STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG VILLAGE VIEW, LLC,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION and MARQUIS PARTNERS, LTD,

Respondents.
_____/

FHFC Case No.: 2018-017BP

DOAH Case No.: 18-2156BID

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on September 14, 2018. Petitioner HTG Village View, LLC ("HTG Village View") and Respondent Marquis Partners, Ltd. ("Marquis Partners"), were Applicants under Request for Applications 2017-113, Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties (the "RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On October 6, 2017, Florida Housing Finance Corporation ("Florida Housing") issued the RFA, which solicited applications to compete for an allocation of low income housing credit funding. On March 16, 2018, Florida Housing posted

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
DATE: 9/17/18

notice of its intended decision to award funding to one applicant from each of the six counties, and one additional applicant from Broward County. Respondent Marquis Partners was selected for funding as one of the two applicants in Broward County. Petitioner HTG Village View was deemed eligible for funding, but through the process outlined in the RFA it was ranked lower than Marquis Partners and was not selected for funding. Petitioner timely filed its notice of intent to protest followed by a formal written protest.

The protest was referred to the Division of Administrative Hearings ("DOAH"). A formal hearing took place on June 1, 2018, in Tallahassee, Florida, before Administrative Law Judge Yolonda Y. Green (the "ALJ").

At hearing, HTG Village View argued that Marquis Partners' application should be deemed ineligible for failure to properly disclose all of the Principals of the Applicant. Based on information discovered during the course of litigation, Florida Housing changed its initial position that Marquis Partners was deemed eligible, and took the position at hearing that Marquis Partners should have been found ineligible for failure to disclose all Principals. Marquis Partners argued that HTG Village View did not have standing to contest the funding award to Marquis Partners because HTG Village View did not have site control at the date the formal written protest was filed. After the hearing, all parties timely filed Proposed Recommended Orders.

After consideration of the oral and documentary evidence presented at hearing, and the entire record in the proceeding, the ALJ issued a Recommended Order on July 27, 2018. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ determined that Petitioner met its burden to establish that Florida Housing's initial determination was contrary to the terms of the RFA or was clearly erroneous, and recommended that Florida Housing determine that Marquis Partners was ineligible for funding and award funding to HTG Village View instead.

Florida Housing and HTG Village View jointly filed one Exception to the Recommended Order. Marquis Partners filed seven Exceptions. Marquis Partners filed a Response to the joint Exception, and Florida Housing and HTG Village View jointly filed Responses to Marquis Partners' Exceptions.

Florida Housing's and HTG Village View's Joint First Exception

Florida Housing and HTG Village View take Exception to Finding of Fact 48, in which the ALJ made the following finding:

> 48. Florida Housing evaluates omissions from the Principal Disclosure Form based on whether the inclusion of the incorrect information negatively impacts other applicants.

All parties appear to agree that this finding is, at least, grammatically incorrect, as it is clearly not possible to evaluate an "omission" based upon whether such omission includes certain information. Florida Housing and HTG Village View

recommend that the entire finding be rejected, while Marquis Partners suggests that it be substantially rewritten to reference a "minor irregularity" analysis. Based upon the evidence at hearing, Florida Housing evaluates omissions from the Principal Disclosure Form differently than it does inclusions of incorrect information in that form, and it is impossible to tell from the ALJ's statement which type of evaluation she is referring to. Because Finding of Fact 48 is ambiguous, because the finding as written is not supported by competent substantial evidence, and because the finding as written is not relevant to the ultimate outcome of this case, HTG Village View and Florida Housing's joint First Exception is accepted, and Finding of Fact 48 is rejected and is not adopted in this Final Order.

Marquis Partners' Exceptions

Exception 1

Marquis Partners takes exception to Findings of Fact 39, 40, and 50. Specifically, Marquis Partners takes exception to the statement in Finding of Fact 39 that "the applicant was required to disclose the type of Principal, name of the Principal and organization [sic] structure of that Principal at each disclosure level;" to the statement in Finding of Fact 40 that "[t]he second Principal disclosure level required Marquis Partners to provide the type of Principal being associated with the corresponding first-level Principal entity and the name of the Principal;" and to the statement in Finding of Fact 50 that "Mr. Wolfe was not properly disclosed at the

second principal disclosure level as required. The RFA required that applicants disclose Principals in the Principal Disclosure Form for each type of entity."

