

BEFORE THE STATE OF FLORIDA  
HOUSING FINANCE CORPORATION

JANIE POE ASSOCIATES 3, LLC

Petitioner,

vs.

CASE NO. 2013-015BP

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

---

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Christopher D. McGuire, held a final hearing in this case on October 1, 2013, in Tallahassee, Florida.

APPEARANCES

For Petitioner

Michael P. Donaldson  
Carlton Fields, P.A.  
Post Office Drawer 190  
Tallahassee, FL 32302

For Respondent

Hugh Brown  
Deputy General Counsel  
Florida Housing Finance Corporation  
227 North Bronough Street  
Suite 5000  
Tallahassee, FL 32301-1329

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 Janie Poe Associates 3, LLC's ("Janie Poe") Response to Request for Proposals (RFP) 2013-07, on the grounds that it failed to properly

identify the Principals of its Developer entity, was clearly erroneous, contrary to competition, arbitrary or capricious, or was contrary to Florida Housing's governing statutes, rules, policies or RFP specifications.

There are no disputed issues of material fact.

#### PRELIMINARY STATEMENT

Prior to the commencement of the hearing the parties filed a Prehearing Stipulation which included fact and exhibits describing the RFP process and the scoring issue raised in this challenge. 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 the Florida Housing and to any applicable rules promulgated by Florida Housing.

At the hearing Joint Exhibits 1-7 were admitted without objection. Joint Exhibits 4 and 5 were consolidated into one exhibit listed as Joint Ex. 5. Janie Poe Exhibits 1-4 and Florida Housing Exhibits 2-4 were also admitted. The undersigned took official recognition of the 2011 Universal Cycle Application, the Universal Application Instructions and Rule 67-48, Florida Administrative Code (F.A.C.). Official recognition was also taken of RFP 2013-001, Rule 67-60, F.A.C. and Florida Housing's Advance Review of Applicant and Developer Lists of Principals. The undersigned also took official recognition of New Jersey Statute 42:2B-27 which was also listed as Janie Poe Ex. 1.

The transcript of the final hearing was filed on October 9, 2013. All parties timely submitted Proposed Recommended Orders on October 15, 2013. The parties' Proposed

Recommended Orders have been given consideration in the preparation of this Recommended Order.

#### EXHIBITS

- J-1: RFP 2013-07.
- J-2: Janie Poe's Application to RFP 2013-07.
- J-3: Review Committee Agendas June 4 and 11, 2013.
- J-4/5: All other Applications to RFP 2013-07, in pertinent part, with scoring notes and threshold failure chart (Elizabeth Thorp).
- J-6: Board recommendation regarding RFP 2013-07.
- J-7: Attachments to the Petition and Amended Petition filed in this matter.
  
- P-2: Evernia Place Partners materials.
- P-3: Janie Poe 2009 Submission materials.
- P-4: Current Rules 67-48 and 67-60, Fla. Admin. Code.
  
- R-1: Cure Documents, Application 2011-209C (Sailboat Bend).
- R-2: Composite of Chambers Prequalifying Submissions 2013.
- R-3: Janie Poe Prequalifying Submissions 2013.
- R-4: Janie Poe 2011 Submission Materials.

#### FINDINGS OF FACT

Based upon the undisputed facts and documents received into evidence at the hearing, the following relevant facts are found:

1. Janie Poe is a Florida for-profit limited liability company with its address at 3 East Stow Road, Suite 100, Marlton, New Jersey 08053. Janie Poe is in the business of providing affordable rental housing units in the State of Florida.
  
2. 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.

3. Florida Housing administers the Low Income Housing Credit Tax Credit (HC) Program pursuant to Section 42 of the Internal Revenue Code and Section 420.5099, F.S., under which Florida Housing is designated as the Housing Credit agency for the state of Florida within the meaning of Section 42(h)(7)(A) of the Internal Revenue Code.

4. Florida Housing's Board of Directors, in accordance with the 2013 Qualified Allocation Plan (QAP) and pursuant to Section 420.507(48), Florida Statutes, authorized the award of up to 10% of its 2013 annual allocation of HC through a competitive solicitation process to high priority affordable housing developments.

