STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINNACLE RIO, LLC

Petitioner,

vs. Case No. 14-1398BID
14-1399BID
14-1400BID
14-1428BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

and

ALLAPATTAH TRACE APARTMENTS,
LTD.,

Intervenor.
_______________________________/

RECOMMENDED ORDER

Pursuant to notice, an evidentiary hearing was held in the above-styled consolidated cases on April 22, 29, and 30, 2014, in Tallahassee, Florida, before F. Scott Boyd, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner Pinnacle Rio, LLC:

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For Petitioner/Intervenor Town Center, Phase Two, LLC:

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For Petitioner APC Four Forty Four, Ltd.:

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For Respondent Florida Housing Finance Corporation:

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For Intervenor Allapattah Trace Apartments, Ltd.:

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For Intervenor HTG Miami-Dade 5, LLC:

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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent's intended decision to award low-income housing tax credits in Miami-Dade County through Request for Applications 2013-003 to

HTG Miami-Dade 5, LLC, and Allapattah Trace Apartments, Ltd., is contrary to governing statutes, the corporation's rules or policies, or the solicitation specifications.

PRELIMINARY STATEMENT

Respondent, Florida Housing Finance Corporation (FHFC or the Corporation), issued Request for Applications 2013-003 (RFA) on September 19, 2013, through which it solicited applications to compete for the award of low-income tax credits for affordable housing developments to be constructed in Miami-Dade, Broward, and Palm Beach Counties. One hundred nineteen applications were filed by the November 12, 2013, deadline in response to the RFA.

The Board of Directors of FHFC posted a Notice of Intended Decision by electronic posting on January 31, 2014. The posting indicated the sorting order for the applications, including which applications had been deemed eligible and ineligible, and approved the Review Committee's recommendation to award tax credits for construction in Miami-Dade County to HTG Miami-Dade 5, LLC d/b/a Wagner Creek (HTG) and to Allapattah Trace Apartments, Ltd., (ATA).

Petitioners Pinnacle Rio, LLC (Pinnacle), Town Center, Phase Two, LLC (TC), and APC Four Forty Four, Ltd. (APC), timely filed notices of intent to protest, followed by formal written protests pursuant to section 120.57(3), Florida Statutes (2013).

The Corporation referred these protests, along with others now dismissed, to the Division of Administrative Hearings, where the cases were consolidated and, after a scheduling conference, set for hearing on April 22, 29, and 30, 2014.

A Joint Pre-Hearing Stipulation was entered into by all parties and stipulated facts are included among the Findings of Fact below.

The parties offered Joint Exhibits J-1 through J-5, which were admitted into evidence. Petitioner Pinnacle offered 12 exhibits, P-1 through P-9, and P-11 through P-13, all of which were admitted. Petitioner TC introduced 10 exhibits, TC-1, TC-7, TC-8, TC-11 through TC-14, TC-18, TC-20, and TC-21, including the deposition testimony of Mr. Frank Lezcano, and presented the telephone testimony of Mr. Alberto Milo, Jr. Petitioner APC offered 19 exhibits, APC-1 through APC-12, and APC-14 through APC-20, which were admitted into evidence. Exhibit APC-13 was not admitted. APC also offered the testimony of Ms. Elizabeth Wong, Vice President of Atlantic Pacific Communities and Ms. Elizabeth O'Neill, Senior Policy Analyst at FHFC. Respondent FHFC introduced Exhibit FHFC-1, the deposition testimony of Ms. Amy Garmon, Review Committee member, and offered the testimony of Ms. Elizabeth Thorp, Multifamily Programs Manager and Mr. Kenneth Reecy, Director of Multifamily

Programs for the Corporation. Intervenor ATA introduced 18 exhibits, ATA-1, ATA-3 through ATA-14, and ATA-18 through ATA-22, including the deposition testimony of four witnesses, Mr. Jorge Cordoves, Mr. Mark Johnson, Mr. Douglas Pile, and Mr. Alberto Milo, Jr., and presented the live testimony of Mr. William Fabbri, Executive Vice President of The Richman Group Development Corporation. Intervenor HTG offered Exhibit HTG-1, which was admitted into evidence. Official recognition was given to Florida Administrative Code Rule chapters 67-48 and 67-60.

The three-volume hearing Transcript was filed on May 5, 2014. After an Order granting a one-day extension of time, all parties timely filed Proposed Recommended Orders by May 16, 2014, which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Overview

1. FHFC is a public corporation created pursuant to section 420.504, Florida Statutes (2013).[1/] Its purpose is to promote the public welfare by administering the governmental function of financing affordable housing in Florida. Pursuant to section 420.5099, FHFC is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code and has the responsibility and

authority to establish procedures for allocating and distributing low-income housing tax credits.

2. The low-income housing tax credit program was enacted by Congress in 1986 to incentivize the private market to invest in affordable rental housing. Tax credits are competitively awarded to housing developers in Florida for qualified rental housing projects. Developers then sell these credits to investors to raise capital (or equity) for their projects, which reduces the debt that the developer would otherwise have to borrow. Because the debt is lower, a tax credit property can offer lower, more affordable rents.

3. Provided the property maintains compliance with the program requirements, investors receive a dollar-for-dollar credit against their federal tax liability each year over a period of 10 years. The amount of the annual credit is based on the amount invested in the affordable housing.

4. These are tax credits and not tax deductions. For example, a $1,000 deduction in a 15 percent tax bracket reduces taxable income by $1,000 and reduces tax liability by $150. However, a $1,000 tax credit reduces tax liability by $1,000.

5. Developers that are awarded tax credits can use them directly. However, most sell them to raise equity capital for their projects.[2/] Developers sell these credits for up-front cash. A developer typically sets up a limited partnership or

limited liability company to own the apartment complex. The developer maintains a small interest but is responsible for building the project and managing (or arranging for the management) of the project. The investors have the largest ownership interest but are typically passive investors with regard to development and management.[3/]

6. Because the tax credits can be used by the investors that provide the equity for 10 years, they are very valuable. When sold to the investors, they provide equity which reduces the debt associated with the project. With lower debt, the affordable housing tax credit property can (and must) offer lower, more affordable rent.