It is undisputed that Marquis Partners failed to list Mr. Leon Wolfe as a manager of Cornerstone Marquis, LLC at the second disclosure level on the Principal Disclosure Form. As the ALJ correctly found, the terms of the RFA, Rule 67-48.002(93), F.A.C., the Continuing Advance Review process instructions, examples, and FAQs that are referenced in the RFA, and the testimony at hearing, taken together, specifically require that each Applicant must identify all of the Principals of each Principal entity identified on the Disclosure Form, and that failure to identify all such Principals will render an application ineligible for funding. The challenged findings are supported by competent substantial evidence, are reasonable, and are consistent with prior agency practice, and for the reasons stated in the Joint Response to Exceptions, Marquis Partners' First Exception is rejected.

Exception 2

Marquis Partners takes exception to Finding of Fact 53, specifically the finding that "the omission of Mr. Wolfe as a manager of Cornerstone Marquis is a material deviation that cannot be waived." Marquis Partners argues that this omission should have been waived as a "minor irregularity" and that the ALJ did not make specific findings relevant to such a determination.

In Conclusions of Law 76 and 77, however, the ALJ credited testimony adduced at hearing to support her conclusion that the omission of Mr. Wolfe should not be waived as a minor irregularity. While it may be that the ALJ occasionally mischaracterized conclusions as findings and vice versa, there is nonetheless competent substantial evidence to support Finding of Fact 53, and the conclusions of the ALJ are supported by credible testimony, are reasonable, and are consistent with past agency practice. For the reasons stated in the Joint Response to Exceptions, Marquis Partners' Second Exception is rejected.

Exception 3

Marquis Partners takes exception to Findings of Fact 47 and 53 in which the ALJ found that because the information submitted by Marquis Partners in its Principal Disclosure Form was incorrect, it should not have been awarded five points for participating in the Advance Review Process. As noted above, it is undisputed that the Form incorrectly omitted Mr. Wolfe as a Principal of Cornerstone Marquis, LLC, but Marquis Partners argues that because Florida Housing did not and could not know of this error at the time it reviewed the Form, the Form was "procedurally" correct and that Marquis Partners was therefore entitled to five points even though the Form was factually incorrect. For the reasons stated in the Joint Response to Exceptions, Marquis Partners' Third Exception is rejected.

Exceptions 4 and 6

Marquis Partners takes exception to Conclusions of Law 77 and 78, in which the ALJ concluded that Marquis Partners was ineligible for funding under the RFA. For the reasons stated above and in the Joint Response to Exceptions, Marquis Partners' Fourth and Sixth Exceptions are rejected.

Exception 5

Marquis Partners takes exception to Conclusions of Law 59, 60, and 61, in which the ALJ concluded that HTG Village View had standing to contest the preliminary award to Marquis Partners. Section 120.57(1)(l), Florida Statutes, provides that an agency in its final order "may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Questions of standing involve interpretations and applications of law over which Florida Housing does not have substantive jurisdiction. While the arguments presented in the Joint Response to Exceptions are persuasive, it is not appropriate for Florida Housing to review the ALJ's ruling on this question. Marquis Partners' Fifth Exception is rejected.

Exception 7

Marquis Partners takes exception to the Recommendation in the Recommended Order. For the reasons stated above, Marquis Partners' Seventh Exception is rejected.

Ruling on the Recommended Order

Except for Finding of Fact 48, the Findings of Fact set out in the Recommended Order are supported by competent substantial evidence.

The Conclusions of Law of the Recommended Order are reasonable and supported by competent substantial evidence.

In accordance with the foregoing, it is hereby **ORDERED:**

The Findings of Fact of the Recommended Order, except for Finding of Fact 48, are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order. The Conclusions of Law in the Recommended Order are adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.

The Recommendation of the Recommended Order is adopted.

Florida Housing's preliminary award of funding to Marquis Partners is rescinded, the relief requested in the Petition is granted, and HTG Village View shall be awarded funding under RFA 2017-113.

DONE and ORDERED this 14th day of September, 2018.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

Hugh R. Brown
Betty Zachem
Florida Housing Finance Corporation
Hugh.brown@floridahousing.org
Betty.zachem@floridahousing.org

Maureen M. Daughton, Esq.
Maureen McCarthy Daughton, LLC
mdaughton@mmd-lawfirm.com

Michael J. Glazer, Esquire
Anthony L. Bajoczky, Jr., Esquire
Ausley & McMullen, P.A.
TBajoczky@ausley.com
MGlazer@ausley.com

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HTG VILLAGE VIEW, LLC,

Petitioner,

vs. Case No. 18-2156BID

MARQUIS PARTNERS, LTD., AND FLORIDA HOUSING FINANCE CORPORATION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, Yolonda Y. Green, Administrative Law Judge of the Division of Administrative Hearings ("Division"), conducted a hearing on June 1, 2018, pursuant to sections 120.57(1) and 120.57(3), Florida Statutes, in Tallahassee, Florida.

