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M E M O R A N D U M

TO: INTERESTED PARTIES

FROM: STEPHEN P. AUGER, EXECUTIVE DIRECTOR 

DATE: AUGUST 18, 2009

RE: RFP 2009-04 - STATEMENT OF NECESSITY TO CONTINUE RFP PROCESS
AFTER BID PROTEST IS FILED

On Monday, August 17, 2009, Elmwood Terrace Limited Partnership filed its "Formal Written Protest and Petition for Administrative Hearing," formally protesting the terms of the Request for Proposals ("RFP") 2009-04, which was issued by Florida Housing to allocate funds available from the Tax Credit Exchange Program ("Exchange Program") and the Tax Credit Assistance Program ("TCAP"), which were created by the American Recovery and Reinvestment Act of 2009, PL 111-5 ("ARRA");. The filing of a formal written bid protest halts the RFP process, except as otherwise provided, pursuant to sec. 120.57(3)(c), Fla. Stat.:

- (c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

I am directing Florida Housing's staff to continue the process of evaluating, scoring, and recommending awards as provided in RFP 2009-04. As explained more completely below, that action is justified to avoid immediate and serious danger to the public welfare by the risk of Florida losing substantial federal resources due to the timetables imposed by the ARRA.

The Low Income Housing Tax Credit ("LIHTC"), a dollar-for-dollar credit against federal income tax liability, was created in 1986 to induce private sector development of affordable multifamily rental units by providing a source of equity capital. Developers sell the award of LIHTC to investors, who are able to utilize the tax credit. LIHTCs typically sold in the range of 85-95 cents on the dollar in recent years. Market forces have substantially degraded the

value of the tax credits in the last two years; sales, when a buyer can be found, are in the low sixty-cent range. The respondents seeking funding through RFP 2009-04 have previously been awarded LIHTC, but have returned or forfeited credits because they are unable to find an investor willing to buy at a price that will make a project feasible--or unable to find an investor at any price. The ARRA TCAP and Exchange programs are intended to supplement and/or replace the LIHTC value lost due to the current market conditions, thus to restore the viability of as many projects as feasible.

RFP 2009-04 is the mechanism used by Florida Housing to allocate funds available through the Exchange Program created by the ARRA. The Exchange Program allows Florida Housing, as the state LIHTC allocating agency, to receive cash from the U.S. Treasury in exchange for certain allocated tax credits. The rate of exchange is $.85 \times 10^1$, which should result in Exchange Program funds available to be awarded through RFP 2009-04 of about \$456,650,000, to provide multifamily rental projects with equity capital which would in normal market conditions be provided by LIHTC investors.

A closely-related ARRA program, TCAP, will provide \$101,134,952 of funds from HUD, through both RFP 2009-03 and RFP 2009-04. TCAP will provide gap financing to supplement LIHTC awarded by state allocating agency action to projects between October 1, 2006, and September 30, 2009. 75% of TCAP funds must be committed to projects not later than February 16, 2010.

The TCAP and Exchange programs are inextricably linked, as the provisions of RFP 2009-04 place a cap on the amount of Exchange funds that can be requested and any further financing gap must be filled with TCAP funding. 18 of 31 projects responding to RFP 2009-04 represented that they would require both TCAP and Exchange funds to be viable. To participate in the Exchange program, developers returned their LIHTC to Florida Housing for the opportunity to receive Exchange Program funding. To participate in the TCAP program, the ARRA requires that projects must have at least a "nominal" LIHTC allocation. Per federal law, these awards of LIHTC must be made by September 30, 2009. Thus, a delay in RFP 2009-04 will delay the awards of tax credits, pursuant to the RFP, which will ultimately result in the loss of much of the \$ 101,134,952 available through TCAP.

As stated earlier, these two ARRA programs are related to the LIHTC Program. The Exchange Program is under the guidance of the U.S. Treasury Department (Treasury) and TCAP is under the guidance of U.S. Department of Housing and Urban Development (HUD). Both programs must follow Section 42 of the Internal Revenue Code along with additional written guidance from each provider.

The Exchange Program does not specifically provide for award deadlines, but any funds not drawn upon by the state housing agency and expended by the developer of the project by December 31, 2010, will be forfeited. (Exchange funds may not be placed in escrow.)

¹ Low income housing tax credits are awarded on an annual basis, with the face amount paid each year for ten years. Under that program, developers sell the tax credits for some fraction of the face value to an investor, who then redeems the credit with the IRS over the ensuing ten years.

Even if the TCAP deadline of September 30, 2009, were not a consideration, the abbreviated schedule developments must meet in order to draw down the Exchange funds by December 31, 2010, also requires that the process not be delayed. To understand the necessity to proceed with the RFP process when the ultimate deadline is some fifteen months away, one need only look at the progression of projects allocated LIHTC in the 2007 award cycle. Of the 20 projects awarded competitive LIHTC in September 2007, 13 have commenced construction; the remaining seven have returned or forfeited the tax credits awarded. The project first to commence construction took eight months from award to commencement; only three developments commenced construction within eleven months. The six months that RFP 2009-04 allows for construction commencement is already considerably shortened from the norm.

The ultimate timetables are imposed not by Florida Housing, but by the federal government through the ARRA. Assuming that there no delays, the process set forth in sec. 120.57(3), Fla. Stat., will take something over two months to conclude. If the RFP process is halted while the bid protest is adjudicated, this already abbreviated timetable will be so shortened that it simply will not be possible to expend large amounts of the federal funds made available through the ARRA in the time provided by the ARRA. In order to prevent the loss of substantial federal resources, with the concomitant injury to the welfare of the State, it is necessary to proceed with RFP 2009-04 without delay.