

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

CONTRACTORS BONDING AND INSURANCE COMPANY,	:	APPEAL NO. C-110866
	:	TRIAL NO. A-1101985
Plaintiff-Appellee,	:	JUDGMENT ENTRY.
vs.	:	
KENNETH R. ROGERS PLUMBING AND HEATING COMPANY, INC.,	:	
Defendants,	:	
and	:	
KRAMER AND FELDMAN, INC.,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist.Loc.R. 11.1.1.

Defendant-appellant Kramer and Feldman, Inc., (“Kramer”) has appealed a decision of the trial court granting judgment in favor of plaintiff-appellee Contractors Bonding and Insurance Company (“CBIC”). We find no merit in Kramer’s sole assignment of error, and we affirm the trial court’s judgment.

The record shows that Kramer was a subcontractor on a building renovation project at the University of Cincinnati (“UC”). Kenneth R. Rogers Plumbing and Heating Company, Inc., (“Rogers”) was another subcontractor involved in the project. UC had accepted Rogers’s bid and had awarded it a \$138,900 contract to

perform part of the work on the project. In April 2009, CBIC issued a construction bond to cover Rogers's bid, which had a penal sum in the same amount.

At the inception of the project, Solica Construction, Inc., ("Solica") was the lead contractor. UC terminated Solica's contract for Solica's convenience. To keep the project on schedule, UC transferred Solica's work to Rogers under "Change Order No. RP-1." Additional change orders were later issued by UC and accepted by Rogers. All of those change orders increased the contract sum to a total of \$818,932.80. Although the change orders contained a line item for costs of increased premiums for the bond, the bond was never amended to increase the penal sum.

After UC had accepted Kramer's bid to work on the project, it had assigned the bid to Rogers. Kramer and Rogers entered into a subcontractor's agreement. Kramer's work was submitted as a change order to Rogers's original contract, and UC approved those changes.

Kramer completed its work under the contract, and billed Rogers a total of \$492,045.45. When it became clear that Rogers was not going to pay Kramer all of the funds owed, Kramer sent CBIC a formal notice of its claim against the bond. CBIC later responded that Kramer's claim exceeded the amount of the bond.

After receiving letters from numerous unpaid subcontractors, CBIC filed a complaint for interpleader and declaratory judgment in which it named as defendants all known subcontractors on the project. It contended that its liability was limited to \$138,900, the penal sum of the bond. Kramer filed counterclaims for, among other things, a declaratory judgment that CBIC was required to pay it the entire sum still due and owing. The trial court granted CBIC's motion for summary judgment on all claims and counterclaims. In granting the motion, the court declared the rights and liabilities of all parties and found that CBIC's liability was limited to \$138,900, the penal sum in the bond. This appeal followed.

In its sole assignment of error, Kramer contends that the trial court erred in granting summary judgment in favor of CBIC. A bond is a contract between the parties that should be executed according to its terms. *Dean v. Seco Elec. Co.*, 35 Ohio St.3d 203, 205, 519 N.E.2d 837 (1988); *Troyer v. Horvath*, 13 Ohio App.3d 155, 157, 468 N.E.2d 351 (8th Dist.1983). When a bond is required by statute, that statute becomes a part of the bond and is controlling. *Medina v. Holdridge*, 46 Ohio App.2d 152, 155, 346 N.E.2d 339 (9th Dist.1970); *Elliott v. Marc Wilcher Realty, Inc.*, 111 Ohio App. 261, 266, 171 N.E.2d 543 (9th Dist.1959). A court will read into a bond any provision required by statute that is omitted and will deem it as part of the bond as if it were expressly written. *Van Wert Natl. Bank v. Roos*, 134 Ohio St. 359, 17 N.E.2d 651 (1938), paragraph one of the syllabus; *Medina* at 155-156. As a general rule, the liability of a surety is limited to the penal sum stated in the bond, unless the parties contract for a different result or the governing statute provides otherwise. *Elliott* at 266-267; *Southern Surety Co. v. Bender*, 41 Ohio App. 541, 546, 180 N.E. 198 (8th Dist.1931).

Former R.C. 153.54(A), which was in effect at the time the bid was issued stated that each person bidding for a contract with the state or any political subdivision for any public improvement must have filed with the bid a guaranty in the form of a bond, check, or letter of credit. Former R.C. 153.54(B)(2) set forth the requirements for the bond. It provided in pertinent part that:

A bid guaranty filed pursuant to division (A)(1) of this section shall be conditioned to: \* \* \* [i]ndemnify the state, political subdivision, district, institution or agency against all damage suffered by failure to perform the contract according to its provisions and in accordance with the plans, details, and specifications and bills of material therefor and to pay all lawful claims of subcontractors, material suppliers, and laborers for labor performed or material furnished in carrying forward,

performing, or completing the contract; and agree and assent that this undertaking is for the benefit of any subcontractor, material supplier, or laborer having a just claim, as well as for the state, political subdivision, district, institution, or agency.