APPEARANCES

For Petitioner: HTG Village View, LLC

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
Suite 304
1725 Capital Circle Northeast
Tallahassee, Florida 32308

For Respondent: Florida Housing Finance Corporation

Betty Zachem, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

For Respondent: Marquis Partners, Ltd.

Michael J. Glazer, Esquire
Anthony L. Bajoczky, Jr., Esquire
Ausley & McMullen, P.A.
123 South Calhoun Street
Post Office Box 391
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

Whether Respondent, Florida Housing Finance Corporation's ("Florida Housing"), intended action to award housing credit funding to Marquis Partners, Ltd. ("Marquis Partners"), based on the Request for Applications 2017-113 Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties (the "RFA") is contrary to governing statutes, Florida Housing rules, or the RFA specifications; and, if so, whether the award is contrary to competition, clearly erroneous, or arbitrary and capricious.

PRELIMINARY STATEMENT

On October 6, 2017, Florida Housing issued an RFA, which solicited applications to compete for an allocation of Federal Low-Income Housing Tax Credit funding ("tax credits") for the construction of affordable housing developments. Modifications to the RFA were issued on November 1 and November 29, 2017. On or before December 28, 2017, applications were submitted in response to the RFA by a number of developers, including HTG

Village View, LLC ("Petitioner" or "HTG Village"), and Respondent, Marquis Partners. On March 16, 2018, Florida Housing posted notice of its intended decision to award funding to seven applicants, including Marquis Partners. Petitioner was found to be eligible, but was not selected for funding. Petitioner timely filed a Formal Written Protest and Petition for Administrative Proceeding, which was subsequently amended.

Florida Housing filed a Motion to Consolidate this matter with Petitions filed in two other matters by Sailboat Bend II, Ltd. ("Sailboat Bend") (DOAH Case No. 18-2157BID), and Marquis Partners (DOAH Case No. 18-2158BID). The undersigned consolidated the three cases. The Petitions filed in DOAH Case Nos. 18-2157BID and 18-2158BID were voluntarily dismissed. Marquis Partners filed a Motion to Dismiss Petitioner, HTG Village in this case, which the undersigned denied.

The undersigned initially scheduled this matter for May 29, 2018. However, the parties filed an unopposed Motion for Continuance, which the undersigned granted. The undersigned rescheduled this matter for June 1, 2018.

Prior to the final hearing, in the pre-hearing stipulation, Florida Housing changed its position indicating that it now agreed with Petitioner's allegation that Marquis Partner's application should have been found ineligible, and that Petitioner should have been recommended for funding.

At the hearing, the parties jointly presented the testimony of Marisa Button, director of Multifamily Allocations, Florida Housing. Joint Exhibits 1 through 7 were admitted into evidence. Marquis Partners Exhibits 1 through 4 and 6 were admitted into evidence. HTG Village Exhibits 1 through 5 and 7 through 10 were admitted into evidence.

The official Transcript of the hearing was filed with the Division on June 21, 2018. The parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

Unless otherwise stated, all references to statutes or rules are to those in effect in 2017.

FINDINGS OF FACT

Based on the stipulated findings of fact, the oral and documentary evidence presented at hearing, and the entire record in this proceeding, the Findings of Fact are as follows:

Parties

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to promote public welfare by administering the governmental function of financing affordable housing in Florida. Pursuant to section 420.5099, Florida Housing 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. HTG Village and Marquis Partners submitted applications for funding from Florida Housing to develop affordable housing developments. Both applications were deemed "eligible" for funding. Marquis Partners was preliminarily selected for funding under the RFA. While HTG Village was determined to be eligible for funding, it was not selected for an award of funding.

3. The "tax credit" program was enacted to incentivize the private market to invest in affordable rental housing. These tax credits are awarded competitively to housing developers in Florida for rental housing projects that qualify. These credits are then normally sold by developers for cash to raise capital for their projects. The effect is that it reduces the amount that the developer would have to borrow otherwise. Because the total debt is lower, a tax credit property can (and must) offer lower, more affordable rents. Developers also covenant to keep rents at affordable levels for periods of 30 to 50 years as consideration for receipt of the tax credits.

Competitive Application Process

4. Florida Housing is authorized to allocate tax credits, SAIL funding, and other funding by means of requests for proposal or other competitive solicitation in section

420.507(48), and adopted Florida Administrative Code Chapter 67-60, which govern the competitive solicitation process for several different programs, including the program for tax credits. Chapter 67-60 provides that Florida Housing handles disputes regarding the allocation of its tax credits, which were made available to Florida Housing on an annual basis by the U.S. Treasury, through the bid protest provisions of section 120.57(3).