7. The demand for tax credits provided by the federal government far exceeds the supply. FHFC has adopted Florida Administrative Code Rule chapter 67-60, to govern the competitive solicitation process for several different programs, including the one for tax credits.

8. Chapter 67-60 was newly enacted on August 20, 2013. It replaced prior procedures used by FHFC for the competitive process for allocating tax credits. FHFC has now adopted the bid protest provisions of section 120.57(3), Florida Statutes, as its process for allocating tax credits.[4/]

The Competitive Application Process

9. Tax credits are made available annually. FHFC begins the competitive application process through the issuance of a Request for Applications.[5/] In this case, that document is Request for Applications 2013-003. A copy of the RFA, including its Questions & Answers, is Joint Exhibit 1. The RFA was issued September 19, 2013 and responses were due November 12, 2013.

10. According to the RFA, FHFC expected to award up to approximately $10,052,825 in tax credits for qualified affordable housing projects in Miami-Dade, Broward, and Palm Beach Counties.

11. Knowing that there would be far more applications than available credits, FHFC established an order for funding in the three counties:

> The Applications will be considered for funding in the following funding order: first the highest scoring eligible Application located in Miami-Dade County that can meet the Funding Test, then the highest scoring eligible Application located in Broward County that can meet the Funding Test, then the highest scoring eligible Application located in Palm Beach County that can meet the Funding Test, then the highest scoring eligible unfunded Application located in Miami-Dade County that can meet the Funding Test and then the highest scoring eligible unfunded Application located in Broward County regardless of the Funding Test. If there is not enough funding available to fully fund this last Broward County Application, the Application will be entitled to receive a

> Binding Commitment for the unfunded balance. No further Applications will be considered for funding and any remaining funding will be distributed as approved by the Board.

RFA at page 36.

12. Applications were scored using a 27-point scale based on criteria in the RFA. RFA at page 37. This process was described in the RFA as follows:

> The highest scoring Applications will be determined by first sorting all eligible Applications from highest score to lowest score, with any scores that are tied separated first by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four A.4.c.(1)(a) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference), then by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.9.e. of the RFA, (with Applications that qualify for the preference listed above Applications to [sic] do not qualify for the preference), then by the Application's Leveraging Classification (applying the multipliers outlined in Exhibit C below and having the Classification of A be the top priority), then by the Application's eligibility for the Florida Job Creation Preference which is outlined in Exhibit C below (with Applications that qualify for the preference listed above Applications that do not qualify for the preference), and then by lottery number, resulting in the lowest lottery number receiving preference.

RFA at page 36 (emphasis added).

13. The way this process works in reality is that the developers know that they must first submit a project that meets all the eligibility criteria and does not have any significant omissions or errors.[6/] Developers also strive to submit projects structured to receive all 27 points. The tiebreaker is then the luck-of-the-draw. At the time each application is filed, it is randomly assigned a lottery number[7/] used to break the ties.

14. The role of the lottery numbers is demonstrated by the following facts. One hundred and nineteen applications were filed in response to the RFA. All but six received the maximum score of 27 points. Seventy of the 119 were deemed eligible. Of those 70, 69 received the maximum score of 27 points. A copy of the RFA Sorting Order is Joint Exhibit 2.[8/] As such, the lottery numbers are a big factor in deciding the winners and, concomitantly, the challengers are (1) the projects with high lottery numbers that were deemed ineligible; and (2) those with lottery numbers outside the funding range that are trying to displace those with lower lottery numbers.

15. A copy of the final Review Committee Recommendations is Joint Exhibit 3. This document shows the developers selected, the county and the lottery number.

16. The two Miami-Dade projects selected for funding are:

- HTG Miami-Dade 5, LLC d/b/a Wagner Creek - lottery number 3

- Allapattah Trace Apartments, Ltd. - lottery number 6

17. The Petitioners/Intervenors in these consolidated proceedings are:

- Town Center Phase Two, LLC - lottery number 7
- Pinnacle Rio, LLC - lottery number 9
- APC Four Forty Four, Ltd. - deemed ineligible and with a lottery number of 10

18. The protests here center upon whether various applicants were correctly deemed eligible or ineligible. Applications are competitively reviewed, and so determinations as to one applicant affect other applicants' positions. Each application, and the allegations against it, will be considered in turn.

<u>HTG's Application</u>

19. APC argues that HTG should be found ineligible for allocation of tax credits because HTG failed to disclose its principals and those of its developer, as required by the RFA.

20. The RFA at Section Four A.2.d. provides, in part, that each applicant will submit an application that identifies:

> d. Principals for the Applicant and for each Developer.
>
> All Applicants must provide a list, as Attachment 3 to Exhibit A, identifying the Principals for the Applicant and for each Developer, as follows:
>
> * * *

(2) For a Limited Liability Company, provide a list identifying the following: (i) the Principals of the Applicant as of the Application Deadline and (ii) the Principals for each Developer as of the Application Deadline. This list must include warrant holders and/or option holders of the proposed Development.

* * *

This eligibility requirement may be met by providing a copy of the list of Principals that was reviewed and approved by the Corporation during the advance-review process.

To assist the Applicant in compiling the listing, the Corporation has included additional information at Item 3 of Exhibit C.

RFA at page 5.

21. The RFA goes on to provide in Exhibit C 3.:

3. Principal Disclosures for Applicants and Each Developer

The Corporation is providing the following charts and examples to assist the Applicant in providing the required list identifying the Principals for the Applicant and for each Developer. The term Principals is defined in Section 67-48.002, F.A.C.

a. Charts:

(1) For the Applicant:

* * *

(b) If the Applicant is a Limited Liability Company:

Identify All Managers	and	Identify All Members

and

For each Manager that is a Limited Partnership:		For each Manager that is a Limited Liability Company:		For each Manager that is a Corporation:
Identify each General Partner		Identify each Manager		Identify each Officer
and		and		and
Identify each Limited Partner		Identify each Member		Identify each Director
				and
				Identify each Shareholder

and

For each Member that is a Limited Partnership:		For each Member that is a Limited Liability Company:		For each Member that is a Corporation:
Identify each General Partner		Identify each Manager		Identify each Officer
and		and		and
Identify each Limited Partner		Identify each Member		Identify each Director
				and
				Identify each Shareholder

For any Manager and/or Member that is a natural person (i.e., Samuel S. Smith), no further disclosure is required.

