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FLORIDA HOUSING
FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

EHDOC Council Towers Limited Partnership,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2023-001VW
Application No.

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULES 67-21.003(1)(b) and 67-21.026(12)(b) (eff. 7/8/18) AND THE NON-COMPETITIVE APPLICATION INSTRUCTIONS (REV. 05-2018)

Petitioner EHDOC Council Towers Limited Partnership (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing"), for a waiver of the prohibition under Rules 67-21.003(1)(b) and 67-21.026(12)(b), Florida Administrative Code ("F.A.C.") (7/8/18) and the incorporated Non-Competitive Application Instructions (collectively, the "Rules") against exceeding the General Contractor's fee maximum of 14% of actual construction cost. As discussed in more detail below, Petitioner was forced to pay severance fees to its former general contractor, which fees will cause the 14% maximum to be exceeded. Petitioner therefore respectfully seeks s waiver of the Rules. If the waiver is granted, Petitioner agrees that any amount of the GC Fee (overall) in excess of 14% will be paid as a subset of the Developer Fee and reflected as such in the Development Final Cost Certification ("DFCC"). In support of this request, Petitioner states as follows:

A. THE PETITIONER.

1. The address, telephone, facsimile numbers and e-mail address for Petitioner and its qualified representative are:

Melanie Ribeiro
President and CEO
Elderly Housing Development & Operations Corporation
1200 S. Pine Island Road, Ste 725
Plantation, FL 33324
Phone: 954-835-9200
Fax: 954-835-0888
mribeiro@ehdoc.org

2. The address, telephone, and facsimile number and e-mail address of Petitioner's counsel is:

Brian J. McDonough, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
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B. WAIVER IS PERMANENT.

3. The waiver being sought is permanent in nature.

C. DEVELOPMENT BACKGROUND.

4. The following information pertains to the development underlying Petitioner's application ("Development"):

- Development Name: Council Towers North & South
- Development Address: 533 & 1040 Collins Ave., Miami Beach, FL 33139
- County: Miami-Dade
- Developers: EHDOC Development Services, LLC and SCG Development Partners, LLC

- Number of Units: 250 acquisition/rehab
- Type: High Rise
- Set Asides: 100% of units at 60% AMI or lower
- Demographics: Elderly; Non-ALF
- Funding: $4,500,000 (Completion Bonds) ($2,863,624 in 4% Housing Credit)

D. THE RULES FROM WHICH WAIVER IS REQUESTED.

5. Petitioner requests a waiver of Rule 67-21.026(12)(b), F.A.C. (7/8/18), which states:

> The General Contractor's fee shall be limited to a maximum of 14 percent of the actual construction costs. For the purpose of any necessity to prepare a HUD subsidy layering review, if there exists an Identity of Interest as defined herein between the Applicant or Developer and the General Contractor, the allowable fees shall in no case exceed the amount allowable pursuant to the HUD subsidy layering review requirements.

6. Petitioner also requests a waiver of Rule 67-21.003(1)(b), F.A.C. (7/8/18) which provides in pertinent part:

> (1) Applicants shall apply for MMRB, Non-Competitive HC, or a combination of MMRB and Non-Competitive HC as set forth below. For purposes of this subsection only, the term NC Award shall refer to MMRB, Non-Competitive HC, or a combination of MMRB and Non-Competitive HC, and funding from the following Corporation programs will not be considered to be other Corporation funding: Predevelopment Loan Program (PLP) and Elderly Housing Community Loan (EHCL) Program.
>
> ***
>
> (b) If the NC Award will not be in conjunction with other Corporation funding made available through the competitive solicitation funding process outlined in rule chapter 67-60, F.A.C., the Applicant shall utilize the Non-Competitive Application Package in effect at the time the Applicant submits the Application. The Non-Competitive Application Package or NCA (Rev. 05-2018) is adopted and incorporated herein by reference and consists of the forms and instructions available, without charge, on the Corporation's website under the Multifamily Programs link labeled Non-Competitive Programs or from http://www.flrules.org/Gateway/reference.asp?No=Ref-09576, which shall be completed and submitted to the Corporation in accordance with this rule chapter.

