IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

CASE NO. 4D11-408

WEST CONSTRUCTION, INC.
Appellant

v.

FLORIDA BLACKTOP, INC.
Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
L.T. CASE NO. 502009CA035159XXXXMB

AMICUS CURIAE BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION, INC. IN SUPPORT OF APPELLEE, FLORIDA BLACKTOP, INC.

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amicus Curiae, American Subcontractors Association, Inc. ("ASA") is the largest national organization and foremost defender of, and advocate for, the interests of subcontractors, specialty contractors, and material suppliers throughout the United States. Today, ASA has approximately 5,000 subcontractor members practicing in virtually every state, including hundreds of businesses currently located in Florida and adjacent states.

Subcontractors perform approximately 80-90% of the work on commercial construction projects in the United States, like the Public Safety Multi Purpose Building project at issue in this dispute. Founded in 1966, ASA leads and amplifies the voice of subcontractors to improve the business environment in the construction industry and to serve as stewards of the community. ASA dedicates itself to improving the business environment in the construction industry, with an emphasis on ethical and equitable business practices, quality construction, membership diversity, and integrity.

In its 45 years, ASA has acted in the interest of all subcontractors by promoting education and legislative action, and promoting the equitable treatment of subcontractors. As part of this, ASA occasionally seeks leave to enter an appearance as Amicus Curiae in significant legal actions that affect the industry. **This is just such a case.**

After a three day trial, a jury found that Appellant, West Construction, Inc. ("West") contracted Appellee, Florida Blacktop, Inc. ("Florida Blacktop") to perform certain asphalt paving work on a project known as the Public Safety Multi Purpose Bldg., DHGA Project No. 20083900 (the "Project"). The jury found West breached that contract by later hiring another subcontractor for that asphalt work, effectively terminating Florida Blacktop without cause. Ultimately, the jury awarded Florida Blacktop its lost contract expectancies.

West's appeal argues that the trial court wrongly failed to set aside the jury verdict when it denied West's Motion for Judgment Notwithstanding the Verdict ("JNOV") and deferred Motion for Direct Verdict (collectively the "Motions").

West's appeal implicates a range of crucially important matters including: (1) whether subcontractors can effectively condition their bids to protect themselves, the public, and the integrity of the bidding process from the harms of bid shopping; (2) whether the implied covenant of good faith and fair dealing still applies to parties' dealings, and (3) a party's right to its contract expectancy when that expectancy is wrongly terminated. This matter thus involves issues that reach far beyond the immediate parties to the dispute.

ASA and its members have a vital interest in this case. The reversal urged by West would strip subcontractors of fundamental rights while encouraging unethical, anti-competitive and economically harmful activities such as bid

shopping. In an already difficult business climate, reversal would be adverse to the financial survival and well-being of numerous small businesses and thousands of Floridians who work for (or are employed by) subcontractors.

SUMMARY OF THE ARGUMENT

The jury verdict at issue rests atop a wellspring of well-established law and good policy. West's appeal threatens to poison that wellspring as the reversal it seeks would have tremendously negative legal and economic ramifications by encouraging unethical bid shopping and destroying the right of a bidder to control its offer.

It is an extremely high hurdle under Florida law to establish a right to a Motion for Directed Verdict or JNOV. That hurdle is virtually impossible to clear where the result would overturn a jury verdict because such verdicts must be sustained unless there is **no** competent evidence (or inference from the evidence) on which the jury could rely. West does not come close to clearing this hurdle.

The evidence here included (but was not limited to) evidence: (i) West solicited an offer from Florida Blacktop for the asphalt paving work on the Project, (ii) regarding the terms and consideration for which Florida Blacktop prepared the requested bid, (iii) of offer, acceptance, consideration, and breach, (iv) West identified Florida Blacktop to the Owner as its asphalt paving subcontractor, and (v) West terminated Florida Blacktop's contract expectancies by engaging in

unethical bid shopping to find, and ultimately contracting another subcontractor willing to undercut Florida Blacktop's price.