RFA at page 61.

22. The RFA at Section Three F.3. Provides:

> 3. Requirements. Proposed Developments funded with Housing Credits will be subject to the requirements of the RFA, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the credit underwriting and HC Program requirements outlined in Rule Chapter 67-48, F.A.C., and the Compliance requirements of Rule Chapter 67-53, F.A.C.

RFA at page 3.

23. The term "principal" is defined by rule 67-48.002(89)[9/], as follows:

> (89) "Principal" means:
>
> (a) Any general partner of an Applicant or Developer, any limited partner of an Applicant or Developer, any manager or member of an Applicant or Developer, any

> officer, director or shareholder of an Applicant or Developer,
>
> * * *
>
> (c) Any officer, director, shareholder, manager, member, general partner or limited partner of any manager or member of an Applicant or Developer, and . . . .

24. HTG received an "advance review" approval of its designation of principals on October 8, 2013. HTG submitted this stamped and approved list of principals with its application.

25. Applicant HTG is a limited liability company, as is its developer, HTG Miami-Dade 5 Developer, LLC. In its submission of principals, HTG disclosed the names of the manager and member of the applicant and the manager and member of the developer, all of which were also LLCs. HTG also disclosed the names of the managers and members of these component LLCs. HTG did not disclose any officers of the applicant, the developer, or any of the component LLCs.

26. Other documents submitted as part of the application indicate that Mr. Matthew Rieger is a Vice President of the applicant, HTG Miami-Dade 5, LLC, and that the component LLCs also have officers.

27. APC contends that the rule's definition of principal requires HTG to disclose not only the managers and members of the applicant and developer, and those of their component LLCs,

but also the officers of any of these entities, if they also have officers.

28. FHFC asserts that such disclosure is not required, arguing that the term "officer" as found in the rule's definition of "principal" only applies to corporations. FHFC argues that there is no inconsistency between the rule and the charts of the RFA with respect to disclosure of principals. FHFC contends that the charts in the RFA, read in conjunction with the rule, indicate that officers must be disclosed only when the entity is a corporation, and that members and managers must be disclosed when the entity is a LLC.

29. FHFC interprets rule 67-48.002(89) in a manner consistent with the charts. It does not interpret the rule to require that an LLC disclose its officers, even if it has them, but only that an LLC disclose its managers and members. Both Ms. O'Neill and Ms. Thorp testified to that effect. The examples provided in the RFA are also consistent with this interpretation.

30. The rule certainly might have been drafted with more precision to expressly indicate that a principal is any officer, director, or shareholder if the entity is a corporation; any manager or member if the entity is an LLC; and any general partner or limited partner if the entity is a Limited

Partnership. It cannot be said, however, that the Corporation's interpretation of the RFA and its rule is impermissible.

ATA's Application

31. Mr. Kenneth Reecy, Director of Multifamily Programs, testified that FHFC revised the "Universal Application Cycle" process that had been conducted in the past. Under the old universal cycle, most of the criteria were incorporated into the rule, and then there was a "cure" process that provided an opportunity to correct errors that didn't necessarily have a bearing on whether a project was good enough to be funded. Under the newer process, several issues were moved out of the eligibility and scoring phase and into the credit underwriting phase.[10/] Specifically relevant here, site plan issues and the availability of infrastructure, such as sewer service, were no longer examined as part of the eligibility and scoring phase set forth in the RFA. Mr. Reecy testified that these issues were complex and had been intentionally pushed to the "rigorous review" that takes place during the credit underwriting phase.

32. In signing and submitting Exhibit A of the RFA, each applicant acknowledges and certifies that certain information will be provided to FHFC by various dates in the future. RFA at page 46. Section Four 10.b.(2)(b) provides in part that the following will be provided:

(2) Within 21 Calendar Days of the date of the invitation to enter credit underwriting:

(a) Certification of the status of site plan approval as of Application Deadline and certification that as of Application Deadline the site is appropriately zoned for the proposed Development, as outlined in Item 13 of Exhibit C of the RFA;

(b) Certification confirming the availability of the following for the entire Development site, including confirmation that these items were in place as of the Application Deadline: electricity, water, sewer service, and roads for the proposed Development, as outlined in Item 13 of Exhibit C of the RFA;

33. Item 13 of Exhibit C goes on to provide:

13. Certification of Ability to Proceed:

Within 21 Calendar Days of the date of the invitation to enter credit underwriting, the following information must be provided to the Corporation:

a. Submission of the completed and executed 2013 Florida Housing Finance Corporation Local Government Verification of Status of Site Plan approval for Multifamily Developments form.

* * *

c. Evidence from the Local Government or service provider, as applicable, of the availability of infrastructure as of Application Deadline, as follows:

* * *

(3) Sewer: Submission of the completed and executed 2013 Florida Housing Finance Corporation Verification of Availability of Infrastructure — Sewer Capacity, Package Treatment, or Septic Tank form or a letter

> from the service provider which is dated within 12 months of the Application Deadline, is Development specific, and specifically states that sewer service is available to the proposed Development as of the Application Deadline.

34. The 2013 Florida Housing Finance Corporation Local Government Verification of Status of Site Plan Approval for Multifamily Developments Form (Site Plan Approval Form) and the 2013 Florida Housing Finance Corporation Verification of Availability of Infrastructure — Sewer Capacity, Package Treatment, or Septic Tank Form (Certification of Sewer Capacity Form) are incorporated by reference in the RFA.

