STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

BLUE BROADWAY, LLC,

Petitioners,

vs.

DOAH Case No.: 17-3273BID
FHFC Case No.: 2017-032BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

WEST RIVER PHASE 2, LP,

Intervenors.
_____/

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 22, 2017. Blue Broadway, LLC ("Petitioner" or "Blue Broadway") and Intervenor West River Phase 2, LP, ("Petitioner" or "West River") were Applicants under Request for Applications 2016-113: 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

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
J. Marshall /DATE: 9/22/2017

Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order, and Responses thereto.

On October 28, 2016, Florida Housing Finance Corporation ("Florida Housing") issued the RFA, which solicited applications to compete for an allocation of low income housing credit funding. Responses to the RFA were initially due on December 8, 2016. The RFA was modified on November 10, 2016, and the application period was extended to December 30, 2016. In response to the RFA, applications were submitted by a number of developers including Petitioner Blue Broadway and Intervenor West River.

On May 5, 2017, Florida Housing posted notice of its intended decision to award funding to seven Applicants, including West River. Blue Broadway was found to be eligible, but was not selected for funding. Petitioner timely filed a notice of intent to protest followed by formal written protest. Specifically, Blue Broadway argued that the West River application was deficient for failure to properly identify the Principals of the Developer and, also, for failure to fulfill the requirements to get points for developer experience. West River properly and timely filed for intervention to participate in this proceeding. Prior to hearing, Florida Housing filed a Notice of Change of Position indicating that it now agreed with Blue Broadway's allegation that Intervenor's application should have been found ineligible, and that Blue Broadway, not West River, should have been recommended for funding.

The protest was referred to the Division of Administrative Hearings (DOAH). A formal hearing took place on July 11, 2017, in Tallahassee, Florida before the Honorable Administrative Law Judge Linzie F. Bogan ("ALJ"). After the hearing, the 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 August 29, 2017. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ determined that Petitioner met its burden and has shown by a preponderance of the evidence that Florida Housing's initial decision to find West River's application eligible was erroneous and not consistent with the requirements of the RFA. The Recommended Order recommended that Florida Housing enter a final order finding that Florida Housing's initial scoring decision regarding the West River application was erroneous, concluding that the West River application is ineligible for funding, and awarding funding to Blue Broadway.

West River filed Exceptions to the Recommended Order. Blue Broadway and Florida Housing each filed Responses to the Exceptions. All of which are addressed as follows:

WEST RIVER'S EXCEPTIONS TO FINDINGS OF FACT

6. West River takes exception to the Findings of Fact set forth Paragraphs 31 and 32 of the Recommended Order.

7. After a review of the record, the Board finds that the Findings of Fact set forth in Paragraphs 31 and 32 of the Recommended Order are supported by competent, substantial evidence, and the Board rejects West River's Exceptions to the Findings of Fact set forth in Paragraphs 31 and 32 of the Recommended Order.

WEST RIVER'S EXCEPTIONS TO CONCLUSIONS OF LAW AND RECOMMENDATION

8. West River takes exception to the Conclusions of Law set forth in Paragraphs 52, 56, 57, and 58 as well as the Recommendation of the Recommended Order.

9. The Board finds that it has substantive jurisdiction over the issues presented in Paragraphs 52, 56, 57, and 58 of the Recommended Order.

10. After a review of the record, the Board finds that the Conclusions of Law set forth in Paragraphs 52, 56, 57, and 58 and the Recommendation of the Recommended Order are reasonable and supported by competent, substantial evidence, and rejects West River's Exceptions to the Conclusions of Law presented in Paragraphs 52, 56, 57, and 58 and the Recommendation of the Recommended Order.

RULING ON THE RECOMMENDED ORDER

15. The Findings of Fact set out in the Recommended Order are supported by competent substantial evidence.

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

ORDER

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

The Findings of Fact of the Recommended Order 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.

IT IS HEREBY ORDERED that the preliminary award to West River is rescinded, West River is ineligible, and Blue Broadway is a recipient of funding under RFA 2016-113.