R.C. 153.571, which has not been amended, sets forth the form of the bond. It provides that the bond provided for in R.C. 153.54(B) “shall be in substantially the following form[.]” The form contains language stating:

The penal sum referred to herein shall be in the dollar amount of the principal’s bid to the obligee, incorporating any additive or deductive alternate bids made by the principal on the date referred to above to the obligee, which are accepted by the obligee. In no case shall the penal sum exceed the amount of \_\_\_\_\_ dollars.

The bond in this case contains substantially similar language. It also states that it is “expressly understood and agreed that the liability of the Surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation herein stated.” This language is exactly the same as the language in R.C. 153.571. Thus, the bond and the statutes are clear that the surety’s liability cannot exceed the penal amount.

The record contains two copies of the bond, one with the amount of the penal sum left blank and one with the amount of the bid, \$138,900, filled in. But this discrepancy makes little difference. R.C. 153.571 expressly states that “[i]f the foregoing blank is not filled in, the penal sum will be the full amount of the principal’s bid, including alternates.” When the bond was entered into between CBIC and Rogers, the amount of Rogers’s bid was \$138,900.

Kramer argues that the term “alternates,” which is not defined in R.C. 153.571, includes properly approved change orders. We think that is a tortured reading of the statutes. In our view, the plain language of R.C. 153.571 indicates that the term

“alternates” means alternate bids. R.C. 153.571 makes no reference to change orders, which were provided for in former R.C. 153.10 and 153.11.

If statutory language “conveys a meaning that is clear and unequivocal, interpretation is at an end, and the statute must be applied accordingly.” *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 291, 762 N.E.2d 979 (2002). Courts have a duty to give effect to all of the words used in the statute and may not delete words or insert words not used. *Bernardini v. Bd. of Edn.*, 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979); *Cincinnati v. Ohio*, 1st Dist. No. C-110680, 2012-Ohio-3162, ¶ 9.

Kramer argues that former R.C. 153.11 required that a construction bond for construction or renovation of a building belonging to the state or a political subdivision of the state must be of an amount sufficient to cover the full amount of the construction project, including cost increases resulting from properly approved change orders. Therefore, former R.C. 153.11 operated to increase the penal sum of the bond as change orders were issued to the original contract between UC and Rogers.

Former R.C. 153.11, in effect at the time of the events in question, stated:  
Whenever the change referred to in section 153.10 of the Revised Code is approved by the owner as defined in section 153.01 of the Revised Code, accepted in writing by the contractor, and filed, the same shall be considered as being a part of the original contract, and the bond theretofore executed shall be held to include and cover the same.

We agree with the trial court’s assertion that former R.C. 153.11 should be read in *pari materia* with the other statutes on the same subject matter and should be “harmonized so as to give full application” to all. *Jones v. Multi-Color Corp.*, 108 Ohio App.3d 388, 396, 670 N.E.2d 1051 (1st Dist.1995), quoting *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 294, 649 N.E.2d 1205 (1995).

Although we find the remainder of the court's interpretation of R.C. 153.11 to be problematic, we need not reach that issue.

Although the document naming Rogers as the general contractor is entitled "change order" and all parties referred to it as a "change order," that is not dispositive as to whether the document constitutes a "change order" as contemplated by former R.C. 153.11. Former R.C. 153.11 specifically applied to the "change referred to R.C. 153.10." Former R.C. 153.10 provided that "no change of plans, details, bills of material, or specifications" could be made without the approval of the owner. "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42.

Thus, "change" as used in former R.C. 153.11 refers to changes in the project "plans, details, bills of material, or specifications." Because the alleged "change order" in this case was not a change to the plans, details, bills of materials or specifications of the project, it was not a "change order" as contemplated by former R.C. 153.11. Compare *Seneca Valley, Inc. v. Caldwell*, 156 Ohio App.3d 628, 2004-Ohio-1730, 808 N.E.2d 422 (7th Dist.); *Powerlight Elec. Co. v. Howard Corp.*, 8th Dist. No. 53866, 1988 Ohio App. LEXIS 2532 (June 16, 1988); *High Voltage Sys. Div. v. Ohio Dept. of Transp.*, 10th Dist. No. 78AP-88, 1978 Ohio App LEXIS 10153 (Dec. 19, 1978); *Backus Associates, Inc. v. Ohio Dept. of Natural Resources*, 47 Ohio Misc. 11, 352 N.E.2d 663 (Ct.Cl.1976).

Because this is not a "change order" as contemplated by former R.C. 153.11, CBIC's liability was limited to the penal sum of the bond. We find no issues of material fact. Construing the evidence most strongly in Kramer's favor, we hold that reasonable minds could come to but one conclusion—that CBIC's liability was limited to \$138,900. Consequently, CBIC is entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in its favor. See *Temple v. Wean United Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); *Alexander v.*

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*Motorists Mut. Ins. Co.*, 1st Dist. No. C-110836, 2012-Ohio-3911, ¶ 16. We overrule Kramer's assignment of error, and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., DINKELACKER and FISCHER, JJ.**

To the clerk:

Enter upon the journal of the court on September 26, 2012  
per order of the court \_\_\_\_\_.  
Presiding Judge