5. In their applications, applicants request a specific dollar amount of housing credits to be given to the applicant each year for a period of 10 years. Applicants normally sell the rights to that future stream of income tax credits (through the sale of almost all of the ownership interest in the applicant entity) to an investor to generate the amount of capital needed to build the development. The amount, which can be received, depends upon the accomplishment of several factors, such as a certain percentage of the projected Total Development Cost; a maximum funding amount per development based on the county in which the development will be located; and whether the development is located within certain designated areas of some counties. This, however, is not an exhaustive list of the factors considered.

6. Tax credits are made available through a competitive application process commenced by the issuance of an RFA. An RFA

is equivalent to a "request for proposal" as indicated in rule 67-60.009(3). At issue here is RFA 2017-113: Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties.

7. The RFA was issued on October 6, 2017, and responses were due December 28, 2017. The RFA was modified on November 1 and November 29, 2017.

8. Through the RFA, Florida Housing seeks to award up to an estimated $14,601,863.00 of housing credits to applicants that propose developments in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties.

9. Florida Housing received 33 applications in response to RFA 2017-113.

10. A review committee was appointed to review the applications and make recommendations to Florida Housing's Board of Directors (the "Board"). The review committee found 25 applications eligible and eight applications ineligible. Through the ranking and selection process outlined in the RFA, seven applications were recommended for funding, including Marquis Partners.

11. On March 16, 2018, Florida Housing's Board met and considered the recommendations of the review committee for RFA 2017-113. Later, on March 16, 2018, at approximately

1:05 p.m., Petitioners and all other applicants in RFA 2017-113 received notice that the Board determined whether applications were eligible or ineligible for consideration for funding, and that certain eligible applicants were selected for award of tax credits, subject to satisfactory completion of the credit underwriting process. Such notice was provided by the posting of two spreadsheets on the Florida Housing website, one listing the "eligible" applications in RFA 2017-113 and one identifying the applications which Florida Housing proposed to fund.

12. In that March 16, 2018, posting, Florida Housing announced its intention to award funding to seven applicants, including Marquis Partners. HTG Village was eligible, but not recommended for funding.

13. All of the parties in this case applied for funding to develop a proposed development in Broward County. According to the terms of the RFA, a maximum of two Broward County applications are to be funded. Sailboat Bend was the other application, in addition to that of Marquis Partners that was selected for funding in Broward County. Once Marquis Partners dismissed its petition in DOAH Case No. 18-2157BID, there were no remaining challenges to Sailboat Bend.

14. Petitioner timely filed a Notice of Protest and Petition for Formal Administrative Proceedings. Marquis Partners timely intervened.

15. No challenges were made to the terms of RFA 2017-113.

RFA 2017-113 Ranking and Selection Process

16. The RFA contemplates a structure in which the applicant is scored on eligibility items and obtains points for other items. A list of the eligibility items is available in section 5.A.1, beginning on page 63 of the RFA. Only applications that meet all the eligibility items will be eligible for funding and considered for funding selection. The eligibility items also include Submission Requirements, Financial Arrearage Requirements, and the Total Development Cost Per Unit Limitation requirement.

17. Applicants can earn points for each of the following items (for a maximum of 20): Submission of Principal Disclosure Form stamped by Corporation as "Pre-Approved" (maximum 5 points); Development Experience Withdrawal Disincentive (maximum 5 points); and either Local Government Contribution Points (maximum 5 points) or Local Government Area of Opportunity Points (10 points).

18. The RFA's stated goal is to fund one application wherein the applicant applied and qualified as a non-profit applicant.

19. As part of the funding selection process, the RFA starts with the application sorting order. All eligible applications are ranked by first sorting all eligible

Applications from the highest score to lowest score, with any scores that are tied separated in the following order:

a. First, by the Application's eligibility for the Proximity Funding Preference (which is outlined in Section Four A.5.e. of the RFA) with Applications that qualify for the preference listed above Applications that do not qualify for the preference;

b. Next, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.11.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

c. Next, by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four A.4.b.(4) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

d. Next, by the Application's Leveraging Classification, applying the multipliers outlined in Item 3 of Exhibit C of the RFA (with Applications having the Classification of A listed above Applications having the Classification of B);

e. Next, by the Application's eligibility for the Florida Job Creation Funding Preference which is outlined in Item 4 of Exhibit C of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference); and

f. And finally, by lottery number, resulting in the lowest lottery number receiving preference.

