorized as required by law.

TRENAM LAW

Contract Administration and Changes

—Authority of the Public Owner's Representative to Modify a Contract

However,

- An entity contracting with a public owner cannot rely on the authority of the owner's project team to approve a change order or otherwise to modify the terms of an agreement, unless the modification is expressly approved by the board.
  - *Frankenmuth Mutual Ins. Co.*, 769 So. 2d. 1012.

TRENAM LAW

Contract Administration and Changes

—Authority of the Public Owner's Representative to Modify a Contract

- *Frankenmuth Mutual, supra,* the Florida Supreme Court established that, in the absence of either an express delegation or a ratification, the administrative County staff had no authority to bind the County Commission to the terms of a lease-purchase agreement for computer equipment, even where the lease recited that appropriate approval of the governing body had been obtained but it had not been.

TRENAM LAW

Contract Administration and Changes

—Authority of the Public Owner's Representative to Modify a Contract

- There are five major points to keep in mind regarding changes when the owner is a public entity:
  - (1) the authority of the public owner's representative to modify a contract;
  - (2) a delegation of authority by after-the-fact ratification;
  - (3) a delegation of authority by prior board action;
  - (4) limitations regarding claims to public property; and
  - (5) rights to recover for changes from the original contract terms.

TRENAM LAW

Contract Administration and Changes

—Right to Recover for Changes from the Original Contract Terms

- *Pan-Am Tobacco Corp. v. Department of Corrections,* 471 So. 2d 4 (Fla. 1984). The Court also emphasized that its holding allowing breach of contract suits against the government "is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter." *Id.* at 6. *See also Southern Road Builders, Inc. v. Lee County*, 495 So. 2d 189 (Fla. 2d DCA 1986).

TRENAM LAW

Contract Administration and Changes

—Right to Recover for Changes from the Original Contract Terms

- *See Southern Gulf Utilities Inc. v. Boca Ciega Sanitary Dist.*, 238 So. 2d 458 (Fla. 2d DCA 1970);
- *Artec Group, Inc. v. City of Tampa*, 1997 Fla. App LEXIS 11530 (Fla. 2d DCA 1997);
- *Ajax Paving Indus. Inc. v. Charlotte County*, 752 So. 2d 143 (Fla. 2d DCA 2000);
- *Hypower, Inc. v. Department of Transportation*, 839 So. 2d 856 (Fla. 1st DCA 2003);
- *Amec Civil, LLC v. State Dept of Transp.*, 878 So. 2d 468 (Fla. 1st DCA 2004);
- *City of Orlando v. W. Orange Country Club, Inc.*, 9 So. 3d 1268 (Fla. 5th DCA 2009).

TRENAM LAW

Contract Administration and Changes

—Implied Obligations vs. Perceived Extra Work

- The distinction between implied covenants contained within a written contract (for example, the covenant to act in a reasonable manner) and perceived additional work not addressed in the written contract, is the source of considerable conflict between public owners and their contractors, much like the tension on a private project between base contract work and additional work.
  - *See, e.g., Dept. of Transportation v. United Capital Funding Corp.*, 219 So. 3d 126, 134 (Fla. 2d DCA 2017) ("A necessary implication of Pan–Am's sovereign immunity analysis is that, unless the legislature has specified that different standards apply, the government's obligations under the terms of an express written contract it was authorized by law to enter are subject to the same standards of contract performance and enforcement that would apply to a private party.").

TRENAM LAW

Contract Administration and Changes

—Implied Obligations vs. Perceived Extra Work

- In the case of *County of Brevard v. Miorelli Engineering, Inc.*, the Florida Supreme Court distinguished between implied covenants, which apply to changes within the scope of the contract (for which the contractor may recover additional compensation), and additional work "totally outside the terms of the contract."
  - *Miorelli Engineering, Inc.*, 703 So. 2d at 1051.

TRENAM LAW

Contract Administration and Changes

—Implied Obligations vs. Perceived Extra Work

- The Court stated that, "without a written change order, the doctrine of sovereign immunity precludes recovery of the cost of the extra work. . . . We decline to hold that the doctrines of waiver and estoppel can be used to defeat the express terms of the contract." *Id.*

TRENAM LAW

Contract Administration and Changes

—Implied Obligations vs. Perceived Extra Work

- Where the express written contract between the contractor and the public owner did not provide for reservations of future claims, the contractor's reservation of unknown future claims was found to be unenforceable.
  - *C.O.B.A.D. Construction Corp v. School Board of Broward County*, 765 So. 2d 844 (Fla. 4th DCA 2000).

TRENAM LAW

Contract Administration and Changes

—Public Owner Can't Wrongfully Refuse to Issue Change Order

- *W & J Construction Corp. v. Fanning/Howey Associates, supra,* recognized that although sovereign immunity bars recovery for work not within authorized change orders, nonetheless, a contractor was entitled to demonstrate its assertion that the County wrongfully failed to issue a change order for additional extra work it had ordered.

TRENAM LAW

Contract Administration and Changes

—Recovery for Pre-Contract Costs

- Recovery has been denied for costs incurred by a contractor prior to the contract award because there was no contract in place at the time the services were rendered, and so the doctrine of sovereign immunity barred recovery against the city.
  - *Frenz Enterprises, Inc. v. Port Everglades,* 746 So. 2d 498 (Fla. 4th DCA 1999).
  - *Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536 (Fla. 4th DCA 2005).
  - *Martin County v. Polivka Paving, Inc.*, 44 So. 3d 126 (Fla. 4th DCA 2010).
  - *City of Miami v. Tarafa Const., Inc.,* 696 So. 2d 1275 (Fla. 3d DCA 1997).

TRENAM LAW

Contract Administration and Changes

—Doctrine of Apparent Authority Not Applicable to Public Entity

- A public officer or employee cannot bind the public entity—the doctrine of apparent authority does not apply to governmental entities or employees. One contracting with a public body has a duty to inquire as to limitations of authority of public officials.
- *Ramsey v. City of Kissimmee*, 139 Fla. 107, 190 So. 474 (Fla. 1939). ("Persons contracting with a municipality must at their peril inquire into the power of the municipality, and of its officers, to make the contract contemplated.").
- *See Town of Madison v. Newsome*, 39 Fla. 149, 22 So. 270 (1897);
- *Jones v. Pinellas County,* 81 Fla. 613, 88 So. 388 (1921);
- *Fruchtl v. Foley*, 84 So. 2d 906 (Fla. 1956);
- *Town of Indian River Shores v. Coll,* 378 So. 2d 53 (Fla. 4th DCA 1979).

TRENAM LAW

Ethical Issues: Lobbying & Gifts

- Section 112.313(2) of the Florida Statutes prohibits public officers and employees from soliciting or accepting anything of value to the recipient based on any understanding that the vote, official action, or judgment of the official or employee would be influenced thereby.
- "Things of value" include gifts, loans, and rewards, promises of future employment, favors and services.
- "Gifts" are defined at section 112.312(12)(a) of the Florida Statutes and are subject to reporting if they exceed $100 in value.

TRENAM LAW

How Public Projects Differ From Private Work

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