Id. Rule 67-21.003(1)(b), F.A.C. (7/8/18) incorporates by reference the Non-Competitive Application Package (Rev. 05-2018) ("NCA"). The NCA includes the following requirement:

> General Contractor's fee is limited to 14% of actual construction cost (for Application purposes, this is represented by A 1.1. Column 3). The General Contractor's fee must be disclosed. The General Contractor's fee includes General Conditions, Overhead, and Profit. A General Contractor's Cost Certification will need to be completed prior to the issuance of IRS form 8609 and that certification may further restrict the overall General Contractor's fee. It is advised to review that certification process as early as possible.
> ***
> A1.2. General Contractor Fee see Note (3) (Max.14% of A1.1., column 3)

Id. at Note (3).

E. STATUTES IMPLEMENTED BY THE RULES.

7. Rules 67-21.003(1)(b) and 67-21.026(12)(b), F.A.C., implement, among other sections of the Florida Housing Finance Corporation Act (the "Act"):

- Section 420.502, Legislative findings.
- Section 420.507, Powers of the corporation.
- Section 420.508, Special powers; multifamily and single-family projects.
- Section 420.509, Revenue bonds.
- Section 420.5099, Allocation of the low-income housing tax credit.

8. Per Section 420.5099(1), (2), Florida Housing acts as the State's housing credit agency and is authorized to establish procedures for allocating and distributing low-income housing tax credits.

F. JUSTIFICATION FOR GRANTING WAIVER OF THE RULES.

9. Petitioner submitted a non-competitive application for the Development in May 2019.

10. The Development subsequently experienced extenuating circumstances, discussed below, and the current general contractor, who is conducting ~90% of the work, is and will receive General Contractor Fees in an amount below the 14% maximum.

11. The financial closing on the Property occurred on June 4, 2020, with renovation commencing shortly thereafter.

12. Almost immediately after commencement of renovation, the Property began to experience substantial timing delays because of COVID-related local ordinances and restrictions enacted by the City of Miami Beach relating to construction and renovation protocols, specifically for in-place renovations.

13. As a result of these restrictions, it was determined that the general contractor ("Morrissey"), who is based in California, would be unable to perform their duties as planned under the contract and was replaced with a more qualified general contractor, NEI General Contracting ("NEI"), who has offices and significant experience in Florida with both the U.S. Department of Housing and Urban Development ("HUD") and Florida Housing.

14. Petitioner began working with HUD to replace Morrissey in January of 2021. However, it took six months (*i.e.*, July of 2021) before Petitioner obtained full approvals to execute the new contract and get NEI on-site.

15. Petitioner is aware that the maximum combined General Contractor Fees (overhead, profit, and GCs) may not exceed 14% pursuant to the Rules. Unfortunately, in order to remove Morrissey, and as part of severance negotiations, Petitioner had to pay various fees, expenses, etc., to Morrissey, which ended up totaling more than 14% of the cost incurred by Morrissey. The severance costs were all billed against the Contractor's and/or Mortgagor's Cost Breakdown form ("HUD-2328") for HUD's purposes (amongst the General Contractor Fees),

which resulted in these line items totaling substantially above the 14% cap. *See* Exhibit A (portions highlighted in green). This was an extenuating one-time circumstance necessary to allow the renovation to move-forward.

16. The new general contractor (*i.e.*, NEI) was able to "step-into-the-shoes" of most of the previously incurred subcontractor costs but, due to the nature of the General Contractor Fees billed by Morrissey as part of the severance, NEI was not able to absorb most or all of these costs. This duplicative billing of General Contractor Fees (to separate general contractors) necessitates the waiver sought here.

17. NEI's fees currently total 13.44% of their contract value, which is within the 14% maximum allowed under the Rules, and the amount NEI is entitled to under the construction contract. *See* Exhibit A (portions highlighted in yellow).

18. The General Contractor Fees paid to Morrissey as part of its removal (both actual construction-related fees and severance-related fees) have been approved by HUD and allocated to the specific line items within the HUD-2328.[1] Per their contract, NEI is entitled to their General Contractor Fees of ~13.44% (not to exceed the 14% maximum). As shown in Exhibit A, the total of the fees paid to Morrissey, combined with the fees proposed to be paid to NEI, will

[1] The Severance Agreement with the former GC dated January 31, 2021 contains language explicitly requiring the former GC's full cooperation with Petitioner and the Partnership towards the successful substantial completion and stabilization of this project. Specifically, the severance agreement states: "**Cooperation with Completion**. Contractor shall provide reasonable assistance to the Owner in transitioning the Contract or building permit to a new completion contractor as the Owner may request, including but not limited to, the delivery in native format of all documents created by or for Contractor for the performance of the Contract including, without limitation the Project schedule, submittals and shop drawings, as well as execution of any further documents, letters, or authorizations, and the privilege to review all payment ledgers, accounts payable, accounts receivable, subcontractor files and other documentation or files relating to the Contract and costs by Contractor incurred in connection herewith." Failure to comply with this requirement, for which consideration was paid, would constitute a breach of contract. Petitioner has no reason to believe the former GC will refuse to execute the General Contractors Cost Certification for the work the GC completed and/or costs the GC incurred.