DONE and ORDERED this 22nd day of September 2017.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic mail this 22nd day of September, 2017 to the following:

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J. Marshall
Corporation Clerk

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 32399-1850, 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

BLUE BROADWAY, LLC,

Petitioner,

vs. Case No. 17-3273BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

WEST RIVER PHASE 2, LP,

Intervenor.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, on July 11, 2017, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Intervenor: Maureen McCarthy Daughton, Esquire
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STATEMENT OF THE ISSUE

Whether the intended decision of Florida Housing Finance Corporation (Respondent/Florida Housing) to fund the application of West River Phase 2, LP (West River/Intervenor), based on the scoring of its application, is contrary to Respondent's governing statutes, rules, policies, or solicitation specifications.

PRELIMINARY STATEMENT

On October 28, 2016, Florida Housing issued a Request for Applications (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. A modification to the RFA was issued on November 10, 2016. On December 30, 2016, applications were submitted in response to the RFA by a number of developers, including Blue Broadway, LLC (Petitioner), and Intervenor. On May 5, 2017, Florida Housing posted notice of its intended decision to award funding to seven applicants, including West River. Petitioner was found to be eligible, but was not selected for funding. Petitioner timely filed a Formal Written Protest and Petition for Administrative Proceeding. Prior to the final hearing, however, Florida Housing filed a Notice of Change of

Position indicating that it now agreed with Petitioner's allegation that Intervenor's application should have been found ineligible, and that Petitioner, and not Intervenor, should have been recommended for funding. The matter was forwarded to the Division of Administrative Hearings for a disputed-fact hearing.

The parties submitted a Joint Pre-hearing Stipulation on July 7, 2017, in which all parties agreed to a number of material facts. The facts and stipulations of the parties, where appropriate, have been incorporated into this Recommended Order.

Petitioner presented the testimony of Shawn Wilson, president, Blue Sky Communities, LLC. Florida Housing presented the testimony of Kenneth Reecy, director of multi-family housing for Florida Housing. Intervenor presented the testimony of Leroy Moore, Sr., vice president and chief operating officer of the Housing Authority of the City of Tampa; Eileen Pope, senior vice president, Banc of America Community Development Corporation (via deposition); and Kathy Krickhahn, equity manager, Banc of America Community Development Corporation (via deposition).

Joint Exhibits 1 through 9 were admitted into evidence. Intervenor's Exhibits 1, 2, 3, 5, and 6 were admitted into evidence.

A Transcript of the disputed-fact hearing was filed with the Division of Administrative Hearings (DOAH) on August 2, 2017. The parties each filed a proposed recommended order, and the same

have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a Florida limited liability corporation based in Tampa, Florida, in the business of providing affordable housing.

2. Intervenor is a Florida limited partnership based in Tampa, Florida, in the business of providing affordable housing.

3. Respondent is a public corporation created pursuant to section 420.504, Florida Statutes (2017).[1/] 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.

4. The low-income housing 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 which qualify. These credits are then normally sold by developers for cash to raise capital for their projects. This has the effect of reducing 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.

5. Tax credits are not tax deductions. For example, a $1,000 deduction in a 15-percent tax bracket reduces taxable income by $1,000 and reduces tax liability by $150, while a $1,000 tax credit reduces tax liability by $1,000. The demand for tax credits provided by the federal government exceeds the supply.

6. Florida Housing allocates housing tax credits and other funding by means of request for proposals or other competitive solicitation as authorized by section 420.507(48).

7. Housing 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 Florida Administrative Code Rule 67-60.009(4). The RFA at issue here is 2016-113, Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. The RFA was issued on October 28, 2016, a modification to the RFA was issued on November 10, 2016, and responses were due December 30, 2016. A challenge was filed to the terms,

conditions, or requirements of the RFA by parties not associated with the instant case, but that challenge was ultimately unsuccessful.

