

December 9, 2024

VIA E-MAIL:

Hernando County Board of County Commissioners
Attn: Pamela Hare, Esq. and
Melissa Tartaglia, Esq. (County Attorney's Office)
20 N. Main Street, Room # 462
Brooksville, FL 34601
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mtartaglia@co.hernando.fl.us

**Re: New Vista Builders Group, LLC
Hernando County Fire Station No.5 (the "Project")
Contract Number 21-C00008 (the "Contract")
Our File No. 2804-000**

Dear Ms. Hare and Ms. Tartaglia:

This is New Vista Builders Group, LLC's ("New Vista") response to your letter on behalf of the Hernando County Board of County Commissioners ("Owner") dated November 8, 2024 (the "Correspondence"). Within your Correspondence, the Owner asserts the Chief Procurement Officer's denial of New Vista's prompt payment claim is final and binding because New Vista purportedly failed to timely invoke the Contract's dispute resolution procedures.

First, New Vista's prompt payment claim is not a contractual "claim"¹ subject to the Contract's dispute resolution provisions, but rather a statutory claim resulting from the Owner's violation of Chapter 218, Florida Statutes, the Local Government Prompt Payment Act (the "Act"). The Owner conveniently ignores Article 62.3 of the Contract which states:

The duties and obligations imposed by these Contract Documents and the rights and remedies available hereunder to the parties hereto ***are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by laws or regulations*** . . . The provisions of this Paragraph will be as effective as if

¹ The Contract does not clearly define the word "claim" as that term is used in Article 55.5.1; however, other provisions in the Contract provide the proper interpretation – i.e. that the "claims" subject to the Contract's dispute resolution procedures pertain to New Vista's contractual claims for an adjustment of the contract price or contract time. There is no language in the Contract subjecting New Vista's statutory rights and remedies for violations of the Act to the Contract's dispute resolution procedures, including New Vista's right to statutory interest.

repeated specifically in the Contract Documents in connection with *each particular duty, obligation, right, and remedy to which they apply*.

This contractual provision directly contradicts the Owner's position that New Vista's statutory rights and remedies are barred by the Contract.

Second, various provisions of the Contract, including the dispute resolution provisions, violate the public policy expressly stated in the Act. Florida Statute §218.71 sets forth the public policy of the Act and states: "[i]t is the policy of this state that payment for all purchases by local government entities be made in a timely manner." Florida law is clear that a "contract which violates a provision of the constitution or a statute is void and illegal, and, will not be enforced in our courts."²

The Contract's payment provisions violate the prompt payment requirements mandated by the Act, particularly Florida Statute §218.735. For example, Articles 59.2.2.1 and 59.2.3 state a payment application must first be approved by the "Owner Designated Representative" within five (5) days of receipt from New Vista and then payment is due "twenty-five (25) business days after the Application for Payment is presented to the Owner." These provisions clearly violate the Act's requirement that the payment application must be rejected or disputed in writing within twenty (20) business days of receipt or else the payment must be paid within twenty-five (25) business days of receipt.

The Contract's dispute resolution provisions – to the extent applicable to a prompt payment violation – also violate the Act's public policy. Assuming *arguendo* New Vista's prompt payment claim was subject to the provisions of the Contract, Article 55.5 impermissibly purports to shorten the statute of limitations governing New Vista's rights and remedies under the Act to thirty (30) days after the Chief Procurement Officer issues its denial of the claim. The Florida legislature promulgated the Act to prohibit such efforts by local government entities, and New Vista never agreed, through Contract or otherwise, to subject its statutory rights to such draconian results.

Lastly, assuming *arguendo* New Vista's prompt payment claim was subject to the provisions of the Contract, the burden is on the Owner to affirmatively demonstrate it was prejudiced by New Vista's alleged failure to comply with any condition precedent in the Contract.

² *Lucas Games, Inc. v. Morris AR Assocs., LLC*, 197 So.3d 1183, 1184 (Fla. 4th DCA 2016); *see also Local No. 234 v. Henley & Beckwith, Inc.*, 55 So.2d 818, 821 (Fla. 1953) ("[A]n agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void."). As stated by the Florida Supreme Court, this rule is engrained in Florida jurisprudence because "courts have no right to ignore or set aside a public policy established by the legislature" and "there rests upon the courts the affirmative duty of refusing to sustain that which by the valid statutes of the jurisdiction, or by the constitution, has been declared repugnant to public policy." *Local No. 234*, 55 So.2d at 821.

By its own admission, Owner acknowledges receipt of New Vista's prompt payment claim and the basis for same. Owner is incapable of demonstrating it was prejudiced by any alleged failure to invoke the dispute resolution procedures in the Contract, including a demand for mediation.

Statutory interest is owed on New Vista's payment application per the Act. On November 22, 2024, the Owner finally issued the \$293,044.87 payment due to New Vista for several months. The Owner's payment does not absolve it of its statutory violations of the Act. The total statutory interest owed to New Vista through November 22, 2024, is **\$47,821.78**.

Article 59.9.2 states New Vista's acceptance of final payment constitutes "a waiver of all claims by [New Vista] against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled." Owner is in receipt of New Vista's prompt payment claim. Upon receipt of this correspondence, please confirm in writing to the undersigned counsel that New Vista's prompt payment claim remains unsettled, and that acceptance of the final payment is not a waiver of such claim. It is in both parties' interests to acknowledge the claim remains unsettled and that New Vista is retaining the final payment to mitigate its damages. This acknowledgement allows New Vista to pay its subcontractors for the work performed at the Project while simultaneously limiting the Owner's exposure to statutory interest under the Act to the interest owed through the date of New Vista's receipt of the final payment.

Should Owner fail to confirm same in writing, New Vista will return the final payment funds to Owner and proceed with filing a lawsuit to recover the final payment amount (\$293,044.87) and all statutory interest incurred under the Act (i.e. 2% per month through the date of final judgment), plus attorneys' fees and costs as permitted by the Act.

Upon receipt of this correspondence, please contact us to discuss an amicable resolution to this dispute without the need to resort to litigation.

Sincerely,



Daniel A. Marquez, B.C.S.
VLP Copenhaver Espino

DAM/yp

cc: New Vista Builders Group, Inc. *(via e-mail)*
Carla Rossiter-Smith, Chief Procurement Officer *(via email)*