The verdict is supported by record evidence, well-established Florida law, and sound public policy; thus. this Court should affirm the Final Judgment.

ARGUMENT

West incorrectly states the issue on appeal as whether a bidder who "merely proposes the name of a subcontractor to the owner" is legally bound to contract with that subcontractor. Appellant's Initial Brief, at p. 1. This issue is a strawman because it does not fairly characterize the facts.

The jury verdict did not result "merely" from the fact that West identified Florida Blacktop to the Village as its proposed asphalt paving subcontractor. To the contrary, as Florida Blacktop's Appellee brief details, this listing was merely one piece of a long chain of evidence supporting the verdict. The jury heard, for example, that West solicited a bid from Florida Blacktop to perform the asphalt paving work at the Project. R 5[1] (West's Invitation to Bid to Florida Blacktop); T 125, lns. 4-6; (""*. This is an invitation to bid...* "). Florida Blacktop then submitted a "Proposal/Contract" (the "bid") to West. The bid included the following condition (in the same font and size as the other bid conditions) regarding consideration for the offer and the parties' agreement as to manner of acceptance:

[1] T means trial transcript. R means record.

> Florida Blacktop, Inc. has devoted the time, money, and resources toward the preparation of this bid and **as consideration therefore is submitting this bid to 'buyer' with the express understanding and agreement of the parties** that in the event the 'buyer' **in any way uses Florida Blacktop, Inc.'s bid** such as figures contained therein for purposes of shopping the bid with third-parties ... competing with Florida Blacktop, Inc. for the work at issue and/or incorporating any portion of Florida Blacktop, Inc.'s bid in correspondence with third-parties ... in any way involved with the construction work on the project at issue **such action(s) shall in all instances constitute acceptance of Florida Blacktop, Inc.'s bid and shall create a binding contract between the parties consistent with the bid documents.** R 1 (emphasis added).

At trial, Florida Blacktop's President testified that the above language reflected his understanding of the parties' agreement: "*If West uses my bid and gets the job, that we have an agreement, a contractual agreement.*" T 133, lns. 15-17. The evidence was that, in this regard, the offer spelled out both well accepted industry standards and Florida Blacktop's prior course of dealing with West. T. 133, lns. 18-23; *see also* T. 126, lns. 1-25 —T. 127, lns. 1-2.

If West disagreed with the condition Florida Blacktop included as an essential element to its offer, West could have put the bid aside and not used it.

But, if West wanted to use the bid to win the Project, West had to accept the offer's terms. Record evidence confirms West relied upon the bid and accepted the offer, and as a result, the Project was awarded to West. T. 137, ln. 11-25; R. 10, T.

152, lns. 23-25; T. 152 ("*[T]hey used my price, they put it on the schedule of values.*"). The day after bids were opened, West publically identified Florida Blacktop to the Village as its proposed "Asphalted concrete paving" subcontractor. R. 2, T. 139, ln. 6-12. Florida Blacktop then sent a letter to West (which West did not dispute) thanking it for the opportunity to work together on the Project. R. 8, T. 144-145.

The above is more than enough under Florida law to sustain the jury's conclusion that there was a contract. In *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297, 302 (Fla. 1st DCA 1999), the First District Court of Appeal of Florida held that the threshold requirements for alleging the existence of a contract are met where a subcontractor alleges it submitted its bid with the understanding it would be awarded the contract if its bid was low and the general contractor won the work.

To support its decision, the First District cited *Electrical Constr. & Maint. Co., Inc. v. Maeda Pac. Corp.*, 764 F.2d 619 (9th Cir. 1985). In *Maeda,* the subcontractor alleged that —like Florida Blacktop here— it agreed to bid on the condition that the contractor agrees to award it the subcontract if it was the low bidder and the contractor won the work. As West did here, the contractor disputed it agreed to that condition. The Ninth Circuit, however, rejected the contractor's arguments and reversed the preliminary dismissal of the subcontractor's claim.