8. Through the RFA, Florida Housing seeks to award up to an estimated $14,669,052 of housing tax credits to qualified applicants to provide affordable housing developments.

9. A review committee made up of Florida Housing staff reviews and scores each application. These scores are presented in a public meeting and the committee ultimately makes a recommendation as to which projects should be funded. This recommendation is presented to Florida Housing's Board of Directors (Board) for final agency action.

10. On May 5, 2017, Petitioner and all other participants in RFA 2016-113 received notice that the Board had determined which applications were eligible for consideration for funding and that certain applications were selected for awards of tax credits, subject to satisfactory completion of the credit underwriting process. Such notice was provided by the posting of two spreadsheets, one listing the "eligible" and "ineligible" applications and one identifying the applications which Florida Housing proposed to fund.

11. Florida Housing announced its intention to award funding to seven developments, including Intervenor. Petitioner's application was deemed eligible and scored the

maximum number of points, but it was not selected for funding due to having a higher lottery number than Intervenor.

12. If Intervenor's application had been deemed ineligible, Petitioner's would have been selected for funding.

13. In this proceeding, Petitioner alleges that Intervenor's application is ineligible for two reasons. First, Petitioner asserts that Intervenor failed to include all "principals" for its designated developer entity as required by the RFA. Next, Petitioner asserts that Intervenor failed to provide sufficient documentation to establish that its designated developer entity, and specifically the identified "principal" of the developer entity, had the requisite developer experience required by the RFA.

A. Disclosure of the Principals of the Developer

14. The RFA at section Four (A)(3)(d) requires the disclosure of information as follows:

> Principals Disclosure for the Applicant and for each Developer.
>
> The Application must include a properly completed Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 08-16) ("Principals Disclosure Form") that was uploaded 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 must 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 that includes, for any organizational structure, any type of entity that is not specifically included in the Rule definition of Principals, will not be accepted by the Corporation to meet the Mandatory requirement to provide the Principals of the Applicant and Developer(s) Disclosure Form.

15. The term "principal" is defined by Florida Administrative Code Rule 67-48.002(93)(b) with respect to a developer, and provides as follows when the developer entity is a limited liability company:

> 3. A limited liability company, at the first principal disclosure level, any manager or member of the Developer limited liability company, and, with respect to any manager or member of the Developer limited liability company that is:
>
> a. A corporation, at the second principal disclosure level, any officer, director or shareholder of the corporation,
>
> b. A limited partnership, at the second principal disclosure level, any general partner or limited partner of the limited partnership, or
>
> c. A limited liability company, at the second principal disclosure level, any manager or member of the limited liability company.

16. Florida Housing offers a pre-approval of the principals disclosure form to all potential applicants. The pre-approval process verifies that the disclosure form has been completed properly as to form. However, its purpose is not to determine the accuracy of the information provided by the applicant.

Intervenor utilized the pre-approval process and its principal disclosure forms were pre-approved.

17. In response to this RFA and rule requirement, Intervenor identified WRDG Boulevard, LLC, as its developer. On the principal disclosure form included within its application, Intervenor further identified Banc of America Community Development Corporation (BOACDC) as the "managing member" and the Housing Authority of the City of Tampa as "member" of WRDG Boulevard, LLC.

18. The principal disclosure form submitted by Intervenor for its developer entity lists approximately 62 individuals that are principals of BOACDC and identifies them as officers, directors, and shareholders. However, two officers who met the definition of principal were omitted from Intervenor's principals disclosure form for the developer entity.

19. The evidence establishes that the annual report filed by BOACDC with the Florida Secretary of State's office on March 31, 2016, lists four officers and directors for BOACDC. The listed officers and directors include Mr. Jason Pritchard as senior vice president and Mr. Nathan Barth as secretary. Neither Mr. Pritchard nor Mr. Barth is listed on the principals disclosure form submitted to Florida Housing by Intervenor.

