

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

CASE NO. 2018-049VW

CORAL BAY COVE, LLC
Petitioner

vs.

FHFC APPLICATION: 2016-394S
REQUEST FOR APPLICATIONS: 2016-109

FLORIDA HOUSING FINANCE
CORPORATION,
Respondent

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**PETITION FOR WAIVER OF RULE 67-21.026(13)(e) AND RULE 67-48.0072(17)(f)
TO ALLOW A SINGLE SUBCONTRACT FOR WORK IN EXCESS OF 20%
OF A DEVELOPMENT'S CONSTRUCTION COST**

Petitioner Coral Bay Cove, LLC, a Florida limited liability company ("Coral Bay") submits its Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of the Corporation's general prohibition on subcontracting more than 20% of the construction costs of a development to one subcontractor, without the Corporation's approval. See Rules 67-21.026(13)(e) and 67-48.0072(17)(f), Florida Administrative Code.

In support of its Petition, Coral Bay states:

A. THE PETITIONER

1. The name, address, telephone and facsimile numbers, and email address for Coral Bay and its qualified representative for Coral Bay's application (the "Application") in response to RFA 2016-109 SAIL Financing of Affordable Multifamily Housing Developments to be used in Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits (the "RFA") are:

Coral Bay Cove, LLC
3050 Biscayne Boulevard, Suite 300

Miami, Florida 33137
Attention: Francisco Rojo
Telephone: (305) 538-9552 x103
Facsimile: (305) 538-9553
E-Mail: francisco@landmarkco.net

2. The name, address, telephone and facsimile numbers for Coral Bay's attorney are:

Brian J. McDonough, Esq.
Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Telephone: (305) 789-3350
Facsimile: (305) 789-3395
E-Mail: bmcdonough@stearnsweaver.com

B. THE DEVELOPMENT

3. Coral Bay timely submitted its Application for SAIL funding in response to the RFA for the development named "Coral Bay Cove" (the "Development"). *See* Application No. 2016-394S. On March 31, 2017, Coral Bay accepted the Corporation's invitation to Credit Underwriting.

4. The proceeds of the SAIL financing will be used for new construction of 224 garden-style units in twelve (12) three-story buildings. The Development will also be financed with (i) the proceeds of the syndication of Low-Income Housing Tax Credits, (ii) the proceeds of Multifamily Mortgage Revenue Bonds anticipated to be issued by the Housing Finance Authority of Miami-Dade County in the approximate amount of \$27,000,000, (iii) Miami-Dade County Surtax funds in the amount of \$5,600,000, (iv) ELI funds from the Corporation in the amount of \$600,000, (v) funds provided by the seller of the project site for required offsite improvements in the amount of \$250,000, (vi) a loan from Column Financial, Inc., in the amount of \$2,000,000 and (vii) deferred developer fee in such amount as may be necessary. The Development will serve low-income households in the southern portion of Miami-Dade County,

Florida. One hundred percent of the units will be set aside for occupants whose income is equal to or less than 60% of the Area Median Income.

5. The waiver being sought is permanent in nature.

C. RULES FROM WHICH WAIVER IS SOUGHT

6. Coral Bay requests a waiver from Rules 67-21.026(13)(e) and 67-48.0072(17)(f), Florida Administrative Code (collectively, the "Rule"). Specifically, Coral Bay is requesting that the Corporation exercise the discretion provided by the Rule to allow a subcontract that exceeds 20% of the construction costs for a specific Development, upon consideration of the facts and circumstances of the request.

7. The Rule provides, in relevant part, as follows:

(13) The General Contractor must meet the following conditions:

...
(e) Ensure that not more than 20 percent of the construction cost is subcontracted to any one entity, with the exception of a subcontractor contracted to deliver the building shell of a building of at least five (5) stories which may not have more than 31 percent of the construction cost in a subcontract, unless otherwise approved by the Corporation for a specific Development. With regard to said approval, the Corporation shall consider the facts and circumstances of each Applicant's request, inclusive of construction costs and the General Contractor's fees;

Rule 67-21.0026(13)(e), F.A.C. (emphasis added).

And

(17) The General Contractor must meet the following conditions:

...
(f) Ensure that not more than 20 percent of the construction cost is subcontracted to any one entity, with the exception of a subcontractor contracted to deliver the building shell of a building of at least five (5) stories which may not have more than 31 percent of the construction cost in a subcontract, unless otherwise approved by the Corporation for a specific Development. With regard to said approval, the Corporation shall consider the facts and circumstances of each Applicant's request, inclusive of construction costs and the General Contractor's fees;

Rule 67-48.0072(17)(f), F.A.C. (emphasis added).

D. STATUTES IMPLEMENTED BY THE RULE

8. The applicable Rule for which a waiver is requested is implementing, among other sections of the Florida Housing Finance Corporation Act (the “Act”),¹ the statute that created the SAIL loan program (*See* § 420.5087, Fla. Stat.), and the statute that designated the Corporation as the housing credit agency responsible for the allocation and administration of Low-Income Housing Tax Credits (*See* Section 420.5099, Florida Statutes). Further, pursuant to the RFA, “Proposed Developments funded under this RFA will be subject to the requirements of the RFA, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the SAIL Loan requirements outlined in Rule Chapter 67-48, F.A.C., the ELI Loan requirements outlined in Exhibit D of the RFA, the MMRB and/or Non-Competitive HC requirements outlined in Rule Chapter 67-21, F.A.C., and the Compliance requirements of Rule Chapter 67-53, F.A.C.”

E. PETITIONER REQUESTS A WAIVER FROM THE RULE FOR THE FOLLOWING REASONS

9. Coral Bay requests a waiver of the Rule, to allow its general contractor to engage a shell contractor whose work will exceed 20% of the construction costs of the Development. Each of the twelve (12) residential buildings in the Development will be fewer than five stories in height, and therefore the language of the Rule which would allow the shell contractor’s work to be more than 20% (but no more than 31%) of the construction costs does not apply.