35. The Site Plan Approval Form requires (in the case of Miami-Dade County which does not have a preliminary or conceptual site plan approval process) that the local government confirm that the site plan was reviewed as of the application deadline.

36. Pinnacle and APC assert that the site plan that ATA submitted to the City of Miami for review included a strip of land that is not legally owned by the current owner and will not be conveyed to ATA under the Purchase and Sale Agreement. As a result, they contend, the site plan review which was required on or before the application deadline did not occur. Pinnacle argues that ATA's certification in its application was incorrect, that this was a mandatory requirement that was not met, and that

it will be impossible for ATA to provide the Site Plan Approval Form in credit underwriting.

37. TC similarly maintains that ATA could not "acknowledge and certify" as part of its application that it would later certify that it had "ability to proceed" because the RFA (at Section Four 10.b.(2)(b) quoted above) requires that "sewer service" be "in place" for ATA's proposed development as of the application deadline. TC also asserts that the Certification of Sewer Capacity Form explicitly states (and that any service provider letter must, too) that no moratorium is applicable to a proposed development.

38. ATA did not submit a Certification of Sewer Capacity Form. Miami-Dade County will not complete such forms. The "letter of availability" option was created to accommodate Miami-Dade County.

39. The November 12, 2013, letter from Miami-Dade Water and Sewer regarding ATA's development does not state that there is no applicable moratorium in effect. In fact, the letter affirmatively acknowledges that flow to the gravity system already connected to the property cannot be increased because there is a moratorium in effect as to the pumping station serving the abutting gravity sewer basin.

40. The letter from the County states that, if the pumping station is still in Moratorium Status "at the time this project is ready for construction," that a private pump station is acceptable. It is logical to conclude that this means sewer service would be available at that time and that sewer service was similarly available at the time of application deadline. The letter, therefore, implies, but does not specifically state, that "sewer service is available to the proposed development as of the application deadline."

41. The moratorium in effect at the application deadline was not a "general" moratorium. It applied only to the pump station serving the abutting gravity sewer basin, but it was applicable to the proposed development and precluded any increase in the flow to the gravity system connected to the property. A moratorium pertaining to sewer service applicable to ATA's proposed development was in effect at the time that ATA's application was submitted. Sewer capacity was otherwise available for the proposed development through use of a private pump station.

42. ATA asserts, first, that ATA has not yet filed certification of ability to proceed or the required forms or letter, that it is not to do so until after it is invited to enter credit underwriting, that FHFC has consequently yet to

make a determination as to ATA's ability to proceed, and that therefore any issues as to site plan or sewer service are not yet ripe for consideration.

43. As to the site plan, ATA further maintains that even if it had been required to provide evidence of ability to proceed as part of its application, the site plan submitted to the City of Miami did not represent that the alley was part of the ATA site. ATA, therefore, asserts that the site plan that was reviewed was the correct one, and that its application certification was correct.

44. The plan of the site of ATA's development project indicates that the site is bifurcated by a private alley, which is not dedicated as a street, avenue, or boulevard.

45. The legal description of the development project, as submitted to the Department of Planning and Zoning of the City of Miami, included lots 2 through 7 and lots 19 and 20. It did not include the strip of land that lies between these lots (lots 2 through 7 lie to the West of the alley and lots 19 and 20 lie to the East of it.)

46. As to sewer availability, ATA asserts that the 2011 Universal Cycle and the RFA are significantly different. ATA maintains that while the former provided that the existence of a moratorium pertaining to sewer service meant that infrastructure

was unavailable, this language was removed from the RFA. ATA contends that a letter of availability need not "mimic" the Certification of Sewer Capacity Form and that the RFA allows a development to certify sewer availability by other means when a moratorium is in effect.

47. Mr. Reecy testified that FHFC takes the certified application at face value, regardless of what other information the Corporation might have at hand. As to the site plan, he testified that even had site plan approval been a part of the scoring process, FHFC would not have found ATA's application ineligible on that ground. He testified that the alley would not be a problem unless it was a "road" or something similar. He testified that it also could have been a problem if the measurement point to measure the distance to nearby amenities was not on the property, but he was not aware that that was the case in ATA's application.

48. As for sewer service, Mr. Reecy testified that a letter from the service provider does not have to say "exactly" what is on the form, but stated that it does have to give "the relevant information" to let FHFC know if sewer is "possible." He testified that the only guidance as to what constituted sewer "availability" was contained in the criteria found on the Certification of Sewer Capacity Form.

49. One of the four numbered requirements on the Certification of Sewer Capacity Form is that there are no moratoriums pertaining to sewer service that are applicable to the proposed development.

50. Under the RFA, the Certification of Sewer Capacity Form could not be completed for a proposed development for which a moratorium pertaining to sewer service was in effect at the time the application was submitted. The form could not be certified by the service provider even if it was possible for such a development to obtain sewer service by other means. The text on the 2013 form is substantively identical to that on the form used during the 2011 Universal Cycle, that wording was specifically drafted to require that any moratorium on sewer infrastructure would be a disqualifying criterion, and the 2013 Certification of Sewer Capacity Form still has that effect. No challenge to the use of the form in the RFA was filed. Even though the language of the 2011 Universal Cycle which paralleled the text on the form does not appear in the RFA, that criterion remains as part of the RFA because of the incorporated Certification of Sewer Capacity Form.

51. In any event, the site plan and sewer availability issues must await at least initial resolution by FHFC during the credit underwriting phase. The testimony of Mr. Reecy clearly

indicated that FHFC interprets the RFA specifications and its rules to move consideration of site plan issues and infrastructure availability to the credit underwriting phase. It has not been shown that this is an impermissible interpretation.

Town Center's Application

52. Pinnacle alleges that TC's application fails to demonstrate site control, because the applicant, Town Center Phase Two, LLC, is not the buyer of the site it intends to develop.