5. In previous years Florida Housing allocated its available HC through a competitive process known as the Universal Application Cycle or "UAC." This process allowed developers to submit applications for funding consistent with the Universal Cycle Application, Universal Cycle Application Instructions and Rule 67-48, F.A.C.

6. This year for the first time Florida Housing is using a competitive RFP process to allocate its HC. To this end, on April 11, 2013, Florida Housing issued RFP 2013-07 to award an estimated \$2,580,000 of competitive HC allocation to proposed developments in medium and small counties in Florida.

7. On May 9, 2013, Janie Poe submitted a Response to the RFP which included information concerning a proposed 72-unit apartment complex in Sarasota County named Janie's Garden. Through the Response Janie Poe requested \$820,000 in tax credit funding assistance for the project which has an overall development cost of \$12,490,278. Six other responses to the RFP were also filed on May 9, 2013, for various projects located throughout the State.

8. The RFP lists numerous items that must be included in a response, and assigns points to each item. In order to qualify for funding, an Applicant must achieve at least 56 points out

of the 93 points available. In addition, some items are considered “threshold” items, meaning that failure to properly respond will result in denial of funding regardless of the final numeric score.

9. Section Six A.2. of the RFP requires, among other things, that each Applicant provide a list (to be identified as Attachment 2) identifying the Principals for the Applicant and for each Developer, and specifies that this requirement is a threshold issue. Thus failure to identify the Principals would result in disqualification of the Applicant.

10. On June 4th and 11th, 2013, Florida Housing’s Review Committee met and considered the Responses to the RFP. The Review Committee was made up of Florida Housing staff members. The first meeting was an organizational meeting where the Review Committee discussed the scoring process including a limited discussion of minor irregularities. At the second meeting the Review Committee orally listed and manually input the scores for each Section of each RFP Response and ultimately made a recommendation to the Board of Directors for their consideration as to which projects should be funded.

11. In its consideration, the Review Committee determined that Janie Poe should be awarded 73 points making it the second-highest scoring applicant and at least at the outset placing it within the funding range. However the Review Committee went on to conclude that Janie Poe should be considered ineligible for funding because it failed the threshold requirement to identify the Principals of the Developer.

12. In addition to the Janie Poe response, four other Responders failed threshold for alleged deficiencies in the same Attachment 2. Janie Poe however was the only Response deemed to have failed threshold solely because it failed to identify a Member and Manager. The other Responses also failed to identify officers and directors for various listed corporate entities. Of the

two remaining Responders who provided an acceptable Attachment 2 one failed threshold because of an equity commitment issue.

13. Accordingly only one Response was deemed to have passed threshold and was recommended for funding, in the amount of \$865,000, which leaves a remaining balance of approximately \$1,730,000 in unfunded allocation. The Review Committee recommended Response No. 2013-105C, Laurel Court for funding. Regardless of the outcome of this proceeding Laurel Court will be funded.

14. On June 21, 2013, Florida Housing's Board of Directors accepted the Review Committee's ranking and funding recommendation. Also during the June 21, 2013, meeting the Board of Directors accepted the Review Committee's recommendation to reject 6 RFP Responses based on the alleged failure to comply with the requirements of the RFP. This included Janie Poe's Response.

15. As disclosed in the notes of the Review Committee the Janie Poe Response was specifically rejected for the following reason:

The GP of the developer is The Michaels Development Holding Company, LLC. As an LLC, they must give us the member and manager. They gave us the sole member but not the manager.

16. As it relates to the identification of Principals, the RFP at Section Six A.2.c. requires all Applicants<sup>1</sup> to provide a list at Attachment 2 to Exhibit A identifying the Principals for the Applicant and for each Developer in relevant part as follows:

(2) For a Limited Liability Company, provide a list identifying the following: (i) the Principals of the Applicant as of the Application deadline, including percentage of ownership interest of each, and (ii) the Principals for each Developer as of the Application deadline. This list must include warrant holders and/or option holders of the proposed Development.

---

<sup>1</sup> For purposes of this RFP process and this Order, the terms Applicant and Responder are used interchangeably.

17. The RFP further defines "Principals" to mean:

(i) any general partner of an applicant or Developer, any limited partner of an Applicant or Developer, any manager or member of an Applicant or Developer, any officer, director or shareholder of an Applicant or Developer, (ii) any officer, director, shareholder, manager, member, general partner or limited partner of any general partner or limited partner of an Applicant or Developer, (iii) any officer, director, shareholder, manager, member, general partner or limited partner of any manager or member of an Applicant or Developer, and (iv) any officer, director, shareholder, manager, member, general partner or limited partner of any shareholder of an Applicant or Developer.