20. The RFA also outlines the funding selection process as follows:

> a. The highest ranking eligible Application will be selected for funding for proposed Developments located in each of the following counties for which an eligible Application was received: Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas.
>
> b. If funding remains after funding the highest ranking eligible Applications as outlined in a. above, and if none of the Applications selected for funding in a. above qualify for the Non-Profit goal, the next Application selected for funding will be the highest ranking eligible unfunded Application wherein the Applicant applied and qualified as a Non-Profit Applicant, regardless of county. If the selected Application cannot be fully funded, it will be entitled to receive a Binding Commitment for the unfunded balance.
>
> c. If funding remains after funding the highest ranking eligible Applications as outlined in a. above and at least one (1) of the selected Applications qualified for the Non-Profit goal, the next Application selected for funding will be the highest ranking eligible unfunded Application in Broward County. If the selected Application cannot be fully funded, it will be entitled to receive a Binding Commitment for the unfunded balance. If funding remains after selecting the highest ranking eligible unfunded Broward County Application, or if there is no eligible unfunded Application located in Broward County, no additional Applications from any county will be selected for funding and any remaining funding will be distributed as approved by the Board.

HTG Village Standing

21. One of the eligibility requirements in the RFA is that applicants are required to demonstrate site control by providing certain documentation as Exhibit 8 to the application. The RFA provides three ways to demonstrate site control: 1) eligible contract, 2) deed or certificate of title, or 3) lease.

22. In order to demonstrate site control as an eligible contract, the following must be demonstrated:

> Eligible Contract - For purposes of this RFA, an eligible contract is one that has a term that does not expire before June 30, 2018 or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than June 30, 2018; specifically states that the buyer's remedy for default on the part of the seller includes or is specific performance; and 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. Any assignment must be signed by the assignor and the assignee. 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, and, if a contract, must contain the following elements of an eligible contract: a) have a term that does not expire before June 30, 2018 or contain extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date

> that is not earlier than June 30, 2018, and b) specifically state that the buyer's remedy for default on the part of the seller includes or is specific performance.

23. In response to RFA 2017-113, HTG Village timely submitted application number 2018-303C ("HTG Village Application") requesting an allocation of $2,561,000 in housing credits. HTG Village proposed to develop a 96-unit affordable, multifamily housing development in Broward County.

24. The address of the development site provided within the application of HTG Village is "N Andrews Ave and NE 6th St., Fort Lauderdale." ("HTG Village Development Site").

25. HTG Village had a contractual right to purchase the HTG Village Development Site as of the application deadline and satisfied the site control requirement of RFA 2017-113 as of the application deadline.

26. HTG Village terminated its contract to purchase the HTG Village Development Site in a letter dated January 16, 2018, and delivered on January 17, 2018.

27. HTG Village entered a First Amendment and Reinstatement to the original Purchase and Sale Agreement on May 8, 2018 ("Amended Purchase and Sale Agreement"), with a retroactive effective date of January 17, 2018.

28. Although HTG Village terminated its purchase agreement after the application deadline, Ms. Button credibly testified

that the determination of whether the applicant is ready to proceed with the development is at the time of the application deadline (through submission of the completed application) and again at the time of underwriting.

29. Of the applicants that submitted applications in response to the RFA, four applicants submitted applications for development in Broward County. Two applicants received a score of 20 points, Sailbooat Bend and Marquis Partners. Of the two applicants that received 20 points, Marquis Partners was assigned a lottery number of nine. HTG Village and another applicant, Casa St. Angelo, received scores of 15 points. HTG Village was assigned a lottery number 1.

30. In the solicitation process, if Marquis Partners is deemed ineligible, HTG Village would be the next highest-ranked application for funding for development in Broward.

31. If Marquis Partners remains eligible, but its score is reduced to 15, HTG Village would replace Marquis Partners in the line for funding because HTG Village has the lowest lottery number (1).

Marquis Partners Application

32. In response to RFA 2017-113, Marquis Partners timely submitted application number 2018-279C ("Marquis Partners Application") requesting an allocation of $1,727,000 in housing

credits. Marquis Partners proposed to develop a 100-unit affordable, multifamily housing development in Broward County.

33. Florida Housing determined that the Marquis Partners Application was eligible for an award of housing credits and preliminarily selected the Marquis Partners Application for an award of housing credits. The Marquis Partners Application was selected as the second Broward County application under subpart (c) of the funding selection process.

34. As another eligibility item, RFA 2017-113 required that applicants identify their "Principals" by completing and submitting with their applications a Principal Disclosure Form as follows:

> Eligibility Requirements to meet the submission requirements, the Applicant must upload the Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 08-16) ("Principals Disclosure Form") with the Application and Development Cost Pro Forma, as outlined in Section Three above.
>
> The Principals Disclosure Form must identify the Principals of the Applicant and Developer(s) as of the Application Deadline and should include, for each applicable organizational structure, only the types of Principals required by Subsection 67-48.002(93), F.A.C. A Principals Disclosure Form should not include, for any organizational structure, any type of entity that is not specifically included in the Rule definition of Principals.

