Final Order No. BPR-2004-04235 Date: 9-17-04
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: Brenda M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2004029306

LEWIS L. LARSON, Unit Owner,
Cedar Pointe Village No. 8 Association, Inc.
_____/

DS 2004-021

DECLARATORY STATEMENT

Lewis L. Larson (Larson), petitioner and unit owner member of Cedar Pointe Village No. 8 Association, Inc., filed a petition for declaratory statement requesting an opinion as to whether an association may select a contractor for termite fumigation of 13 apartment buildings and a clubhouse in May and June 2004 from competitive bids submitted for termite fumigation services to one building in May 2003 without obtaining new competitive bids under section 718.3026, Florida Statutes.

STATEMENT OF FACTS

The following facts are based on information submitted by Larson. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement. No hearing was requested or held.

1. Larson filed his petition with the Division on May 24, 2004. Notice of the petition was published in Florida Administrative Weekly on June 14, 2004.

2. Larson is a unit owner member of Cedar Pointe Village No. 8 Association, Inc., an "association" as that term is defined by section 718.103(2), Florida Statutes.

3. Cedar Pointe has more than 100 condominium units.

4. The association did not file a response or a petition to intervene with the Division.

5. On February 4, 2004, the association board of administration voted to spend $40,000 for the termite fumigation of thirteen buildings and one clubhouse to take place in May and June 2004. According to Larson, the $40,000 fumigation cost is 7.7 percent of the association's total annual 2004 budget of $520,227 including reserves.

6. Larson states that the association board of administration chose the fumigation contractor and signed the fumigation contract without first receiving competitive bids for the 13 buildings and clubhouse fumigation project pursuant to section 718.3026, Florida Statutes. Instead, the board used bids dated May 2003, which were requested in regards to the fumigation of one building previously. Larson asserts that the extermination "project was not offered for competitive bid to insure corrective treatment and quality workmanship be obtained at the lowest cost to association."

7. The Division has no indication of whether or not the fumigation of the 13 buildings and clubhouse occurred as scheduled.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order in accordance with sections 120.565 and 718.501, Florida Statutes.

2. Larson has standing to seek a declaratory statement.

3. Section 718.3026, Florida Statutes, provides, in relevant parts:

> Associations with less than 100 units may opt out of the provisions of this section if two-thirds of the unit owners vote to do so, which opt-out may be accomplished by a

> proxy specifically setting forth the exception from this section.
> (1) . . . . If a contact for the purchase, lease, or renting of materials or equipment, or for the provision of services, requires payment by the association on behalf of any condominium operated by the association in the aggregate that exceeds 5 percent of the total annual budget of the association, including reserves, the association shall obtain competitive bids for the materials, equipment, or services. Nothing contained herein shall be construed to require the association to accept the lowest bid.
> (2)(c) This section shall not apply if the business entity with which the association desires to enter into a contract is the only source of supply within the county servicing the association.

4. Under section 718.3026, Florida Statutes, an association is required to receive competitive bids if a service contract costs more than "5 percent of the total annual budget of the association." The fumigation contract at issue here was for more than 5 percent of the association's total 2004 budget; therefore, competitive bids are required for the fumigation services of the 13 buildings and clubhouse. Further, the contract that the association accepted based on the previous fumigation of one building was bid under the budget for 2003 and not under the budget for 2004. By using the terms "annual budget," the statute implies that a contract for services would need to be bid in relation to the year the expense is to be incurred.

5. Under section 718.3026, Florida Statutes, the association required to receive competitive bids for the project or services to be performed. The competitive bids from which the association chose the fumigator with which it contracted for the fumigation of 13 buildings and clubhouse related not to the fumigation of those 13 buildings and clubhouse, but to a different service of fumigating one building. The association can ask a previous service provider to submit another competitive bid for a new project or

service, but the association must also solicit additional competitive bids for that new project.

6. However, if the fumigation contractor utilized was the only known source of the services in the county, or if the circumstances presented a genuine emergency based on the threat presented to the building or residents caused by the termites, then the association would be excused from obtaining competitive bids for the services under section 718.3026(2)(b) and (c), Florida Statutes. The other exceptions to the competitive bid requirement under section 718.3026, Florida Statutes, (contracts entered into before January 1992; contracts with association employees; contracts for attorneys, accountants, architects, engineers, and landscape firms) do not appear to apply in the situation at issue here.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that Cedar Pointe Village No. 8 Association, Inc. may not select a contractor for termite fumigation of 13 apartment buildings and a clubhouse from competitive bids submitted for termite fumigation services to one building in May 2003 without obtaining new competitive bids under section 718.3026, Florida Statutes.

DONE and ORDERED this 8th day of September, 2004.



MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales,
Condominiums, and Mobile Homes

1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Lewis L. Larson, Cedar Pointe Village Eight Condominium, 2929 S.E. Ocean Boulevard #136-4, Stuart, Florida 34996, on this 21st day of September, 2004.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:
Michael T. Cochran, Director

Janis Sue Richardson,
Chief Assistant General Counsel