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FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

INNOVARE, LP,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2023-004VW
Application No. 2020-478CSN

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.0072(16)(b) (eff. 7/11/19) AND RFA 2020-103 PROVISIONS

Petitioner Innovare, LP (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing"), for a waiver of Rule 67-48.0072(16)(b), Florida Administrative Code ("F.A.C.") (7/11/19) (the "Rule"), and the RFA 2020-103 Housing Credit and SAIL Financing to Develop Housing for Homeless Persons (the "RFA") provisions, which limit the General Contractor's ("GC") fee to 14% of actual construction cost. After three months of construction, the development was delayed for nine months due to circumstances beyond the GC's control. The GC did not walk away from the job, nor de-mobilize, because it appeared each month that work would resume imminently. Unfortunately, the sub-contractors were not as committed, requiring the GC to re-bid at least three times in relation to delays. Fortunately, construction is back in full swing and Petitioner will be able to comply with the 14% cap with the exception of the PCO 17 portion of change order 1 ("PCO 17"). Petitioner therefore respectfully seeks a Rule and RFA waiver. If granted, Petitioner will pay any excess GC fee over the 14% limitation out of the Developer Fee and will

reflect the excess amount as a subset of the Developer Fee on 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:

Janet M. Stringfellow
Innovare, LP
200 2nd Ave South #436
St. Petersburg, Florida 33701
Telephone: (727)369-8500
Fax: N/A
Email: jstringfellow@voa-fla.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: Innovare
- Development Address: 5th Ave S, SE of the intersection of 5th Ave S. & Dr. Martin Luther King Jr. St. S., St. Petersburg AND 5th Ave S, SW of the intersection of 5th Ave S. & Highland Court S., St. Petersburg

- County: Pinellas
- Developers: Volunteers of America of Florida, Inc.; Gorman & Company
- Number of Units: 51 new construction
- Type: Garden was indicated in the Application, but a Rule waiver was subsequently granted to change to Mid-Rise 5 stories for one building and mid-rise 6 stories for the other building.
- Set Asides: 85% of units at or below 60% AMI and 15% at or below 33%.
- Demographics: Innovare will set aside at least 50 percent of the total units (50) for Homeless individuals and families as defined in Section 420.621(5), F.S. and at least 15 percent of the total units for Persons with Special Needs as defined in Section 420.0004(13), F.S. The remaining 50 percent of the units will be affordable housing reserved for income qualifying individuals and families, with preference given to formerly homeless households who may no longer need supportive housing.
- Funding: HC request of $1,165,367 annually; ELI Loan request of $205,600; and SAIL request of $3,500,000.

D. THE RULE FROM WHICH WAIVER IS REQUESTED.

4. Petitioner requests a waiver of Rule 67-48.0072(16)(b), F.A.C. (7/11/19) which provides in pertinent part:

> (16) For all Developments, the Developer Fee and General Contractor's fee shall be limited to:
> ***
> (b) The General Contractor's fee shall be limited to a maximum of 14 percent of the actual construction cost.

Id. (emphasis added).

E. THE RFA PROVISIONS FOR WHICH A WAIVER IS REQUESTED.

5. RFA 2020-103 states:

> (2) General Contractor Fee
> General Contractor fee shall be limited to 14 percent of actual construction cost. The maximum allowable General Contractor fee will be tested during the scoring of the Application by multiplying the actual construction cost by

14 percent, rounded down to the nearest dollar.

Id. at p. 50.

> NOTES: . . . (3) General Contractor's fee is limited to 14% of actual construction cost (for Application purposes, this is represented by A1.1. Column 3), rounded down to nearest dollar. The General Contractor's fee must be disclosed. The General Contractor's fee includes General Conditions, Overhead, and Profit.
>
> ***
>
> A1.2. General Contractor Fee See Note (3)
> (Max. 14% of A1.1., column 3) $_____

Id. at Development Cost Pro Forma, p. 1.

F. STATUTES IMPLEMENTED BY THE RULE.

6. Rule 67-48.0072, F.A.C., implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"):

- Section 420.5087, State Apartment Incentive Loan Program.
- Section 420.5089, HOME Investment Partnership Program; HOME Investment Partnership Fund.
- Section 420.5099, Allocation of the low-income housing tax credit.

7. 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.

G. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE AND RFA.