35. RFA 2017-113 also enabled an applicant to obtain "points" by participating in Florida Housing's advance review process as follows:

> Point Item: Applicants will receive 5 points if the uploaded Principal Disclosure Form was stamped "Approved" during the Advance Review Process provided (a) it is still correct as of Application Deadline, and (b) it was approved for the type of funding being requested (i.e., Housing Credits or Non-Housing Credits). The Advance Review Process for Disclosure of Applicant and Developer Principals is available on the Corporation's Website http://www.floridahousing.org/programs/developers-multifamilyprograms/competitive/2017/2017-113 (also accessible by clicking here) and also includes samples which may assist the Applicant in completing the required Principals Disclosure Form.
>
> Note: It is the sole responsibility of the Applicant to review the Advance Review Process procedures and to submit any Principals Disclosure Form for review in a timely manner in order to meet the Application Deadline.

36. Marquis Partners participated in the advance review process, and on or about December 21, 2017, Florida Housing approved the Principal Disclosure Form submitted by Marquis Partners for an award of housing credits.

37. The Principal Disclosure Form approved by Florida Housing during the advance review process did not properly identify Marquis Partners' Principals for the corresponding types of entities as provided in Florida Administrative Code

Rule 67-48.002(93). Rule 67-48.002(93) defined the term "Principal" based on the applicant or developer entity, and then by the organizational structure of those specific entities.

38. The term "Principal" was capitalized in the RFA. The RFA provided that unless otherwise defined, capitalized terms within the RFA have the meaning as set forth in Exhibit B, in chapters 67-48 and 67-60, or in applicable federal regulations.

39. Within the disclosure form, the applicant was required to disclose the type of Principal, name of the Principal and organization structure of that Principal at each disclosure level. There were three disclosure levels provided on the disclosure form. The Principal Disclosure Form submitted with the Marquis Partners Application included errors at the second Principal disclosure level.

40. The second Principal disclosure level required Marquis Partners to provide the type of Principal being associated with the corresponding first-level Principal entity and the name of the Principal. Marquis Partners failed to disclose one Principal at the second level as further outlined below.

41. As of the application deadline and at all times pertinent to this case, amongst other partners, Cornerstone Marquis, LLC ("Cornerstone Marquis"), was identified as a general partner of Marquis Partners.

42. As of the application deadline and at all times pertinent to this case, the members of Cornerstone Marquis were as follows: a) Jorge Lopez; b) Awilda Lopez; c) Mara Mades; and d) M3 Acquisitions, LLC. The members were properly disclosed at the second Principal disclosure level.

43. As of the application deadline and at all times pertinent to this case, the managers of Cornerstone Marquis, LLC, were as follows: a) Jorge Lopez; b) Mara Mades; and c) Leon Wolfe.

44. At the second Principal disclosure level, Awilda Lopez and M3 Acquisitions were incorrectly identified as managers of Cornerstone Marquis, LLC, when they were in fact only members. More importantly, Leon Wolfe was not identified at the second Principal disclosure level as a manager of Cornerstone Marquis.

45. Since Leon Wolfe was a manager of Cornerstone Marquis, he should have been identified as a manager of Cornerstone Marquis, LLC, at the second Principal disclosure level.

46. Florida Housing's approval of Marquis Partners' Principal Disclosure Form during the advance review process did not verify the accuracy of the information contained within the Principal Disclosure Form.

47. The information in the Principal Disclosure Form was incorrect at the time it was submitted for approval and remained

incorrect when it was submitted with the Marquis Partners' Application.

48. Florida Housing evaluates omissions from the Principal Disclosure Form based on whether the inclusion of the incorrect information negatively impacts other applicants.

49. Marisa Button, director of multifamily allocation, testified that the misidentification of Awilda Lopez and M3 Acquisitions, LLC, as managers of Cornerstone Marquis is a minor irregularity. On the other hand, Florida Housing considered the failure to properly disclose Leon Wolfe as a manager of Cornerstone Marquis to be a material deviation.

50. Leon Wolfe was disclosed on the Principal Disclosure Form at the third disclosure level as a member and manager of M3 Acquisitions, LLC. However, Mr. Wolfe was not properly disclosed at the second level of disclosure as required. The RFA required that applicants disclose Principals in the Principal Disclosure Form for each type of entity.

51. Ms. Button testified that the purpose of proper disclosure of all Principals of the entities that are associated with the applicant is so that Florida Housing is aware of who it is doing business with. Florida Housing screens the Principals to determine whether a Principal has been deficient to the corporation on prior affordable housing deals, identify bad actors, or to limit the amount of funding received by any

related applicants. Florida Housing uses the disclosed Principals to determine if applications are related.