Maeda Pac. Corp., 764 F.2d at 620. The First District approvingly cited *Maeda* for the proposition that consideration for subcontract formation may exist in the "subcontractor's submission of bid, an act bargained for that subcontractor was not under a legal duty to perform." *Townsend*, 728 So. 2d at 302 (citation omitted).

I. The right to control the terms of your offer is well established and should not be infringed.

In finding for Florida Blacktop, part of the evidence the jury considered was an express condition of the bid prescribing how West could accept Florida Blacktop's offer. This was proper. Florida law provides that a bidder (at all times) controls the terms of its offer, which includes the right to set "any conditions as to . . . **mode of acceptance**, or other matters which it may please him to insert in and make a part thereof ..." *Webster Lumber Co. v. Lincoln*, 115 So. 498, 504 (Fla. 1927) (citations omitted); *Gillespie v. Bodkin*, 902 So. 2d 849, 850 (Fla. 1st DCA 2005) (acceptance of offer must be in mode and manner of offer.). Acceptance of an offer (to create a contract) "may be in writing, by parol, or by acts." *Bullock v. Harwick, et al.*, 30 So. 2d 539, 542 (Fla. 1947); *see also, L&H Const. Co., Inc. v. Circle Redmont, Inc.*, 55 So.3d 630, 634 (Fla. 5th DCA 2011) ("A valid contract arises when the parties' assent is manifested through written or spoken words, or 'inferred in whole or in part from the parties' conduct'" (citation omitted)).

The right to control your own bid offer is particularly important in construction. Subcontractors devote considerable time, energy and resources into

preparing their bids. An essential part of this process involves the right to condition bids by setting forth conditions and assumptions of the offer. This may include specifying the consideration for the bid, the parties' understandings and agreement regarding the solicitation and submission of the bid, and terms regarding how one can accept the offer, and the need to keep the bid confidential.

This is precisely why prudent subcontractors meticulously condition their bids. A bid is an investment, and like any investment, bidding for construction work has costs and risks. In the real world of contracting, subcontractors typically base (and adjust) their bidding plans for future projects on the amount of work "in the pipeline" and under contract. This is necessary so that subcontractors avoid either getting "spread too thin" or not having enough work to keep their employees busy and receiving paychecks. It also means there are long lasting financial ramifications when one's contract expectancy is wrongly terminated.

Preparing a bid is costly. The first resources are spent to analyze invitations for bid and determine what projects are a good fit given the resources allocated for current and expected projects. For projects that make this first cut, considerable time and money is needed to obtain and review the applicable plans and specifications to prepare estimates and bid proposals for the work. To do this, full-time professional estimators and support staff are needed. In addition,

reproduction and document delivery costs are incurred together with necessary home office overhead expenses.

Subcontractors who do not successfully bid a job will not recover *any* of those costs. Even the successful bidder will usually have to wait months before any of those "up front" bidding costs are finally reimbursed through its first pay application.

Bidding is also risky. In theory, if a project is competitively bid and prices are solicited from more than one bidder, a subcontractor's bid represents its best price (i.e., the lowest price at which it believes it can perform the work, win the job, and still make a profit that will keep it in business). A subcontractor generally should not expect to win a job unless it is the "low" bidder. There is the risk of spending the resources and not being "low", and there is a risk that the subcontractor will prepare a low bid but *still* not realize its contract expectancies. This can happen if it makes a mistake as it may have to "eat the loss" if the elements of promissory estoppel are met. And it can happen if the subcontractor is the victim of bid shopping.

This is why keeping bids confidential is so important to subcontractors: a competitor who knows your costs or pricing information has a treasure trove of valuable information to undercut your price. If that happens too many times, you will eventually go out of business for lack of work. Bid conditions thus help

subcontractors protect their investments in their low bids and can mitigate the risk of losing their contract expectancies through bid shopping.