53. The RFA requires at Section Four A.7. that an applicant must provide a copy of a contract, deed, or lease to demonstrate site control:

> 7. Site Control:
>
> The Applicant must demonstrate site control by providing, as Attachment 7 to Exhibit A, the documentation required in Items a., b., and/or c., as indicated below. If the proposed Development consists of Scattered Sites, site control must be demonstrated for all of the Scattered Sites.
>
> a. Eligible Contract - For purposes of the RFA . . . the buyer MUST be the Applicant unless an assignment of the eligible contract which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant, is provided. If the owner of the subject property is not a party to the eligible contract, all documents evidencing intermediate contracts, agreements, assignments, options, or conveyances of any kind between or among the owner, the Applicant, or other parties, must be provided . . . .

RFA at page 23.

54. The Contract for Purchase and Sale of Real Property submitted as Attachment 7 to TC's application is signed by Mr. Milo, who is identified as Vice President. The Buyer on the signature page is incorrectly listed as RUDG, LLC.

55. No other assignment, intermediate contract, agreement, option, or conveyance was included with TC's application to indicate that TC otherwise had site control of the property.

56. The applicant entity, Town Center Phase Two, LLC, is correctly listed in the opening paragraph of the Contract for Purchase and Sale of Real Property as the "Buyer."

57. RUDG, LLC, is the 99.99 percent Member of Town Center Phase Two, LLC, and is also the sole Member and Manager of Town Center Phase Two Manager, LLC, which is the .01 percent Managing Member of Town Center Phase Two, LLC.

58. Mr. Milo is a Vice President of RUDG, LLC, a Vice President of Town Center Phase Two Manager, LLC, and a Vice President of the applicant, Town Center Phase Two, LLC.

59. Florida Administrative Code Rule 67-60.008, provides that the Corporation may waive minor irregularities in an otherwise valid application.

60. The term "Minor Irregularity" is defined by rule 67-60.002(6), as follows:

> (6) "Minor Irregularity" means a variation in a term or condition of an Application

> pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of the Corporation or the public.

61. Mr. Reecy testified that FHFC interpreted the rule to mean that if information requested by the RFA is reasonably available within the Application, even if it was not provided exactly in the place where it was requested, the failure to have it in the particular place it was requested is a minor irregularity.

62. Although the information on the signature page of the Contract for Purchase and Sale of Real Property identifying the Buyer as RUDG, LLC, was a discrepancy in the application, the contract elsewhere identified Town Center Phase Two, LLC, as the Buyer, and Mr. Milo was, in fact, authorized to sign for the true Buyer.

63. Ms. Amy Garmon's deposition testimony indicated that because she was able to determine from other places in the application that the Buyer was the applicant, and that Mr. Milo was authorized to sign for the Buyer, she found this portion of TC's application to be compliant, and she didn't see that there was a "minor irregularity" that needed to be waived. However, it is determined that FHFC actually did finally determine that the error in identification constituted a minor irregularity that was waived, in accordance with Mr. Reecy's testimony.

Although it was Ms. Garmon who called attention to the irregularity, Mr. Reecy is in a position of higher authority within the FHFC and is better able to address the Corporation's actions with respect to TC's application.

64. Pinnacle also asserts that TC's finance documents fail, based upon the same signature issue.

65. TC submitted equity proposals detailing its construction funding sources that were addressed to Mr. Milo and endorsed by him as "Vice President."

66. FHFC similarly concluded that Mr. Milo had authority to endorse the finance letters on behalf of TC.

67. There is evidence to support FHFC's findings that TC was the actual Buyer, that Mr. Milo had authority to sign the contract and the equity documents, and that the discrepancies in the documents were minor irregularities.

Pinnacle's Application

68. The equity commitment letter from Wells Fargo Bank regarding Pinnacle's development, as submitted to FHFC, contained only pages numbered one, two, and four of a four-page letter. It is clear that page three is actually missing and the letter was not simply incorrectly numbered, because of discontinuity in the text and in the numbering of portions of the letter.

69. APC contends that Pinnacle's application should have been deemed ineligible for award because of the missing page.

70. Mr. Reecy testified that even though a page of Pinnacle's equity commitment letter was missing, all of the RFA requirements were set forth in the remaining pages. He acknowledged that the missing page might have included unacceptable conditions for closing or information that was inconsistent with the other things in the application, but stated that FHFC determined that the missing page from Pinnacle's equity letter was a minor irregularity.

71. There is evidence to support FHFC's finding that the missing page was a minor irregularity.

APC's Application

72. The RFA provides at Section Four, A.3.c., at page 5:

> c. Experienced Developer(s)
>
> At least one Principal of the Developer entity, or if more than one Developer entity, at least one Principal of at least one of the Developer entities, must meet the General Developer Experience requirements in (1) and (2) below.
>
> (1) General Developer Experience:
>
> A Principal of each experienced Developer entity must have, since January 1, 1991, completed at least three (3) affordable rental housing developments, at least one (1) of which was a Housing Credit development completed since January 1, 2001. At least one (1) of the three (3) completed

developments must consist of a total number of units no less than 50 percent of the total number of units in the proposed Development. For purposes of this provision, completed for each of the three (3) developments means (i) that the temporary or final certificate of occupancy has been issued for at least one (1) unit in one of the residential apartment buildings within the development, or (ii) that at least one (1) IRS Form 8609 has been issued for one of the residential apartment buildings within the development. As used in this section, an affordable rental housing development, including a Housing Credit development that contains multiple buildings, is a single development regardless of the number of buildings within the development for which an IRS Form 8609 has been issued. If the experience of a Principal for a Developer entity listed in this Application was acquired from a previous affordable housing Developer entity, the Principal must have also been a Principal of that previous Developer entity.

(2) Prior General Development Experience Chart:

The Applicant must provide, as Attachment 4 to Exhibit A, a prior experience chart for each Principal intending to meet the minimum general development experience reflecting the required information for the three (3) completed affordable rental housing developments, one (1) of which must be a Housing Credit development.

Each prior experience chart must include the following information:

Prior General Development Experience Chart				
Name of Principal with the Required Experience: ___________________________________				
Name of Developer Entity (for the proposed Development) for which the above Party is a Principal: ____________________				
Name of Development	Location (City & State)	Affordable Housing Program that Provided Financing	Total Number Of Units	Year Completed

RFA at pages 5, 6.