20. Intervenor concedes that the principals disclosure form is missing these two principals, but asserts that neither

Mr. Barth nor Mr. Pritchard had actual authority to bind BOACDC or had any direct involvement with the proposed project. Intervenor further points out that neither Mr. Pritchard nor Mr. Barth is listed on Respondent's past due report dated April 5, 2017, which was the most recently published past due report prior to the RFA review committee meeting on April 25, 2017. Intervenor also asserts that there is no specific language in the RFA that prohibits waiving this admitted deviation. Accordingly, Intervenor alleges that the failure to include these two principals should be waived as a minor irregularity.

21. The RFA requires that principals be listed and does not include qualifiers or exemptions to these requirements in instances where the omitted principal is either not on the latest arrears list or does not have the authority to bind the designated entity. Mr. Reecy testified that while Respondent has waived other failures to submit certain information, it did so only when the missing information could be found elsewhere in the application. In the present case, there is no other place in the application where a list of the principals of the developer could be found.

22. The evidence establishes that the accurate and complete disclosure of principals is important in the RFA process for several reasons. First, Respondent uses the disclosure of principals to determine if any individuals associated with a

proposed development are in arrears or indebted to Florida Housing in connection with other developments previously funded by Florida Housing. A Florida Housing staff member, during the review process, checks each principal listed for arrearages and reports back to the review committee accordingly.

23. Second, Respondent uses the information to determine if any principal associated with a proposed development is ineligible to participate in any Florida Housing program due to prior illegal acts or misconduct. Mr. Reecy testified as to several recent instances where individuals have been subject to "timeouts" due to misrepresentations made to Florida Housing.

24. Mr. Reecy credibly testified that Florida Housing must know who it is dealing with for each applicant and developer entity, and that to not know this information would harm the basic structure of the RFA application process, which resultantly would adversely impact the interests of Florida Housing and the public.

B. Developer Experience Chart

25. Section Four, 4(a)(3) of the RFA provides, in part, as follows:

> (3) General Development experience (5 Points):
> To be eligible to be awarded 5 points for General Development Experience, the Prior General Development Experience chart must meet the requirements of (a) below.

(a) At least one Principal, which must be a natural person, of the Developer entity, or if more than one Developer entity, at least one Principal, which must be a natural person, of at least one of the Developer entities, must meet the General Development Experience requirements in (i) and (ii) below.

(i) General Development Experience:
A Principal, which must be a natural person, of each experienced Developer entity must have, since January 1, 1996, completed at least three (3) affordable rental housing developments, at least one (1) of which was a Housing Credit development completed since January 1, 2006.

If the experience of a natural person Principal for a Developer entity listed in this Application was acquired from a previous affordable housing Developer entity, the natural person Principal must have also been a Principal of that previous Developer entity as the term Principal was defined by the Corporation at that time.

(ii) Prior General Development Experience Chart:

The Applicant must provide, as Attachment 4 to Exhibit A, a prior experience chart for each natural person Principal intending to meet the minimum general development experience reflecting the required information for the three (3) completed affordable rental housing developments, one (1) of which must be a Housing Credit development.

26. The RFA requires that at least one principal of the designated developer entity have completed at least three affordable rental housing developments since January 1996. If the designated principal is using experience from a previous

developer entity, the named principal must have been a principal of that entity as the term principal "was defined by the Corporation at that time."

27. Intervenor submitted a general development experience chart as part of its application in accordance with the RFA. This chart listed Eileen M. Pope as its principal with the required developer experience, and specified three developments for which Ms. Pope was identified as a principal of the developer. Based upon this chart, Intervenor was awarded five points by the scoring review committee.

28. One of these developments was First Ward Place Phase I, which was listed as being completed in 1998. In 1998, Ms. Pope was employed as a regional property manager for the Charlotte Housing Authority (CHA). She was not an officer, director, or shareholder of the CHA.