10. Coral Bay has entered into a guaranteed maximum price construction contract for the construction of the Development (the “GC Contract”). One component of the GC Contract is the shell work for each of the twelve (12) individual buildings which comprise the Development.

¹ The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.517 of the Florida Statutes.

11. Due to the size and scope of the shell work, the general contractor received bids from nine shell subcontractors, none of which is affiliated with Coral Bay or the general contractor. All bids received for structural shell in response to the general contractor's request exceeded an amount equal to 20% of the construction costs (exclusive of general requirements, overhead and profit, surveying, testing, bond premium, general contractor liability insurance, permits by contractor and cost certification fees). The GC Contract reflects structural shell costs that equal 23% of the total construction costs, exclusive of the items detailed in the preceding sentence. This structural shell work is to be performed by one entity which is not now, nor will it be, affiliated with the general contractor, Coral Bay, or the principals of either of them. In order to proceed with the construction of the Development, Coral Bay will need the Corporation to waive the requirements of the Rule, or Coral Bay will not be able to move forward with the construction of the Development.

12. In the current construction environment, where construction of residential for-sale and rental products is experiencing high levels of activity, shell contractors are in limited supply and are highly committed, with their work priced accordingly. This presents a challenge with regard to the Corporation's 20% limitation for work to any one entity, since shell work is typically the single largest trade construction item for concrete block construction such as the Development.

13. It is not uncommon for development changes to occur after submission of an application to the Corporation. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its rule requirements when strict application of these rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers shall be granted when (1) the person who is subject to the rule demonstrates that the application of the rule would create a substantial hardship or violate principles of fairness, and (2) the purpose of the underlying statute has been or will be achieved by other

means by the person. § 120.542(2), Fla. Stat. Indeed, the specific language of the Rule provides the Corporation with the flexibility to permit subcontracts in excess of the 20% limitation after considering the facts and circumstances of an applicant's request.

14. As noted, Coral Bay's general contractor sought multiple bids for the shell work, and all bids received exceeded the 20% limitation. Given the results of the bid process, Coral Bay seeks the Corporation's approval, in accordance with the Rule, to allow the shell subcontract price to exceed the 20% limitation in the Rule. Failure to grant Coral Bay's request for a Rule waiver will result in a substantial hardship to Coral Bay, in that it will not be able to proceed with the construction of the Development in a timely manner, if at all, since the shell work is fundamental to the overall construction of the Development.

15. The requested waiver will not adversely affect Coral Bay, the Development, any other party that applied to receive SAIL funding in the RFA, or the Corporation. A denial of this Petition, however, would (a) result in substantial economic hardship to Coral Bay, as it has incurred approximately \$5,400,000 in costs to date toward ensuring that the Development proceeds to completion, inclusive of the purchase of the land for the Development; (b) deprive Miami-Dade County of essential affordable rental units set aside for persons of limited means who desperately need the housing, as well as other amenities and services which the Development will offer; and (c) violate principles of fairness². §120.542(2), F.S.

²“Substantial hardship” means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. “Principles of Fairness” are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Section 120.542(2), Florida Statutes.

16. If this Petition is not granted, the equity provider which has committed to serve as Coral Bay's investor member and to syndicate the Low-Income Housing Tax Credits will likely withdraw from the transaction and the Development will fail to be constructed.

17. A waiver of the Rule's limitation on single-provider construction costs would serve the purposes of Section 420.5099, F.S., and the Act as a whole, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to households of limited means households by ensuring:

The maximum use of available tax credits in order to encourage development of low-income housing in the State, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the Applicant to proceed to completion of the project in the calendar year for which the credit is sought.

Section 420.5099(2), Florida Statutes.

18. By granting the waiver, the Corporation would recognize the principles of fundamental fairness in developing affordable rental housing by encouraging the development of attractive, secure and affordable housing.

F. CONCLUSION

19. The facts set forth in Sections 9 through 18 of this Petition demonstrate the hardship and other circumstances which justify Coral Bay's request for a Rule waiver; that is, the inability of the general contractor to secure bid that comply with the Rule, Coral Bay's potential loss of a substantial sum of money should the transaction not go forward, and the community's loss of critical housing for households of limited means.

20. Controlling statutes and the Corporation's Rules are designed to allow the flexibility necessary to provide relief from requirements when strict application, in particular

circumstances, would lead to unreasonable, unfair, or unintended results. As demonstrated above, the requested waiver serves the purposes of Section 420.5087 and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households. Further, by granting the requested waiver, the Corporation would recognize principles of fundamental fairness in the development of affordable rental housing.

Should the Corporation require additional information, a representative of Coral Bay is available to answer questions and to provide all information necessary for consideration of this Petition.

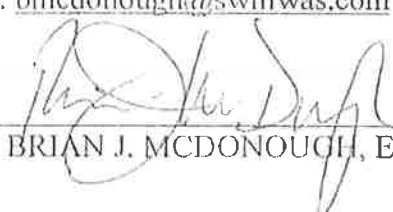
WHEREFORE, Petitioner Coral Bay Cove, LLC, respectfully requests that the Corporation:

- a. Grant the Petition and all the relief requested therein; and
- b. Award such further relief as may be deemed appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
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Miami, Florida 33131
Tel: (305) 789-3350
Fax: (305) 789-3395
E-mail: bmcdonough@swmwas.com

By: _____


BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The Petition is being served by hand-delivery, with a copy served by electronic transmission, for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, with copies served via hand delivery on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 30th day of May, 2018.

s/ Brian J. McDonough _____
BRIAN J. MCDONOUGH, ESQ.