73. Exhibit A to the RFA, at 3.c., further provides:

> General Developer Experience
>
> For each experienced Developer entity, the Applicant must provide, as Attachment 4, a prior experience chart for at least one (1) experienced Principal of that entity. The prior experience chart for the Principal must reflect the required information for the three (3) completed affordable rental housing developments, one (1) of which must be a Housing Credit development.

RFA at page 41.

74. Ms. O'Neill, a Senior Policy Analyst at FHFC and member of the Review Committee responsible for scoring the applications' developer information section, testified at hearing. When FHFC first started scoring applications, Ms. O'Neill was not taking any action to confirm principal developer experience, but rather was taking the information provided by applicants at face value, as it had been submitted on the chart.

75. A colleague of Ms. O'Neill's, not serving on the Review Committee, called her attention to the fact that a development that was then going through credit underwriting (following an award during the 2011 funding cycle) had recently requested that FHFC approve a change to the developer entity. Ms. O'Neill testified that this request raised a question at FHFC as to whether Ms. Wong, listed by APC as the principal with

the required experience, met the requirements. FHFC decided to confirm that Ms. Wong had the required experience for the developments listed in the RFA.

76. Ms. O'Neill stated that she did not make any inquiry to Ms. Wong or to Atlantic Pacific Communities as to whether Ms. Wong was, in fact, a principal of St. Luke's Development, LLC, developer of St. Luke's Life Center, because "we're not really supposed to do that." Ms. O'Neill instead looked at portions of a credit underwriting report on the St. Luke's Life Center project that were researched and shown to her by a colleague. Ms. O'Neill did not see Ms. Wong listed in that report as a principal. She did find information in FHFC files that Ms. Wong was a principal on the other two listed developments.

77. Ms. Thorp testified that she researched several documents in FHFC's possession and found no information indicating that Ms. Wong was a principal for the St. Luke's development. She testified that Ms. Wong or another representative of APC was not contacted about the issue because that would have given them an unfair advantage over other applicants.

78. Based upon the information in its files, FHFC determined that Ms. Wong did not meet the requirements for principal developer experience.

79. FHFC then similarly reviewed the files of other applicants who had listed in-state developments as their experience, but was unable to review out-of-state experience, so out-of-state experience continued to be accepted at face value.

80. Ms. Wong was not originally a principal in the St. Luke's development. However, it was demonstrated at hearing through documentary evidence that Ms. Wong was later appointed an officer of St. Luke's Development, LLC, effective March 2007. That change was submitted to the credit underwriter, and Ms. Wong was a principal for the developer entity before it completed credit underwriting.

81. Both Ms. O'Neill and Ms. Thorp testified that if the documents provided at hearing by APC had been in FHFC's possession at the time APC's application was scored, FHFC would have found that Ms. Wong was a principal of the St. Luke's development and that her experience met principal developer experience requirements.

82. In light of the evidence presented at hearing, it is clear that FHFC's conclusion was wrong. The prior experience chart submitted by APC as part of its application provided all of the information requested by the RFA, and all of that information was accurate. The information available to FHFC in the application correctly indicated that Ms. Wong was a principle for the developer of the St. Luke's Life Center

development. APC's application met all requirements of the RFA with respect to prior developer experience.

83. The Corporation's preliminary determinations that Ms. Wong was not a principal in the St. Luke's development, and that the APC application did not, therefore, meet principal experience requirements to the contrary, made in good faith based upon incomplete information contained in its files, was clearly erroneous.

84. FHFC's contention that APC should have submitted explanations or further documentation of Ms. Wong's developer experience at the time it submitted its application is untenable. APC submitted all of information requested of it. FHFC asked for a chart to be completed, which APC did, completely and accurately. An applicant cannot be found ineligible for failing to do more than was required by the RFA.

Credit Underwriting

85. A comparison of the RFA and rules with the 2011 Universal Cycle process shows that the Corporation has moved many requirements formerly required as part of the eligibility and scoring phase into a second review in the credit underwriting phase, as noted earlier. Rule 67-48.0072 provides in part:

> Credit underwriting is a de novo review of all information supplied, received or discovered during or after any competitive

> solicitation scoring and funding preference process, prior to the closing on funding, including the issuance of IRS Forms 8609 for Housing Credits. The success of an Applicant in being selected for funding is not an indication that the Applicant will receive a positive recommendation from the Credit Underwriter or that the Development team's experience, past performance or financial capacity is satisfactory.

86. The rule goes on to provide that this de novo review in the credit underwriting phase includes not only economic feasibility, but other factors statutorily required for allocation of tax credits, such as evidence of need for affordable housing and ability to proceed. These factors might cause an application to fail and never receive funding, even though it was nominally "awarded" the credits earlier. In that event, the RFA provides:

> Funding that becomes available after the Board takes action on the Committee's recommendation(s), due to an Applicant declining its invitation to enter credit underwriting or the Applicant's inability to satisfy a requirement outlined in this RFA, and/or Rule Chapter 67-48, F.A.C., will be distributed to the highest scoring eligible unfunded Application located in the same county as the Development that returned the funding regardless of the Funding Test. If there is not enough funding available to fully fund this Application, it will be entitled to receive a Binding Commitment for the unfunded balance.

If an applicant nominally "awarded" funding in the eligibility and scoring phase fails credit underwriting, the next applicant

in the queue of eligible applicants may still be granted funding, and so, is substantially affected by FHFC's decisions in the credit underwriting phase.

CONCLUSIONS OF LAW

87. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding under sections 120.569 and 120.57(3).

88. Section 420.507, Florida Statutes, provides statutory authority for the Corporation to allocate low-income housing tax credits by competitive solicitation. It provides:

> The corporation shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers which are in addition to all other powers granted by other provisions of this part:
>
> * * *
>
> (48) To award its annual allocation of low-income housing tax credits, nontaxable revenue bonds, and State Apartment Incentive Loan Program funds appropriated by the Legislature and available to allocate by request for proposals or other competitive solicitation.

