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COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

# Stuck In A Bad Deal Made Before Turnover?

## *Get Me Out Of This Contract - Part I*

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Sign your name to a contract or lease and expect to be bound by its terms. That's the reason for putting it down in writing in the first place. Yet how many times does a party to a written agreement discover only too late, that single critical clause tucked away on page twenty-five that suddenly takes on paramount significance because of an unexpected development? Or finds that some critical provision thought to have been incorporated in the agreement is actually missing? Or decides, after further analysis, that the agreement is just not fair? A contracting party finding itself in such a situation may well decide to look to its attorney for a way out. After all, that's part of what lawyers do, isn't it? And while there are various legal principles that can be used to attack the validity of a written contract or lease, as a general rule, the party seeking to avoid a signed agreement is usually going to find itself swimming against the current. The standard tools in the attorney's workshop are, more often than not, inadequate for the job. For condominium associations, however, there are a few additional specialized tools, available only to them, that may, in the right circumstance, just do the trick. Boards and managers should be aware of these, in order that they not overlook any option when trying to escape the obligations of an undesirable contract.

In evaluating how to avoid an undesirable contract, the first question that should be asked is whether the contract was entered into while the association was under developer control. If so, there may be an out. Section 718.302, Fla. Stats. provides, in part, as follows:

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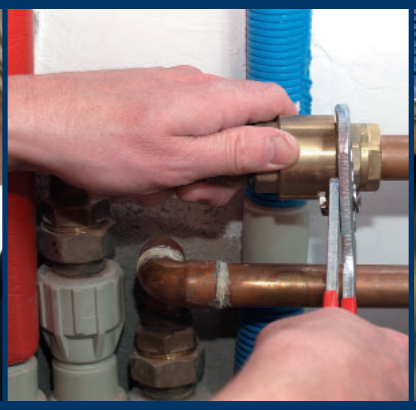


# Stuck With A Management Or Maintenance Contract?

## *Get Me Out Of This Contract - Part II*

By John Cottle, Esq.

What options are available when the contract was not entered into by a developer controlled board? Where the contract sought to be avoided is between the association and a provider of maintenance and management services and provides for the "operation, maintenance, or management of a condominium association or property serving the unit owners," 718.3025 provides that the contract is unenforceable unless it contains the following:

(**a**) Specifies the services, obligations, and responsibilities of the party contracting to provide maintenance or management services to the unit owners.

(**b**) Specifies those costs incurred in the performance of those services, obligations, or responsibilities which are to be reimbursed by the association to the party contracting to provide maintenance or management services.

(**c**) Provides an indication of how often each service, obligation, or responsibility is to be performed, whether stated for each service, obligation, or responsibility or in categories thereof.

(**d**) Specifies a minimum number of personnel to be employed by the party contracting to provide maintenance or management services for the purpose of providing service to the association.

(**e**) Discloses any financial or ownership interest which the developer, if the developer is in control of the association, holds with regard to the party contracting to provide maintenance or management services.

(**f**) Discloses any financial or ownership interest a board member or any party providing maintenance or management services to the association holds with the contracting party.

It is quite common for contracts between associations and service providers to omit one or more of the foregoing items. In assessing the availability of 718.3025 for avoiding a contract, the association should pay particular attention to whether the written document specifies the frequency with which a given service is to be preformed and the number of personnel to be employed by the contracting party in providing the service, as these are two of the most commonly omitted provisions.

The foregoing are by no means the only ways in which an association may avoid the obligations of a written contract, but they are some of the most important and effective devices available, and condominium boards and managers should be aware of their existence. Any effort by an association to avoid the obligations of an undesirable contract should obviously involve the association's legal counsel, and it is important to bring counsel into these discussions at an early stage in order to achieve the best possible result.

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> Any … lease or … contract made by an association prior to assumption of control of the association by unit owners other than the developer, that provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium shall be fair and reasonable, and such grant, reservation, or contract may be canceled by unit owners other than the developer:
>
> (a) If the association operates only one condominium and the unit owners other than the developer have assumed control of the association, or if unit owners other than the developer own not less than 75 percent of the voting interests in the condominium, the cancellation shall be by concurrence of the owners of not less than 75 percent of the voting interests other than the voting interests owned by the developer.