52. Florida Housing made the advance review process available to assist applicants with completing the Principal Disclosure Form. During the process, there were sample charts provided to assist the applicants with completing the form. Marquis Partners participated in the review process and Florida Housing approved the form.

53. The greater weight of the evidence demonstrates that Marquis Partners did not properly disclose Mr. Wolfe on its Principal Disclosure Form and, as a result, it should not have been awarded the additional five points for the advance review approval. Moreover, the omission of Mr. Wolfe as a manager of Cornerstone Marquis is a material deviation that cannot be waived. Thus, the evidence shows that Marquis Partners is not eligible for funding.

CONCLUSIONS OF LAW

54. The Division has jurisdiction over the parties and subject matter of this proceeding. § 120.57(1) and (3), Fla. Stat.

Standing

55. Prior to addressing the merits of the case, the question of HTG Village's standing to bring this action must be decided.

56. Standing is a jurisdictional threshold issue in a chapter 120 proceeding that is not dependent on the merits of a party's case. See, e.g., Abbott Labs. v. Mylan Pharmaceuticals, Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (explaining the question of whether a party has standing is different from the question of whether a party will be able to prove its case). Petitioner must establish standing before the Division has jurisdiction to decide the merits of a case. See, e.g., § 120.569(1), Fla. Stat. (2016); Westinghouse Elec. Corp. v. Jacksonville Transp. Auth., 491 So. 2d 1238, 1240-41 (Fla. 1st DCA 1986). "To have standing to challenge the proposed award of a public contract, an applicant must have a substantial interest to be determined in the case." Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524, 525 (Fla. 3d DCA 1981); see § 120.57(3)(b), Fla. Stat. (2016) (Petitioner, as the third lowest bidder, was unable to demonstrate that it was substantially affected; it, therefore, lacked standing to protest the award). The second lowest bid establishes that substantial interest because if the lowest bid is disqualified, the second lowest bid may receive the award. Madison Highlands, LLC v. Fla. Hous. Fin. Corp., 220 So. 3d 467, 473 (Fla. 5th DCA 2017).

57. In this case, HTG Village was ranked next in line after Marquis Partners, a winning applicant. If Marquis Partners is ineligible, or remains eligible but loses five points, then according to the terms of the competitive solicitation, HTG Village would be selected for funding.

58. Marquis Partners, however, asserts that while HTG Village met the site control requirements in the RFA as of the application deadline, HTG Village lacks standing because it terminated its site control contract around January 17, 2018.

59. However, the determination of whether the applicant is ready to proceed with the development is first at the time of the application deadline (through submission of the completed application) and then at the time of underwriting.

60. Under the traditional standing test in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 479 (Fla. 2d DCA 1981), HTG Village is the next eligible applicant in line for funding and, thus, has a substantial interest that the bid protest procedures are intended to protect.

61. Based on the foregoing, HTG Village has standing to contest the preliminary award to Marquis Partners.

62. Marquis Partners has standing to participate in this proceeding as the intended recipient of funding pursuant to the RFA.

Bid Protest

63. This is a competitive procurement protest proceeding and as such is governed by section 120.57(3)(f), which provides as follows, in pertinent part:

> 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.

64. Although competitive solicitation protest proceedings are described in section 120.57(3)(f) as de novo, courts acknowledge that a different kind of de novo is contemplated than for other substantial interest proceedings under section 120.57. Hearings under section 120.57(3)(f) have been described as a "form of intra-agency review." The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding 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). Thus, competitive protest proceedings such as this one remain de novo in the sense that they are not confined to record review of the

information before the agency. Instead, a new evidentiary record is developed in the administrative proceeding for the purpose of evaluating the proposed action taken by the agency. See, e.g., Asphalt Pavers, Inc. v. Dep't of Transp., 602 So. 2d 558 (Fla. 1st DCA 1992); Intercontinental Props., Inc. v. Dep't of HRS, 606 So. 2d 380 (Fla. 3d DCA 1992); cf. J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127 (Fla. 1st DCA 2013)(describing administrative hearings to review agency action on applications for exemption from disqualification as akin to bid protest proceedings under section 120.57(3)).

65. New evidence cannot be offered to amend or supplement a party's response/application. See § 120.57(3)(f), Fla. Stat. However, new evidence may be offered in a competitive protest proceeding to prove that there was an error in another party's application. Intercontinental Props., 606 So. 2d at 386. Furthermore, a related reason for new evidence is to prove that an error in a party's application is a minor irregularity that should be waived. Id.