89. Protests to competitive contract solicitations or awards are governed by section 120.57(3)(f), which provides in part as follows:

> Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than

> a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

90. As parties challenging FHFC's proposed award action, Petitioners Pinnacle, TC, and APC bear the burden of proof.

91. All Petitioners have standing. While applicable rules do not expressly require applicants to be both responsive and responsible, these factors are inherently part of the standing requirement in competitive solicitations. Intercontinental Props., Inc. v. Dep't of HRS, 606 So. 2d 380 (Fla. 3d DCA 1992); Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3d DCA 1981). Pinnacle and TC were correctly found eligible by FHFC, but have higher lottery numbers than Intervenors. APC demonstrated its eligibility at hearing. All three Petitioners were responsive to the solicitation. Any one of these applicants may yet be awarded housing credits if it is found responsible while all of those ahead of it are not. Capeletti Bros., Inc. v. Dep't of Gen. Svcs., 432 So. 2d 1359, 1360 n.1 (Fla. 1st DCA 1983). Only those applicants having the capability, financial and otherwise, to fully perform all requirements of the RFA are responsible. Couch Constr. Co. v.

Dep’t of Transp., 361 So. 2d 184, 187 (Fla. 1st DCA 1978). Responsibility under the unusual bifurcated allocation process established by the RFA will not be completely determined until the credit underwriting phase, applying statutorily required responsibility criteria for the allocation of tax credits. Each Petitioner’s substantial interests are affected by FHFC’s decisions as to other applicants in both phases of this bifurcated allocation process.

92. Although chapter 120 uses the term “de novo” when describing competitive solicitation protest proceedings, courts have recognized that a different kind of de novo is contemplated than for other substantial interest proceedings under section 120.57. Bid disputes are a "form of intra-agency review" in which the object is to evaluate the action taken by the agency. State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

93. Proceedings to challenge a competitive award are not simply a record review of the information that was before the agency. They remain “de novo” in the sense that in the chapter 120 hearing the evidence adduced is not restricted to that which was earlier before the agency when making its preliminary decision. A new evidentiary record based upon the historical, objective facts is developed. Asphalt Pavers, Inc. v. Dep’t of

Transp., 602 So. 2d 558 (Fla. 1st DCA 1992). The new findings of fact must support the final order to be issued by the agency. Gtech Corp. v. Dep't of Lottery, 737 So. 2d 615, 619 (Fla. 1st DCA 1999)(in bid protests, as in other formal hearings, agency may reject findings of fact only if they are not supported by competent and substantial evidence).

94. While facts are determined based upon new evidence, applicants are not permitted to retroactively submit information required by the solicitation, but omitted from their proposal. Section 120.57(3) provides that "no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered." The application or proposal must therefore stand on its own, as originally submitted, in light of determined facts. § 120.57(3), Fla. Stat.

95. After determining the relevant facts based upon evidence presented at hearing, the agency's intended action must be considered in light of those facts, and the agency's determinations must remain undisturbed unless clearly erroneous, contrary to competition, arbitrary, or capricious. A proposed award will be upheld unless it is contrary to governing statutes, the agency's rules, or the solicitation specifications.

96. The "clearly erroneous" standard of review has been applied to both findings of fact and conclusions of law. A factual finding is clearly erroneous when the reviewer is "left with a definite and firm conviction that a mistake has been made." Tropical Jewelers, Inc. v. Bank of Am., N.A., 19 So. 3d 424 (Fla. 3d DCA 2009); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994). As applied to conclusions of law, the court in Colbert v. Department of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), found that the clearly erroneous standard required that "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations." However, deference need not be given to an agency interpretation which conflicts with the plain and ordinary intent of the law. Fla. Hosp. v. Ag. for Health Care Admin., 823 So. 2d 844, 845 (Fla. 1st DCA 2002).

97. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which have been described in Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931), as protecting the public against collusive contracts and securing fair competition upon equal terms to all bidders.

98. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted

without thought or reason or is irrational." Hadi v. Lib. Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

HTG's Application

99. The Corporation interpreted the RFA and rule 67-48.002(89), defining "principal," to require only that the member and manager of an LLC, and not its officers, had to be disclosed. The evidence did not show that this interpretation was clearly erroneous, contrary to competition, arbitrary, or capricious. State Contr. & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998)

100. The Corporation's proposed action to award low-income housing tax credits available through Request for Applications 2013-003 to HTG Miami-Dade 5, LLC, is not contrary to governing statutes, FHFC's rules or policies, or the solicitation specifications.

ATA's Application

101. The challenges to ATA's application also involve interpretation of specifications and rules. In State

Contracting & Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998), the administrative law judge determined that despite representations made on submitted forms, the selected contractor would be unable to meet the level of participation by disadvantaged business enterprises (DBE) required by agency rule. The agency rejected this conclusion in its final order. The agency maintained that under its specifications and rules, the forms submitted were facially sufficient, the bid was responsive, and that a contractor's ability to later meet the applicable DBE percentage was a compliance issue. The Court, concluding that the dispute centered on interpretation of the agency's rule, found no evidence that the agency's interpretation was clearly erroneous, and affirmed the agency order.

102. Here, while the credit underwriting phase is part of a bifurcated and extended selection process rather than a performance issue, FHFC similarly interprets its specifications and rules as requiring ATA to demonstrate ability to proceed, not at the time of application, but only later, during the credit underwriting phase. The specifications' requirement that an applicant must acknowledge and certify at the time of application that it will later provide certifications within 21 days of the invitation to enter credit underwriting of the

status of site plan approval and the availability of sewer service to the development <u>as of the application deadline</u> is certainly confusing, but the Corporation's interpretation is not clearly erroneous.

103. FHFC's determination that the certification submitted by ATA as part of its application met the RFA requirements was similarly not shown by the evidence to be clearly erroneous, contrary to competition, arbitrary, or capricious.