Here, Florida Blacktop conditioned its offer on West's agreement that the occurrence of certain events or conduct by West would manifest West's intent to contract Florida Blacktop (and preserve Florida Blacktop's contract expectancies). This is entirely consistent with Florida law, where the control of one's offer and assent to a contract may be "manifested through written or spoken words **or 'inferred in whole or in part** from the parties' conduct." *Baron v. Osman,* 39 So. 3d 449, 451 (Fla. DCA 5th DCA 2010) (emphasis added) (citation omitted). Florida Blacktop's offer expressly detailed that as consideration for its investment in the bid, the bid was being submitted on the parties understanding that certain acts or conduct by West would manifest acceptance of the offer. When West used the bid and engaged in the conduct in question, a contract was formed.

A. Bid Shopping is detrimental to public interest.

Bid shopping is an unethical practice whose harmful effects are recognized by courts, legislatures, and trade associations across the country. It is widely condemned because while it may bring isolated benefits to the party who practices it, its well-documented, detrimental results include:

- defeating the purpose of the competitive bid system;
- promoting lower quality work;
- incentivizing corner-cutting;
- increasing claims and change orders;

- delaying project completion; and
- generally worsening the business environment.

See Eric Degn and Kevin R. Miller, *Bid Shopping*, J. CONSTR. EDUC., Spring 2003, at 47–55.

The Court of Common Pleas of Cuyahoga County, Ohio concisely touched on these problems when it observed that:

> Many hours are invested ... in preparing a bid for submission to the [prime contractor]. The latter may then proceed to play one bidder against another, getting each in turn to shave its bid as much as it will. Estimated profit is drastically reduced and financial loss threatens. There is little satisfaction in such a contract. The temptation to do inferior work and to cheat is strong.

Sheet Metal Employers' Assoc. v. Giordano, 188 N.E.2d 329 (Ohio C.P. 1963).

In Florida, the Legislature sought to curb the evil of bid shopping in state contracts by introducing section 255.0515 of the Florida Statutes. In *E.M. Watkins & Co., Inc., v. Board of Regents and Winchester Construction & Engineering*, 414 So. 2d 583, 588 (Fla. 1st DCA 1982), a contractor appealed a finding that its bid was non-responsive because it did not list all its subcontractors as required by §255.0515. In denying the appeal, the First District explained some of the strong public policy reasons for enforcing bid listing requirements, noting that allowing a contractor to avoid identifying its subcontractors could:

> [A]llow[] the potential for speculation, by use of a phantom price and efforts to shop that item or trade until a subcontractor can be found at the speculative contract price, and ... **permit[] a successful bidder to accept additional subcontractor bids after the bid opening**, giving

> the opportunity for **undercutting the low subcontractor on whom he relied in formulating his bid.**

E.M. Watkins & Co., 414 So. 2d at 587 (emphasis added).

Florida is not unique in recognizing the pernicious effects of bid shopping. *See e.g.*, California Public Contract Code § 4101 (2011), "[B]id shopping ... often result[s] in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils."; *Pavel Enterprises, Inc. v. A.S. Johnson Co., Inc.*, 674 A.2d 521, 528 (Md. 1996) (explaining the problems bid shopping creates); *George & Lynch, Inc. v. Div. of Parks & Recreation, Dep't of Natural Resources & Envtl. Control*, 465 A.2d 345, 350 (Del. 1983) (Delaware General Assembly addressed bid shopping "and mandated the performance of certain requisites in order to eradicate that evil"); *Conduit & Foundation Corp. v. City of Philadelphia*, 401 A.2d 376, 380 (Pa. Commw. Ct. 1979) (upholding injunction preventing contract award to bidder who listed multiple subs for same work, noting that "where only one bidder, the lowest, has been left the potential to reap the benefits of bid-shopping, then it cannot be said that all the bidders competed on a fair and open basis").

