BEFORE THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

The ARC of Martin County, Inc.,

Petitioner,

v. FHFC CASE NO.: 2013-037BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, on January 30, 2014, an informal administrative hearing was held in this case in Tallahassee, Florida, before Florida Housing Finance Corporation's appointed Hearing Officer, Christopher McGuire.

APPEARANCES

For Petitioner:

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For Respondent:

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STATEMENT OF THE CASE

The central issue of this case is whether or not Respondent Florida Housing Finance Corporation's ("Florida Housing") rejection of Petitioner The ARC of Martin County, Inc.'s ("ARC") response to Request for Applications 2013-005, on the grounds that it failed to demonstrate site control, was clearly erroneous, contrary to competition, arbitrary or capricious, or was contrary to Florida Housing's governing statutes, rules, policies or RFA specifications.

There are no disputed issues of material fact.

PRELIMINARY STATEMENT

At the informal hearing the Parties filed a Prehearing Stipulation. The Prehearing Stipulation is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order. The parties also stipulated, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of Florida Housing and to any applicable rules promulgated by Florida Housing.

At the hearing Joint Exhibits J-1 through J-6 were admitted without objection. In addition, Petitioner proffered one exhibit, which was not admitted into evidence.

The final hearing was recorded, but no transcript was ordered. All parties timely submitted Proposed Recommended Orders on February 7 and 10, 2014. The parties' Proposed Recommended Orders have been given consideration in the preparation of this Recommended Order.

EXHIBITS

J-1: RFA 2013-005.
J-2: Petitioner's Application to RFA 2013-005.
J-3: Scoring sheet (Elizabeth Thorp).
J-4: Board recommendation regarding RFP 2013-07 in Sorting Order
J-5 Board recommendation regarding RFP 2013-07, Applications selected for funding

J-6 The Joint Stipulation.

FINDINGS OF FACT

1. Florida Housing is a public corporation, with its address at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32310, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida.

2. Florida Housing was appropriated $10,000,000 in non-recurring grant funds by the 2013 Legislature for housing for Persons with Developmental Disabilities as defined in Section 393.063, Florida Statutes.

3. On or about October 11, 2013, Florida Housing issued Request for Applications 2013-005 ("RFA") to award an estimated $4,000,000 to applicants proposing the development of Permanent Supportive Housing for Persons with Developmental Disabilities in all counties, for small properties consisting of no more than four units. The Application deadline was November 8, 2013.

4. On November 8, 2013, ARC submitted its Application to the RFA which included information concerning a one-unit single family residence in Martin County named Ashley Oaks. Through its Application, ARC requested $253,000 in funding assistance for the project which has an overall development cost of $389,575.

5. Sixteen other applicants responded to the RFA as well to provide various projects throughout the State.

6. Section Four of the RFA lists those items which must be included in an application. Part J of Section Four specifies how an applicant must demonstrate that it has control of the development site. Demonstration of site control was a mandatory requirement of the RFA. One

of the available options for demonstrating site control, and the one chosen by ARC, was submittal of a purchase contract. Part J specifically required the applicant to provide such a purchase contract "showing the Applicant as purchaser and evidencing a closing date for the purchase that does not expire prior to a date that is six (6) months after the Application Deadline."

7. As part of its Application at Exhibit 10, Petitioner provided a copy of an "AS IS Residential Contract For Sale and Purchase," agreement between A to Z Properties, Inc. and the ARC of Martin County, Inc. This agreement showed ARC as the purchaser, and specified a closing date of December 6, 2013.

8. On November 22nd and December 10, 2013, Florida Housing's Review Committee met and considered the Applications to the RFA. The Review Committee consisted of Florida Housing staff.

9. In its consideration, the Review Committee determined that ARC's Application should be awarded 47 points, with a lottery number of 4, making it the highest scoring application. However, the Review Committee also concluded that ARC's Application should not be considered eligible for funding because it did not meet the mandatory requirement to demonstrate site control. Specifically, the Committee concluded that the purchase contract included a closing date of December 6, 2013, and that "the closing date expires prior to a date that is 6 months after Application deadline."

10. On December 13, 2013, Florida Housing's Board of Directors accepted the Review Committee's ranking and funding recommendation. Also during the December 13, 2013 meeting the Board of Directors accepted the Review Committee's determination that ARC's Application was ineligible for funding.

11. On December 16, 2013, ARC timely filed its Petition. Florida Housing waived the bid protest bond requirement for the RFA.

12. At the hearing, ARC attempted to provide evidence that the purchase contract submitted with its Application had been modified or amended on December 6, 2013, to essentially extend the closing date. After due consideration, it was determined that this evidence was not admissible for reasons explained below, and thus this case must be resolved based solely on the purchase contract as it was originally submitted to Florida Housing.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2) and (3), Florida Statutes, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Florida Housing determined that ARC's Application was not eligible for funding. As a developer of affordable housing in need of supplemental funding, ARC's substantial interests are affected by Florida Housing's decision and ARC has standing to challenge Florida Housing's scoring and review decisions.

2. Subsection 120.57(3)(f), Florida Statutes, provides in pertinent part:

> . . . . 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. . . .

3. It is undisputed that the purchase contract submitted by ARC as part of its Application does not meet the requirements of Part J of the RFA in that it expired prior to six months from the Application deadline. At the hearing, ARC attempted to show that the purported

modification or amendment to the purchase contract should be considered when determining whether or not ARC had demonstrated site control. Section 120.57(3)(f), Florida Statutes, states in part:

> In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered.

4. This statute precludes Florida Housing from accepting or considering any supplemental documents from ARC in connection with its Application for funding in the RFA process after the application due date of November 8, 2013. This statute also precludes me from accepting into evidence or even considering any documents from ARC that would have the effect of amending or supplementing its application. The purchase contract submitted with the Application, which had an expiration date of December 6, 2013, is the only evidence of site control that can be considered.

5. In its Proposed Recommended Order, ARC suggests that Florida Housing's determination should be reversed because not all of the available funds were awarded, and thus there was in reality no competition for these funds. In other words, it would not be contrary to competition if Florida Housing chose to accept ARC's supplemental documentation and from this determined that the Application was eligible for funding. Even if Florida Housing did have the authority to waive the requirements of Section 120.57(3)(f), Florida Statutes, which it does not, ARC would still not have met its burden to show that the proposed agency action was contrary to competition. It would, at best, simply have shown that Florida Housing's decision was neutral towards competition.

6. Because it has been shown that ARC's Application did not meet all of the mandatory requirements of the RFA, and because ARC has not submitted any admissible evidence

to show that Florida Housing incorrectly applied applicable statutes or rules or incorrectly interpreted the provisions of the RFA, I conclude that ARC has not demonstrated that the proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered affirming Florida Housing's scoring of the Ashley Oaks Application and denying all relief requested by Petitioner.

Respectfully submitted this 21st day of February, 2014.

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