Thus, if the undesirable agreement is covered by 718.302, the concurrence of 75% of the non-developer owners is enough to cancel it. This concurrence should be obtained at a properly noticed meeting of the membership in order to assure compliance with 718.112(2)(b)1 requiring that decisions of the association "shall be made … at a meeting at which a quorum is present." Note that 718.302 does not cover all contracts, but only those that provide for the "operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium." Leases of space for coin operated laundries and for other services made available for the convenience of unit owners have been held to be outside the scope of that language and not subject to cancellation. Palma del Mar Condominium Association #5 of St. Petersburg v. Commercial Laundries of West Florida, 586 So.2d 315 (Fla. 1991) Likewise, easements to third parties that do not directly involve the management or operation of the association have been held to be outside the scope of agreements that can be cancelled. Hastings F Condominium Association v. Perlman, 493 So.2d 1128 (Fla. 4th DCA 1986) Bulk cable contracts, on the other hand, have been held subject to cancellation under 718.302. Comcast of Florida v. L'Ambiance Beach Condominium Association, Inc., 17 So.3d 839 (Fla. 4th DCA 2009). Each contract or lease must be independently reviewed and analyzed to determine if 718.302 may effectively be used to cancel its provisions.

# What if there is a conflict of interest?

*In cases where the contract sought to be avoided is between the association and a board member, or a business in which a board member has a financial interest, the association has yet another available tool to attack the agreement. Section 718.3026(3), Fla. Stats. provides that such contracts must be disclosed to the membership at the next membership meeting. At that meeting, the contract must be brought up for a vote on the motion of any member, and if a majority of those present vote to reject the contract, it is deemed rejected. Note that this remedy is available only once-at the next owners' meeting following the execution of the contract. Further, any member appearing at the membership meeting by proxy may only vote through a limited proxy, pursuant to the terms of 718.112(2)(b)2. A general proxy will not suffice. Obviously, owners wishing to rely on 718.3026(3) to avoid a contract will need to do the groundwork in advance of the meeting in order to solicit the necessary limited proxies. While the limited proxy requirement may diminish the effectiveness of 718.3026(3) as a vehicle for avoiding contracts, it is nevertheless an available remedy that can, in the right circumstance, be used to relieve an association from the oppressive obligations of an undesirable agreement.*

**By John Cottle, Esq.**


# after a better price is found?

What would you do when you find out that a recently purchased product can be purchased for half the price somewhere else? Most would return it, ask for a refund, and purchase it from the second seller. A recent appeal taken by the Florida Second District Court of Appeal suggests this can be done with contractors or subcontractors with regards to previously contracted services.

The decision in *Vila & Son Landscaping Corporation v. Posen Construction, Inc.* addressed whether a ***contractor*** can use a termination for convenience clause in its contract with a subcontractor to terminate the subcontract in favor of a new subcontract obtained at a better price.

Termination for convenience clauses have been around since the American Civil War and were once limited to federal government procurement contracts only. As the name suggests, the federal government could use such a clause to "terminate" a contract for "convenience." Examples of "convenience" were changes in policy, regime, position, situation, or strategy. Fast-forward to today and we find that termination for convenience clauses have become increasingly prevalent in contracts between private parties; including construction contracts. In fact, the American Institute of Architect A-201 General Conditions contains such a clause.

In the case, Posen, the contractor, terminated its subcontract with Vila, the subcontractor, after Posen received a better price for the same work. Vila sued Posen and raised three arguments; the first was that Posen acted in bad faith when he terminated only because of the lower price. The second argument was that in terminating the contract, Posen breached the implied covenants of good faith and fair dealing. Finally, Vila argued that without good faith limitations, the termination for convenience clause reduces the contract to an illusory promise (a contract that lacks consideration).

The appellate court rejected each of Vila's arguments. The court stated that if Posen followed the procedures provided under the contract, including supplying Vila with written notice (which it did), then there is no need to impose any additional limit such as bad faith. The court dismissed the good faith and fair dealing argument because it found that given the plain language of the subcontract, it "was not apparent" how Posen's decision was contrary to the good faith and fair dealing standard of reasonable expectations. Finally, the court quashed the illusory promise argument and cited Florida law which states that a provision requiring written notice (like the termination for convenience clause at issue), the written notice requirement prevents the promise made by the party with the right of termination from being regarded as illusory in nature.

A community association is an owner of a given project. Although Posen was a contractor in *Vila*, a community association stands in a similar position and would certainly be well served to include a provision like the one in *Vila* in its contracts. Nevertheless, the decision leaves us with some rules of thumb to follow in doing so:

- Include a termination for convenience provision in your construction contracts and do not limit its use to specific scenarios.
- Make sure the provision includes a written notice requirement and make sure it is followed in the event that you will be terminating for convenience. Without delving too deep into the law of contracts, remember this is the consideration requirement. In Florida, consideration is any bargained for legal benefit or legal detriment, and as many law students are taught, a mere peppercorn (or written notice) ***is*** enough.
- Try to layout and express the expectations of the parties. If being able to terminate because a lower price is found is what was bargained for than express that. However, realize that it won't be possible to include a provision that is too onerous. Some contractors and subcontractors may insist on special caveats that state termination for convenience clauses cannot be used for the sole purpose of obtaining a lower price.

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