104. The Corporation's proposed action to award low-income housing tax credits available through Request for Applications 2013-003 to Allapattah Trace Apartments, Ltd., is not contrary to governing statutes, FHFC's rules or policies, or the solicitation specifications.

<u>Pinnacle's application</u>

105. While it is clear that Pinnacle's application failed to include the entire equity commitment letter, not every deviation from specifications necessarily results in ineligibility. An irregularity that does not give the applicant a substantial advantage or benefit not enjoyed by other applicants and so stifle competition, or does not adversely affect the interests of the agency, may be considered a minor irregularity. <u>Procacci Commer. Realty v. Dep't of HRS</u>, 690 So. 2d 603, 606 (Fla. 1st DCA 1997). The Corporation's

determination that Pinnacle's omission met the definition of minor irregularity under FHFC's rules, and its decision to waive that irregularity, were not shown to be clearly erroneous, contrary to competition, arbitrary, or capricious.

106. The Corporation's proposed action determining that Pinnacle is eligible for funding is not contrary to governing statutes, FHFC's rules or policies, or the solicitation specifications.

TC's Application

107. The Corporation's determination that discrepancies as to identification of the signatory on TC's contract and finance documents were minor irregularities and its decision that TC is therefore eligible to receive tax credits are also governed by the definition of "minor irregularity" as discussed above. Similar facts were involved in Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 386-87 (Fla. 3d DCA 1992). In that case, while not apparent from the face of submitted documents, the evidence at hearing revealed that the bid documents had been submitted with full authority. The Court stated:

> While the failure to attach proof of the agent's authority rendered each of the two bids technically nonconforming, both deficiencies were easily remedied. This is plainly the sort of deficiency which a

> public agency can, in its discretion, allow a bidder to cure after the fact.

Here, the Corporation's decision to waive similar discrepancies in TC's application was not shown to be clearly erroneous, contrary to competition, arbitrary, or capricious.

108. The Corporation's proposed action determining that TC is eligible for funding is not contrary to governing statutes, FHFC's rules or policies, or the solicitation specifications.

APC's Application

109. While the evidence did not demonstrate that FHFC's use of information from its files was contrary to competition or its consideration of information relating only to Florida developments was arbitrary and capricious, APC did demonstrate that Ms. Wong was a principal in the St. Luke's development and so had the required principal developer experience. APC demonstrated that the application it submitted was complete and accurate concerning prior developer experience.

110. FHFC's argument that the prohibition in section 120.57(3) against amending or supplementing a proposal extends to evidence at a subsequent 120.57(1) hearing offered to show that the application was, in fact, complete and accurate at the time it was submitted, is not persuasive.[11/]

111. The fact that FHFC's contrary determination was made in good faith, based upon information then available to it, does

not insulate that preliminary decision from fact-finding in a challenge to an award decision under 120.57(3). Indeed, the precise purpose of such a hearing is to provide a formal evidentiary record upon which to base final agency action. Following a challenge to an agency's decision to accept a proposal, the agency's final decision must be supported by the evidence adduced at hearing, including evidence unavailable to the agency earlier.[12/] Gtech Corp. v. Dep't of Lottery, 737 So. 2d 615, 619 (Fla. 1st DCA 1999).

112. Based upon the facts here, the Corporation's determination that APC's application failed to meet the required developer experience requirements was clearly erroneous.

113. The Corporation's proposed action determining that APC Four Forty Four, Ltd. is not eligible for funding is contrary to Section Four A.3.c. of the solicitation specifications, setting forth general developer experience requirements.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order finding that APC Four Forty Four, Ltd., is eligible for funding, adjusting the Sorting Order accordingly, and otherwise dismissing the formal written protests of all Petitioners.

DONE AND ENTERED this 4th day of June, 2014, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of June, 2014.

ENDNOTES

1/ All references to statutes and administrative rules are to those in effect at the time of the RFA except as otherwise indicated.

2/ Tax credits are typically sold directly to investors or, often times, to a syndicator who assembles a group of investors and acts as their representative.

3/ http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm planning/affordablehousing/training/web/lihtc/basics/syndication

4/ To be more specific, administrative appeals are governed by section 120.57(3), Florida Statutes, except that no bond is required. Fla. Admin. Code R. 67-60.009.

5/ For purposes of section 120.57(3), the request for applications is equivalent to a "request for proposal." Florida Administrative Code Rule 67-60.009(3).

6/ Both the RFA and chapter 67-60 allow FHFC to waive "minor irregularities."

7/ RFA at page 2.

[8] This list also includes the Broward and Palm Beach County projects. The projects in all three counties were assigned lottery numbers together. However, the Broward and Palm Beach County awards are not at issue in this case.

[9] While the numbering of this rule differed in the version in effect at the time the RFA was initially issued, the parties stipulated at hearing that the substance of the rule was identical in all pertinent respects throughout the eligibility and scoring phase.

[10] No challenge was filed to RFA specifications providing that consideration of such factors as relative need for low-income housing, economic feasibility, and ability to proceed would be considered only as subsequent "pass/fail" issues in the credit underwriting phase rather than through comparative evaluation to "maximize use" of available tax credits pursuant to sections 420.5099(2) and 420.507(48), Florida Statutes. It seems clear that the Corporation's ultimate decisions regarding these factors affect the substantial interests of at least the next eligible applicant in line to receive funding, and so, may not be insulated from the disciplines of chapter 120, even if not ripe in this proceeding.

[11] No deference is given to FHFC's argument on this point, as it has no special expertise or "substantive jurisdiction" as to an interpretation of chapter 120. Cf. G.E.L. Corp. v. Dep't of Envtl. Prot., 875 So. 2d 1257, 1263 (Fla. 5th DCA 2004).

[12] The recent case of J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013), though not a bid protest case, provides an excellent discussion of fact-finding in cases requiring not only a "de novo" hearing but also review under quasi-appellate standards. The court explains that facts are not limited to those available to the agency, but that determined facts must then be used to deferentially evaluate the intended agency action, citing bid disputes.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit exceptions within 10 days from the date of the Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.