66. Pursuant to section 120.57(3), the burden of proof rests with Petitioner as the party challenging and opposing Respondent's proposed agency action finding the Marquis Partners Application eligible. See State Contracting and Eng'g Corp., 709 So. 2d at 609. Petitioner must prove by a preponderance of the evidence that Respondent's proposed scoring actions are

arbitrary, capricious, or beyond the scope of Respondent's discretion as a state agency. Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988); Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). See also § 120.57(1)(j), Fla. Stat.

67. After determining the relevant facts, the role of the Division is to evaluate Respondent's intended action in light of the facts. Respondent's determination must remain undisturbed unless clearly erroneous, contrary to competition, arbitrary, or capricious. Proposed action will be upheld unless it is contrary to governing statutes, the agency's rules, or the RFA specifications.

68. Agency action will be found to be clearly erroneous if it is without rational support. The court in Colbert v. Department of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly erroneous standard to mean that "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." (citations omitted).

69. A capricious action has been defined as an action, "which is without thought or reason or irrationally." Agrico Chem. v. State Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla.

1st DCA 1978). "An arbitrary decision is one that is not supported by facts or logic, or is despotic." Id. The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in Dravo Basic Materials Company v. Department of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

70. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which has 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.

71. The "contrary to competition" standard, unique to bid protests, is a test that applies to agency actions that do not

turn on the interpretation of a statute or rule, do not involve the exercise of discretion, and do not depend upon (or amount to) a determination of ultimate fact. This standard is not defined in statute or rule; however, the legislative intent found in section 287.001, Florida Statutes, is instructive.

72. Actions that are contrary to competition include those which: (a) create the appearance of an opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Sunshine Towing at Broward, Inc. v. Dep't of Transp., Case No. 10-0134BID (Fla. DOAH Apr. 6, 2010; Fla. DOT May 7, 2010). See R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; Sch. Bd. of Miami-Dade Cnty. Mar. 14, 2002); E-Builder v. Miami-Dade Cnty. Sch. Bd., Case No. 03-1581BID (Fla. DOAH Oct. 10, 2003; Sch. Bd. of Miami-Dade Cnty. Nov. 26, 2003).

73. The RFA requires a complete application which consists of the "Application with Development Cost Pro Forma found at Exhibit A of the RFA, the Applicant Certification and Acknowledgment Form and other applicable Verification Forms found at Exhibit B of the RFA, as well as all other applicable

documentation" to be provided by the applicant, as outlined in section four of the RFA.

74. Additionally, rule 67-60.006(1) provides that "the failure of an applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of non-responsiveness." This language is consistent with section 287.012(26), which indicates a responsive bid must "conform in all material respects to the solicitation." The burden is, thus, on the applicant to provide a complete and responsive response to the RFA.

75. Petitioner has challenged the eligibility of Marquis Partners on the basis that it did not disclose Mr. Wolfe at the second disclosure level. Florida Housing asserted at hearing that it changed its position and determined that Marquis Partners was not eligible for funding for that reason.

76. In this proceeding, the undersigned continues to review the correctness of Respondent's application. Ms. Button testified that there were several reasons why the incorrect disclosure would not be considered a minor irregularity that can be waived. For instance, it would not be clear on the face of the application, specifically the Principal Disclosure Form, that Mr. Wolfe was a manager for Cornerstone Marquis. Moreover, the RFA required that the Principal Disclosure Form should

include, for each applicable organizational structure, the types of Principals required by rule 67-48.002(93).

77. The evidence establishes that all Principals were not disclosed by Marquis Partners in the correct manner as required by the RFA. As such, the evidence demonstrates that Marquis Partners' failure to disclose Mr. Wolfe as the manager for Cornerstone Marquis rendered it ineligible for funding under the RFA. Thus, the Marquis Partners Application is ineligible and not entitled to funding or for five scoring points.

78. Here, Petitioner has met its burden and demonstrated by a preponderance of evidence that Respondent's initial decision to find the Marquis Partners Application eligible was erroneous and not consistent with the requirements of the RFA.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be issued finding that Florida Housing's initial scoring decision regarding the Marquis Partners Application was erroneous, concluding that Marquis Partners was ineligible for funding and not eligible for five additional points, and awarding funding to HTG Village.

DONE AND ENTERED this 27th day of July, 2018, in Tallahassee, Leon County, Florida.

YOLONDA Y. GREEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of July, 2018.

COPIES FURNISHED:

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301-1329
(eServed)

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
Suite 304
1725 Capital Circle Northeast
Tallahassee, Florida 32308
(eServed)

Michael J. Glazer, Esquire
Anthony L. Bajoczky, Jr., Esquire
Ausley & McMullen, P.A.
123 South Calhoun Street
Post Office Box 391
Tallahassee, Florida 32302
(eServed)

Betty Zachem, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301
(eServed)

Corporation Clerk
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301-1329
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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