

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

JPM OUTLOOK ONE LIMITED
PARTNERSHIP and GRANDE PARK
LIMITED PARTNERSHIP

Petitioners,
vs.

FHFC Case No. 2018-031BP

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

ORDER DISMISSING PETITION

On April 13, 2018, Florida Housing Finance Corporation received a Petition, pursuant to Sections 120.569 and 120.57(3), from JPM Outlook One LP and Grande Park LP (Petitioners). This petition challenged the terms and conditions of Request for Admissions (RFA) 2018-109. Section 120.569(2)(c), Fla. Stat., sets forth the procedures that an agency must follow upon receipt of a petition. It provides:

(c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

The Uniform Rules are codified in Rule 28-106.201, Fla. Admin. Code.

Among other things, the rules require:

(2) All petitioners filed under these rules shall contain:

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

The Petition filed in this case is not in substantial compliance with the requirements of Section 120.569, Fla. Stat. The Petition identifies only three specific terms or conditions of the RFA that it contends should be modified, although they fail to suggest how these terms should be modified.

First, Petitioner contends that the term "Applicant" should be defined to include "putative" Applicants with Active Awards. The term "Applicant," however, is not defined in the RFA, but is instead defined in Rules 67-48.002(9) and 67-60.002(1), F.A.C., thusly:

"Applicant" means any person or legal entity of the type and with the management and ownership structure described herein that is seeking a loan or funding from the Corporation by submitting an Application or responding to a competitive solicitation pursuant to Rule Chapter 67-60, F.A.C., for one or more of the Corporation's programs. For purposes of Rules 67-48.0105, 67-48.0205 and 67-48.031, F.A.C., Applicant also includes any assigns or successors in interest of the Applicant. Unless otherwise stated in a competitive solicitation, as used

herein, a 'legal entity' means a legally formed corporation, limited partnership or limited liability company with a management and ownership structure that consists exclusively of all natural persons by the third principal disclosure level. For Applicants seeking Housing Credits, the Housing Credit Syndicator/Housing Credit investor need only be disclosed at the first principal disclosure level and no other disclosure is required. The terms 'first principal disclosure level' and 'third principal disclosure level' have the meanings attributed to them in the definition of "Principal."

Petitioners have not challenged these rules pursuant to Section 120.56, F.S., and the RFA cannot use a term that is inconsistent with a rule. Elmwood Terrace LP v. Florida Housing Finance Corporation, DOAH Case No. 09-4682BID (FHFC Final Order December 7, 2009) (it was "clearly erroneous" to include a condition in a solicitation that was contrary to governing rules). Further, there is nothing in this definition that would prevent Petitioners from applying under this RFA; in fact, any person can become an Applicant simply by filing an Application.

Next, Petitioners imply that the terms of Sections Four 3.c. and Exhibit C C.2. of the RFA should be modified to allow exceptions available to "putative" Applicants (*see* ¶ 35 of the Petition). Section Four 3.c. provides: "The Applicant must provide the Corporation-issued Application number for the Active Award." Petitioners in fact have an application number, although it is not for an Active Award, and they have not alleged any specific rules or statutes, or alleged any specific facts, that they contend require reversal or modification of this term.

Exhibit C C.2. provides: “The credit underwriting fee must be received by the Credit Underwriter not later than seven (7) Calendar Days after the notice of preliminary award. Failure to submit the required credit underwriting fee by the specified deadline shall result in withdrawal of the preliminary award.” Exhibit C, C.2. is a section of the RFA that contains the terms and conditions for an award under this RFA after the Board’s decision. It has nothing to do with submitting an application, and Petitioners have not alleged specific rules or statutes the petitioners contend require reversal or modification of this term.

In a recent Recommended Order, Judge Nelson concisely set forth the standards for terms challenges such as this one. In Paragraph 39 of Bridges of America v. Dep’t of Corrections, DOAH Case No. 16-5237BID at 19 (R.O. November 23, 2016), she stated:

In this case, Petitioner is challenging the specifications of the RFP as opposed to challenging an award to a successful bidder. Therefore, as stated by the First District, “[a] challenge to an RFP must be directed to specifications that are so vague that bidders cannot formulate an accurate bid, or are so unreasonable that they are either impossible to comply with or too expensive to do so and remain competitive.” Advocacy Ctr. For Pers. With Disab., Inc. v. Dep’t of Child. & Fam. Servs., 721 So.2d 753, 755 (Fla. 1st DCA 1998). This burden is consistent with the purpose for bid solicitation protests as articulated in Capeletti Brothers v. Department of Transportation, 499 Sop.2d 855, 857 (Fla. 1st DCA 1986), to “allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications prior to accepting bids.”

