

Housing Authority, attorney contingency fee

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Mr. Nagin Gallop Figueredo
The Housing Authority of the
City of Miami Beach
200 Alton Road
Miami Beach, Florida 33139-6742

Dear Mr Figueredo:

As general counsel to the Housing Authority of the City of Miami Beach, you have requested an opinion on whether a public housing agency is authorized to hire a lawyer or a law firm under a contingent fee agreement to obtain litigation representation.

Part I of Chapter 421, Florida Statutes, is Florida's "Housing Authorities Law."^[1] Based on a finding that there was a shortage of sanitary and safe dwelling accommodations available to low income persons, the Legislature declared:

"The clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income, including the acquisition by a housing authority of property to be used for or in connection with housing projects or appurtenant thereto, are exclusively public uses and purposes for which public money may be spent and private property acquired and are governmental functions of public concern."^[2]

To address this problem, the Legislature authorized the creation of housing authorities.^[3]

Section 421.04, Florida Statutes, creates a housing authority in each city but authorizes the transaction of business or exercise of powers by the authority only after the city governing body passes a resolution declaring a need for a housing authority to function in that city.^[4] The powers of a housing authority are set forth in section 421.08, Florida Statutes. Among the powers that may be exercised by a housing authority are the power "to sue and be sued,"^[5] and "to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority."^[6] With regard to legal representation, section 421.05(2), Florida Statutes, states that "[f]or such legal services as it may require, an authority may call upon the chief law officer of the city or may employ its own counsel and legal staff."

The Rules Regulating the Florida Bar address the fees and costs for legal services, including contingency fees. Pursuant to Rule 4-1.5(f) of the Rules of Professional Conduct, contingent fees are an acceptable fee arrangement for legal services except as prohibited by these rules or by law. The rules prohibit contingent fee arrangements for domestic relations matters and for representation of a defendant in a criminal case.^[7] Further, section 287.055, Florida Statutes, the "Consultants' Competitive Negotiation Act," criminalizes payment of contingency fees for

soliciting or securing a contract with a public agency for architecture, engineering, landscape architecture, surveying, or mapping services. Nothing in this statute prohibits contingency fees for legal representation, and I assume that the legal representation required by the housing authority does not include criminal representation or domestic relations cases.

Florida courts have considered contingent fee contracts involving government procurement and have determined that such contracts do not violate public policy unless they are shown to involve favors or corrupt means. Thus, in *Rotemi Realty, Inc. v. Act Realty Company, Inc.*,^[8] the Florida Supreme Court considered whether the common practice of paying real estate commissions contingent on completion of the sale violated Florida public policy when applied to a purchase or sale by a governmental entity. The Court had for review a decision from the appellate court concluding that "contracts which provide for contingency awards for securing public monies are against public policy."^[9] The Court had earlier announced the general rule that contingency fee contracts involving government procurement violate public policy only if they are shown to involve "favors or corrupt means."^[10] The Court explained the genesis of the "general rule":

"We derived the 'general rule' in *Robert & Co.* from two earlier decisions. The first was *Edwards v. Miami Transit Co.*, 150 Fla. 315, 7 So. 2d 440 (Fla. 1942), in which a transit company entered a contingency-fee contract with an individual who attempted to secure a bus franchise from the City of Miami. *Id.* at 440. We refused to declare the contract facially illegal because it 'conceivably could have been lawfully performed without any one engaging in any act or practice which was contrary to public morals or to the public welfare.' *Id.* at 442. The other case was *Wechsler*, 26 So. 2d at 884, decided two years before *Robert & Co.* We held there that 'the legality of agreements to influence administrative or executive officers or departments is to be determined in each case by weighing all the elements involved and then deciding whether the agreement promotes corrupt means to accomplish an end.' *Id.* at 887. Although *Robert & Co.*, *Edwards*, and *Wechsler* were decided more than half a century ago, they represent our most recent statements on this subject. Since then, we have neither confirmed nor questioned their general rule."

The Court also considered the applicability of the Consultants' Competitive Negotiation Act, section 287.055, Florida Statutes, and determined that the professional services encompassed in that statute are limited to those expressly mentioned, *i.e.*, architecture, engineering, landscape architecture, surveying, or mapping.^[11]

Based on the statutory authority of the housing authority to employ its own counsel and legal staff, the limitations on contingent fees provided in the Rules of Professional Conduct, and the general public policy rule announced by the Court most recently in the *Rotemi* case, it would appear that the Housing Authority of the City of Miami Beach is authorized to hire a lawyer or law firm under a contingency fee agreement in order to obtain litigation representation. The housing authority should be cognizant of Rule 4-1.5, Rules Regulating the Florida Bar, relating to contingent fees and their assessment and may wish to rely on those provisions for direction in determining reasonable attorney's fees.

This informal advisory opinion was prepared for you by the Department of Legal Affairs in an effort to be of assistance to you. The opinions expressed herein are those of the writer and do not constitute a formal opinion of the Attorney General.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tfl

[1] Section 421.01, Fla. Stat.

[2] Section 421.02(3), Fla. Stat.

[3] See s. 421.04, Fla. Stat. (creation of municipal housing authorities); s. 421.27, Fla. Stat., (housing authorities in counties); s. 421.28, Fla. Stat. (creation of regional housing authority).

[4] *And see* s. 421.04(2), Fla. Stat., specifying what findings must be made by the governing body to establish a need for a housing authority.

[5] Section 421.08(1), Fla. Stat.

[6] *Id.*

[7] See Rule 4-1.5(f)(3)(A) and (B), Rules Regulating the Florida Bar.

[8] 30 Fla. L. Weekly S 528 (Fla. 2005).

[9] *Act Realty Co. v. Rotemi Realty, Inc.*, 863 So. 2d 334, 336 (Fla. 3rd DCA 2003).

[10] *Robert & Co. v. Mortland*, 33 So. 2d 732 (Fla. 1948).

[11] *And see* s. 287.059(7)(a), Fla. Stat., authorizing an agency of state government to contract for private attorney services and allowing contingency fee contracts for such services so long as they are "commercially reasonable."