8. Petitioner timely submitted Application No. 2020-478CSN for the Development on March 31, 2020 in response to RFA 2020-103.

9. The GC entered a guaranteed maximum price ("GMP") Agreement on April 16, 2021.

10. Construction began in November 2021 and the foundation and ground floor masonry were completed in the span of three months.

11. However, the GC received a temporary stop work order in January of 2022, which was not lifted until October of 2022.[1]

12. During that time, the GC did not de-mobilize because it appeared each month that work would resume at any moment.[2] Unfortunately, the sub-contractors were not as committed, requiring the GC to re-bid at least three times in relation to delays.[3]

13. Petitioner now seeks a waiver of the Rule and RFA for a one-time approval of an increase in the General Conditions of Change Order 1 (PCO 17 only). The waiver is needed because simply charging the general conditions of PCO 17 at 6% will not cover the cost to build the Development over the next 12 months. The entire duration for the Development's construction was originally established in the GMP as only 12 months. However, construction was suspended for nine months of that original 12-month timeframe. Indeed, the previous

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[1] The U.S. Department of Housing and Urban Development, through the St. Petersburg Housing Authority, issued a Stop Work Order in relation to an environmental review conducted pursuant to 24 CFR Part 58. Additionally, the St. Petersburg Housing Authority imposed a subsidy layering review as part of the receipt of project-based Housing Vouchers.

[2] Accordingly, during this time, the GC continued to incur costs related to remaining mobilized, such as the site trailer, fencing, utilities, internet, etc. Additionally, man-hours were expended during this time; for example: (a) the GC continued having monthly meetings; (b) the GC continued to receive, and respond to, requests for information; (c) staff needed to be available onsite to receive and store materials that were ordered during the initial launch period; and (d) staff time was needed to complete draws, lien waivers, re-bid jobs, conduct safety inspections (a hurricane hit during this time); all of which expenses were charged out of General Requirements. Specifically, the delay caused 42 extra weeks to be added to the contract for a total of $435,481 extra in General Requirements.

[3] Although the costs were increasing, it did not necessarily result in an increase to the contractors' allowance for their expenses as well The GC fee makes sense when set over a 12-month period because the General Requirements should be set based on a time period, as opposed to a percentage. Here, the construction schedule doubled, but the change orders only resulted in an increase of around 22%, leaving a delta.

substantial completion deadline was November 7, 2022, but the suspension was not released until October 27, 2022. It will take another 12 months from that date to complete (*i.e.*, the new Substantial Completion date is November 15, 2023).[4]

14. Put simply, the project has doubled the timeframe to complete the same amount of construction. In other words, the GMP Agreement was based upon a timeframe that is half of the new timeframe.

15. Petitioner is aware that the maximum combined General Contractor Fees (overhead, profit, and GCs) may not exceed 14% pursuant to the Rule and RFA. Unfortunately, the suspension and related delays increased the cost of procuring the subcontracted work;[5] and the current rising inflation rate increased labor and material prices. These unforeseen costs and delays were not included within the GMP Agreement. Accordingly, Petitioner is in need of a Rule and RFA waiver.

16. If granted, Petitioner will pay any excess GC fee over the 14% limitation out of the Developer Fee and will reflect the excess amount as a subset of the Developer Fee on the DFCC.

17. 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.

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[4] While the request is for an allowance of just the costs incurred in PCO 17 for General Conditions, the GC Fee, including the Change Order numbers will now be 16.9% (the total contract amount is now $13,445,568 and the new GC Fee is $1,922,384.03, which – after removing the insurance and bond costs – results in the GC Fee being 16.9% of actual construction cost).

[5] Since the cost of the work is increasing, the amount of General Conditions is increasing as well, but because General Contractors base their General Requirements off of time, it does not correspond to how Florida Housing calculates the percentage. The duration of the project was doubled, but the change order only increased about 22%.

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,[6] 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.

18. Strict application of the Rule will violate principles of fairness because other applicants were not subject to the nine-month suspension of work that necessitated this petition. Because the Rule and RFA provisions are only being waived to the extent necessary to redress the inequity caused by that suspension, Petitioner believes it will still achieve the purpose underlying the Rule if a waiver is granted.

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

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

H. <u>ACTION REQUESTED.</u>

21. 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,

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[6] "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.

E-mail: bmcdonough@stearnsweaver.com

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 11th day of January, 2023.

By:___*/s/ Brian J. McDonough*_____