technically exceed the 14% maximum; but, for the extenuating circumstances outlined above, Petitioner believes it will still achieve the purpose underlying the Rules and is therefore respectfully requesting a waiver. If the waiver is granted, Petitioner agrees that any amount of the GC Fee (overall) in excess of 14% will be paid as a subset of the Developer Fee and reflected as such in the DFCC.

19. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., Florida Housing has the authority to grant waivers to its rule requirements when strict application of the rules would lead to unreasonable, unfair and unintended consequences, in particular instances. Waivers shall be granted when the person who is subject to the rule demonstrates that the application of the rule would: (1) create a substantial hardship or, violate principles of fairness,[2] 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.

20. If the Rules are imposed, Petitioner will suffer a substantial hardship.

21. For the foregoing reasons, Petitioner meets the standards for the requested waiver.

22. The waiver will not adversely impact the Development, nor Florida Housing.

[2] "Substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the 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. § 120.542(2), Fla. Stat.

G. ACTION REQUESTED.

23. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested permanent waiver and allow Petitioner to exceed the General Contractor's fee maximum of 14% of actual construction cost; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
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Counsel for Petitioner

By: */s/ Brian J. McDonough*
BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

This Petition is being served by electronic transmission for filing with the Clerk for the Florida Housing Finance Corporation, CorporationClerk@FloridaHousing.org, with a copy served by U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 10th day of January, 2023.

By: */s/ Brian J. McDonough*

Exhibit A

	Spend with Morrissey		Plus NEI		Total Construction Costs	
Concrete	-		125,460		125,460	
Masonry	-		49,000		49,000	
Metals	4,680		408,172		412,852	
Rough Carpentry	-		50,500		50,500	
Finish Carpentry	-		130,500		130,500	
Waterproofing	-		220,000		220,000	
Insulation	-		-		-	
Roofing	18,130		983,000		1,001,130	
Sheet Metal	-		65,190		65,190	
Doors	-		1,275,220		1,275,220	
Windows	207,108		787,950		995,058	
Glass	34		643,380		643,414	
Lath and Plaster	-		642,844		642,844	
Drywall	24,930		624,264		649,194	
Tile Work	-		296,282		296,282	
Acoustical	-		147,091		147,091	
Wood Flooring	-		-		-	
Resilient Flooring	44,437		1,292,503		1,336,940	
Painting and Décor	-		710,520		710,520	
Specialties	-		187,400		187,400	
Special Equipment	-		50,000		50,000	
Cabinets	57,026		888,225		945,251	
Appliances	-		425,000		425,000	
Blinds and Shades	-		105,000		105,000	
Carpets	-		-		-	
Special Construction	-		300,698		300,698	
Elevators	-		-		-	
Plumbing and Hot Water	128,930		2,265,923		2,394,853	
Heat and Ventilation	-		-		-	
Air Conditioning	665,563		2,549,941		3,215,504	
Electrical	439,164		2,237,455		2,676,619	
	-		-		-	
Sub Total	**1,590,003**		**17,461,518**		**19,051,521**	
	-		-		-	
Earth Work	-		-		-	
Site Utilities	-		-		-	
Roads and Walks	-		216,884		216,884	
Site Improvements	-		271,782		271,782	
Lawns and Planing	-		-		-	
	-		-		-	
Sub Total	-		488,666		488,666	
	-		-		-	
Total	**1,590,003**		**17,950,184**		**19,540,187**	
	-		-		-	
General Requirements	381,315	24.0%	1,224,505	6.82%	1,605,820	8.22%
Builders Overhead	273,467	17.2%	395,730	2.20%	669,197	3.42%
Builders Profit	-	0.0%	791,461	4.41%	791,461	4.05%
Other Fees (GL and Spec Insp)	112,490		306,942		419,432	
Bond Premium	216,942		216,942		433,884	
	-		-		-	
Sub Total	**984,214**		**2,935,580**		**3,919,794**	
	-		-		-	
Grand Total	**2,574,217**	41.18%	**20,885,764**	13.44%	**23,459,980**	15.69%