29. The RFA in this case requires an applicant to state the name of each developer, including all co-developers. It is thus relatively easy for applications submitted to Florida Housing in 2017 to determine whether or not a particular entity is considered a "co-developer" of a project. Unfortunately, it is not so easy to make this determination with respect to developers of projects located in North Carolina in 1998. There is no evidence directly identifying CHA as a "co-developer" of First Ward Place Phase I. However, Ms. Pope identified it as such, and

there is evidence in the record that the CHA was in partnership with NationsBank Community Development Corporation (NBCDC), and that NBCDC was the developer of the project. The available evidence does not demonstrate that the CHA should not be considered a co-developer of First Ward Place Phase I.

30. Whether Ms. Pope should be considered a principal of a co-developer, however, is another matter. The evidence is uncontroverted that she was employed by the CHA as a regional property manager. The CHA was governed by a board of directors along with several officers (president, CEO, CFO), any of whom would have been considered a principal of the CHA. Ms. Pope was not a director, officer, or shareholder of the CHA; for the First Ward Place Phase I project, she "worked on the development team middle-to-back-end piece." She considered herself a member of the "senior management" of the CHA and part of the "development team." She testified that the CHA was, to some extent, a regulatory agency, and that part of her job was to oversee compliance issues and to track how certain funds were being spent. She testified that it was her understanding that a "principal" was "a person in authority" and, thus, she considered herself to be a "principal." However, she also testified that she did not claim to be a principal:

> I disagree with your first part of the comment in that you said that I said I was a principal of the housing authority. I didn't

> say I was a principal. I said there were no principals, and I was asked if I viewed myself as a principal, and I said I don't understand what the definition of the principal would be, that a principal is somebody in authority. So, if you're asking me that, yes, I would have viewed myself as a principal. I never claimed to be a principal of the housing authority. (Jt. Ex. 8, pg. 53)

31. Mr. Reecy testified that Ms. Pope was "an employee, but not a principal in any way that Florida Housing has ever defined principal in any regard." Mr. Reecy also testified that Florida Housing had never considered a person other than an officer, director, shareholder, or managing member to be a principal of either an applicant or a developer. In fact, Mr. Reecy compared Ms. Pope's position with the CHA to his own position with Florida Housing, in that both had a high level of responsibility, and both were integral to the operation of the entity, but that neither could be considered a principal.

32. As noted above, the RFA requires that in order to gain points for developer experience, the natural person principal must have also been a principal of that previous developer entity as the term principal was defined by the Florida Housing "at that time." There is no dispute that Respondent's rules in effect in 1998 did not explicitly define a principal of a developer. Both Florida Administrative Code Rules 9I-48.002(69) and 67-48.002(77) defined "principal" to include only officers,

directors, shareholders or general partners, but these rules specifically applied only to applicants. Nonetheless, the evidence shows that it has been Respondent's position and practice that a principal did not include all employees of an applicant or developer, even those in positions of authority, but instead, included only the officers, directors, shareholders, or general partners of an applicant or developer.

33. The greater weight of the evidence shows that Ms. Pope had some degree of experience. As Mr. Reecy indicated, however, simply having experience is only part of the equation; Ms. Pope must also have been a principal. There is no evidence establishing that Ms. Pope was an officer, director, or shareholder of either NBCDC or the CHA in conjunction with the First Ward Place Phase I development. It is, therefore, found that Ms. Pope was not a principal of either entity, and the award to Intervenor of five points for its developer experience was clearly erroneous.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1) and (3), Fla. Stat.

35. Section 120.57(3)(f) provides in part, as follows:

> 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.

36. 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).

37. 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 Health & Rehab. Servs., 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)).

38. 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.

39. 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 Intervenor's 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.

40. After determining the relevant facts, the role of DOAH 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. The proposed action will be upheld unless it is contrary to governing statutes, the agency's rules, or the RFA specifications.

41. 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).

42. A capricious action has been defined as an action, "which is without thought or reason or irrationally." Agrico Chem. Co. v. 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."

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

44. 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.

45. 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 @ 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).

46. The RFA, at section three, 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.

47. 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.