Even the Associated General Contractors of America ("AGC") decries bid shopping. It states on its website that:

> Bid shopping or bid peddling are ***abhorrent business practices*** that threaten the integrity of the competitive bidding system that serves the construction industry and the economy so well. AGC strongly believes that bid shopping and bid peddling cannot sustain long-term working relationships between prime and subcontractors.

See Bid Shopping, AGC of America, http://www.agc.org/cs/advocacy/legislative_activity/bidshopping (last visited July 14, 2011) (emphasis added).

B. West's bid shopping did not negate its acceptance of Florida Blacktop's offer.

Despite industry wide disapproval of the practice, bid shopping still happens. It happens because it is lucrative. This is because when a prime contract is awarded on bid day, the owner accepts the general contractor's price. That price was based on a series of prices including those the contractor received from the original low bid subcontractors. Approximately 80-90% of work on most large construction projects is performed by a wide variety of specialty trades (including everything from early trades like site demolition contractors to the later trades like the asphalt pavers and flooring/carpeting subs). Thus, if a general contractor can obtain a *lower* subcontract price for trade work *after* winning the prime contract, the difference between the 'new' (lower) and the original price is **pure profit to the general contractor** that it need not share with the owner.

This is one reason bid shopping is widely found to be detrimental to quality of construction: the subcontractor who undercut its trade brother must "sharpen its

pencil" and cut corners. The owner thus receives an inferior product for no corresponding cost savings. That is exactly what happened here.

In June 2009, West actively began shopping for a subcontractor willing to undercut Florida Blacktop's contract price. R. 9, T.155-156 (a June 23, 2009 West e-mail to a Florida Blacktop competitor soliciting a price for Florida Blacktop's work). When West found a subcontractor willing to do the work for $50,000 less than Florida Blacktop, it contracted with that subcontractor, and terminated Florida Blacktop's contract expectancies. R. 4 (the fruit of West's bid shopping: the August 2009 Subcontract with Florida Blacktop's competitor); T. 134-137. Furthering the textbook example of bid shopping: West did not pass any of the $50,000 "savings" on to the Village (or its taxpayers). T. 338, lns. 9-14.[2]

II. Bid conditions that act to discourage bid shopping are enforceable and should be encouraged.

The bid conditions Florida Blacktop used were a practical effort to expressly confirm industry standards and discourage bid shopping. If this Court accepts West's invitation to nullify all evidence supporting contract formation, including the bid condition, the decision would have the perverse result of promoting bid shopping by essentially inoculating general contractors from acting in good faith with their subcontractors. As a result, few subcontractors could ever be secure in

[2] Cross-Examination of Mr. West: "Q. You are aware that there is no credit that was ever given to the Village ... for [your] substituting Florida Blacktop with East Coast Paving? A. Not that I am aware of."; See also T. 157, lns. 12-16.

their contract expectancies given the typical lag between acceptance of their offer and commencement of their work. Instead, contractors such as West could with impunity shop bids and contracts, unconstrained by express conditions of the bid, good faith, or industry practice.

In fact, this is essentially what West argued it could do. West's Vice President rejected any notion that West had a duty to hire Florida Blacktop under either the bid condition or the well-accepted industry standards that he refused to acknowledge. The following exchange then occurred:

> Q. So there's ***no rules*** of the game for subcontractors and you?
> A: **No.**
> Q. So it's ***basically chaos*** because subcontractors can submit proposals to you and ... you are not bound to use them if they give you a proposal and you use it to win a bid; is that your testimony?
> A: **Correct.**
> Q. All right. And the system works really well in your mind?
> A. It has for our company since 1969.
> T. 413, lns. 23-25 — 414, lns. 1-11 (emphasis added).

If West really has operated for more than forty years recognizing 'no rules' governing its relationships with and obligations to its bidders, it is time for that unethical practice to stop. The jury weighed the credibility and testimony from Mr. West against the: (1) conflicting testimony from Florida Blacktop's witnesses, who testified as to industry standards; and (2) indisputable documentary evidence (including the terms of Florida Blacktop's offer). The resulting verdict indicated

that the jury found more credible the weight of the evidence in support of Florida Blacktop's position. That verdict should not be disturbed.