Judge D.R. Alexander used virtually the same language in American Residential Development v. Florida Housing Finance Corporation, DOAH Case No. 16-6698BID (2015). Judge Van Wyk similarly described the standard of review of an agency's proposed action in a bid protest proceeding in Paragraph 167 of CCA of Tennessee, LLC v. Dep't of Mgmt Services, 2013 WL 3716414, DOAH Case No. 13-0880BID (2013):

a 'public body has wide discretion' in the bidding process and 'its decision, when based on an honest exercise' of the discretion, should not be overturned 'even if it may appear erroneous and even if reasonable persons may disagree.' Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988) (quoting Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982)) (emphasis in original). 'The hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.' Groves-Watkins, 530 So. 2d at 914.

It is clear from the Petition that Petitioners are not attacking any particular terms or conditions of the RFA as being vague or unreasonable, but instead are alleging that the entire purpose of the RFA, which is to "assist Applicants experiencing a reduction in equity funding for their Active Award," is flawed because Florida Housing is not offering funding to persons who are not experiencing a reduction in equity funding for their Active Award. Petitioners are, in fact, challenging a policy decision of Florida Housing. "It is apparent that only potential bidders . . . have standing to contend that the RFP is too vague or unreasonable to permit a truly competitive bid. In contrast, appellants' challenge is addressed, point

after point, to *policy* decisions with which they disagree, rather than specifications which need clarification because of ambiguity or need adjustment because of expense.” Advocacy at 756:

Petitioners commit the bulk of their petition to rearguing the merits of a previous case that is currently on appeal to the First District Court of Appeal (JPM Outlook One LP v. Florida Housing Finance Corporation, Case No. 1D-17-3499 (Fla. 1st DCA)). Most of the attachments to the Petition consist of the Orders and Briefs that are part of the record of the appellate case. This is completely inappropriate in a terms challenge under Section 120.57(3), F.S. It also seeks to invade the jurisdiction of the First District Court of Appeal, as though Florida Housing could at this point somehow affect whatever decision that Court makes through the terms of this RFA.

Petitioners have not alleged that any term or condition of the RFA is so vague that bidders cannot formulate an accurate bid. Petitioners have not alleged that any term or condition of the RFA is so unreasonable that it is either impossible to comply with or too expensive to do so and remain competitive. Petitioners have not alleged any specific rules or statutes that they contend require reversal or modification of any terms or conditions of the RFA. Petitioners, in fact, merely address policy decisions with which they disagree, rather than specifications which need clarification because of ambiguity or need adjustment because of expense.

Petitioners have not alleged any specific facts that they contend warrant reversal or modification of the agency's proposed action. Petitioners have not identified any specific rules or statutes that they contend require reversal or modification of the agency's proposed action, nor explained how any alleged facts relate to the specific rules or statutes. Petitioners have not stated precisely the action petitioners wish the agency to take with respect to the agency's proposed action except to refer the matter to the Division of Administrative Hearings.¹ The only proposal they have for amending the RFA is to amend the definition of "Applicant;" that term, however, is not defined in the RFA, but is instead defined by Rule 67-48.002(9), and a challenge pursuant to Section 120.57(3) is not appropriate for challenging the validity of an existing rule.

Section 120.569(2)(c), Fla. Stat., states: "Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured." In this case, Florida Housing has determined that the defects cannot be cured through any amendment to the Petition. For this reason, the Petition is DISMISSED with prejudice.

Done this 20th day of April, 2018.

¹ Curiously, Petitioners also request that the Corporation grant relief by somehow assuring that an Administrative Law Judge enter a Recommended Order in their favor.



Harold L. Price
Executive Director
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, FL 32301-1329
850/488-4197

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 20th day of April, 2018 by electronic mail to the following:

Kimberly A. Ashby
Foley & Lardner LLP
111 N. Orange Ave., Ste. 1800
Orlando, FL 32801
kashby@foley.com

Hugh R. Brown
General Counsel
Florida Housing Finance Corporation

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTIONS 120.569, 120.57, AND 120.68, FLORIDA STATUTES. SUCH PROCEEDINGS ARE COMMENCED PURSUANT TO CHAPTER 67-52, FLORIDA ADMINISTRATIVE CODE, BY FILING AN ORIGINAL AND ONE (1) COPY OF A PETITION WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329.