48. Petitioner has challenged the eligibility of Intervenor's application for two reasons. First, Petitioner alleges that Intervenor provided an incomplete response concerning the principals of its developer entity. Next, Petitioner questions whether Intervenor has provided sufficient information concerning the experience of its developer entity.

49. While Respondent initially found Intervenor's application eligible, it now, based on new information, takes the position that because of Intervenor's responses to matters related to the incomplete disclosure of principals and issues related to Ms. Pope's lack of qualifying experience, Intervenor's application should be found ineligible and not entitled to tentative funding award. Respondent's new position is not entitled to the same deference as final agency action; rather, its position and argument shows a change in litigation strategy based on newly discovered evidence. In this proceeding, the undersigned continues to review the correctness of Respondent's

initial decision which was to find Intervenor's application to be eligible. The undersigned finds that decision to be erroneous.

50. The evidence establishes that all principals were not disclosed for Intervenor's development entity as required by the RFA. Mr. Reecy testified that had Respondent known of this omission during the scoring process, Intervenor's application would have been deemed ineligible. This conclusion by Respondent is reasonable, and Petitioner has shown by a preponderance of the evidence that Respondent's initial eligibility determination was erroneous and not consistent with the requirements of the RFA.

51. Similarly, Petitioner has shown by a preponderance of the evidence that Intervenor did not satisfy the developer entity experience requirements of the RFA. While not known to Respondent during its initial review, Ms. Pope was not a principal for the developer of all three developments listed on attachment four.

52. Intervenor raises an issue concerning the fact that the definition of principal in 1998 did not include developers, but applied only to applicants. While this is true, that does not give Intervenor a pass as it relates to satisfying the RFA requirements at issue in the instant case.

53. In at least one other case the question of whether an identified person was a principal was considered. In Pinnacle Rio, LLC v. Florida Housing Finance Corporation, Case

No. 14-1398BID (Fla. DOAH June 4, 2014), rejected in part, (Fla. HFC June 13, 2014), Florida Housing initially found an application ineligible because the identified principal of the developer entity was alleged to not actually be a principal in all the listed developments. Contrary to the initial determination by Florida Housing, the applicant was able to prove that the identified person was an officer of the development entity. Based on this proof, it was determined in Pinnacle that Florida Housing's initial decision was erroneous.

54. In the present case, unlike what happened in Pinnacle, there is no proof that Ms. Pope was a principal of either NBCDC or CHA. Rather Intervenor argues that Ms. Pope was a senior manager and this position is the equivalent of a principal. As Mr. Reecy pointed out, he is also a senior manager, but that does not make him a principal. Simply stated, Ms. Pope was not a principal when working for CHA.

55. Intervenor also argues that to the extent any deviations from the requirements of the RFA occurred, they should be waived as a minor irregularity.

56. Rule 67-60.008 provides that "[t]he Corporation may waive Minor Irregularities in an otherwise valid Application [and] [m]istakes clearly evident to the Corporation on the face of the Application, such as computation and typographical errors,

may be corrected by the Corporation; however, the Corporation shall have no duty or obligation to correct any such mistakes."

57. For several reasons, the deviations committed by Intervenor are not minor irregularities that can be waived. First, Petitioner's failure to disclose all principals of a developer is not an error that was clearly evident to Respondent when considering Intervenor's application. Second, and perhaps most importantly, the disclosure of principals and satisfactory developer experience are mandatory elements of the RFA that cannot be waived for the reasons discussed by Mr. Reecy.

58. Petitioner has met its burden in the instant case and has shown by a preponderance of the evidence that Respondent's initial decision to find Intervenor's application eligible was erroneous and not consistent with the requirements of the RFA.

RECOMMENDATIONS

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 West River application was erroneous, concluding that the West River application is ineligible for funding, and awarding funding to Blue Broadway.

DONE AND ENTERED this 29th day of August, 2017, in Tallahassee, Leon County, Florida.

LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2017.

ENDNOTE

[1/] All subsequent references to Florida Statutes will be to 2017, unless otherwise indicated.

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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.