This Court should not give a judicial stamp of approval to West's worldview. The reversal West urges would render subcontractors helpless to protect themselves from abhorrent business practices like bid shopping, even if they solidly planted the terms of their offers in the meaningful soil of ethical business practices, good faith, and fair dealing. West's radical appeal thus is contrary to the very essence of the implied covenant of good faith and fair dealing recognized by Florida law. *See Scheck v. Burger King Corp.*, 798 F. Supp. 692, 701 (S.D. Fla. 1992) ("Florida law recognizes an implied covenant of good faith and fair dealing, as well as a cause of action" for breach of the covenant); *see also*, *Restatement (Second) of Contracts* §205, (1990).

III. The trial court properly denied West's Motions because there was ample evidence to support the jury's verdict.

Motions for JNOV and for directed verdict "should be resolved with **extreme caution** since the granting thereof holds that one side of the case is essentially devoid of probative evidence." *Stirling v. Sapp*, 229 So. 2d 850, 852 (Fla. 1969) (citing *Hendricks v. Dailey*, 208 So. 2d 101, 103 (Fla. 1968)). As a result, when a party moves for directed verdict it "admits not only the facts stated in the evidence presented but . . . also admits ***every conclusion favorable to the adverse party*** that a jury might freely and reasonably infer from the evidence."

Nelson v. Ziegler, 89 So. 2d. 780, 782 (Fla. 1956) (emphasis added); *Collins v. School Bd. of Broward County,* 471 So. 2d 560, 563 (Fla. 4th DCA 1985) (verdict must be affirmed unless there was no evidence or reasonable inference of the evidence on which the jury could properly rely). This Court reviews *de novo* whether the trial court properly applied the above standards when it refused to substitute an appellant's arguments for a jury's findings. *Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16, 20 (Fla. 4th DCA 2006).

The high bar to overturn a jury verdict gives due regard to the jury's opportunity to weigh and evaluate evidence, including the testimony and credibility of the witnesses. *See McCray v. Allstate Ins. Co.*, 374 So. 2d 1077, 1079 (Fla. 1st DCA. 1979) (reversing grant of a motion JNOV "[s]ince there was evidence to support the jury's verdict"). Thus, if there was **any** evidence in (or to be inferred from) the record to support the verdict, the judgment must not be disturbed.

In this case, the evidence for Florida Blacktop not only existed, but existed in abundance. The law and policy interests that supported the decisions are rock solid; thus, the verdict below should be affirmed.

CONCLUSION

West's appeal involves important questions implicating whether subcontractors remain the masters of their bids and whether subcontractors can submit bids with language to protect their investments, and protect themselves (and the public) from the harms of bid shopping. If the jury verdict below is reversed, and West's requested relief granted, the resulting opinion would give unprincipled general contractors free rein to disregard carefully prepared bid conditions, to bid shop, and to leverage subcontractors against one another, all to the detriment of the integrity of the bidding process and business environment. The result would not merely infringe, but would destroy, the well-established rights of a party to control the terms of its offer and to enjoy the fruits of its contract expectancies.

To affirm the lower court, this Court need only find that there was some evidence to support the jury verdict. There was ample evidence in that regard. The resulting judgment affirms both Florida law and sound public policy. The American Subcontractors Association, Inc. respectfully supports Florida Blacktop, Inc.'s position and asks that this Court affirm the judgment entered by the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via United States Mail on Allen R. Tomlinson, Jones Foster, Post Office Box 3475, West Palm Beach, FL 33402 and Joseph W. Lawrence, II, Vezina, Lawrence & Piscitelli, P.A., 300 S.W. 1st Ave., Fort Lauderdale, FL on this 28th day of July, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule 9.210(a)(2), this brief was prepared using Times New Roman font size 14.

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