18. According to the RFP, the purpose of the requirement to disclose Principals is to determine whether "there are any financial obligations for which an Applicant or Developer or Principal, Affiliate or Financial Beneficiary of an Applicant or a Developer is in arrears to the Corporation or any agent or assignee of the Corporation."

19. In Attachment 2 of its response Janie Poe provided a list of the Principals for both the Applicant and the Developers. Specifically for the Developer entity, Janie Poe provided the following:

The Michaels Development Company, I, LP

Officers: Michael J. Levitt, Chairman  
Ava Goldman, President  
John O'Donnell, COO  
Joseph Purcell, CFO  
Milton Pratt, Senior Vice President  
Whitney Weller, Senior Vice President  
Susan Langley, Secretary

General Partner (99% Owner): The Michaels Development Holding Company, LLC

(Sole Member): Michael J. Levitt  
100% Owner

Limited Partner (1% Owner): Patricia Levitt, Individually

20. Both the Michaels Development Company, I, LP and the Michaels Development Holding Company, LLC are New Jersey corporate entities authorized to do business in the State of Florida as of March 7, 2012. Under the statutes of both New Jersey and Florida, a limited liability company must have at least one member and may also have one or more managers that are not necessarily members. In this case it is undisputed that the Michaels Development Holding Company, LLC has only one member and does not have a separate manager.

21. Numerous exhibits were introduced at the hearing purporting to show how Florida Housing has interpreted the requirement for identification of the Principals of the Applicant and the Developers during previous application cycles. All that these exhibits demonstrated, however, was that Florida Housing has not interpreted this requirement consistently. In some instances an application was found acceptable even though no Principals were identified for some Developers. In other instances where Principals were not identified the Applicant was required to submit additional information about the Principals but was not specifically required to list all owners, managers, officers, shareholders, members, directors and partners separately.

22. During the 2011 Universal Cycle, Janie Poe submitted an application for funding for the same project. Florida Housing found this application to be deficient because the Principals of the Michael Development Holding Company, LLC were not identified. Points were deducted because the application “does not reflect the name of a Principal of the Developer.” The application also failed a threshold requirement because the application “failed to identify the member(s) and manager(s)” of the LLC. Janie Poe was allowed to cure this issue and did so by revising the application to identify Michael J. Levitt as both a “Managing Member” and “Sole Member.”



23. During previous application cycles, Florida Housing's rules allowed an Applicant to address deficiencies in the application by submitting a "cure form." Under the RFP process in this case, however, there is no provision for amending an application.

24. The RFP does contain a provision allowing Florida Housing to waive minor irregularities. The RFP defined a minor irregularity as a "variation in a mandatory term or condition of a Request for Proposals that does not give the Applicant an advantage or benefit not enjoyed by other Applicants and does not adversely impact the interest of the Corporation or public." In this case, however, Florida Housing declined to waive Janie Poe's alleged threshold failure as a minor irregularity.

#### 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. Due to Florida Housing's determination that the application failed a threshold issue, Jane Poe was found ineligible for funding. As such Janie Poe's substantial interests are affected and Janie Poe 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. Prior to this year, the application process for the Universal Application Cycle was spelled out in Chapter 67-48, F.A.C. In this case, however, there are no relevant rules to

guide the interpretation of terms in the RFP document. There is also no written policy or procedure for interpreting the term “Principal” or the requirement that the Principals of the Applicant and the Developers must be listed. I am thus compelled to give the terms in the RFP their plain and common meanings.

4. Florida Housing has taken the position that when listing the Principals of an LLC, the RFP requires that the Applicant must identify both the members of the LLC and the managers of the LLC, and that if the LLC does not have a manager the Applicant must specifically state this. Florida Housing apparently does not seek to require the Applicant to also specify whether the LLC has any directors or officers.

5. Chapter 608, Florida Statutes, governs the formation and operation of limited liability companies. Section 608.422 Florida Statutes, specifies:

(1) Unless otherwise provided in its articles of organization or the operating agreement, the limited liability company shall be a member-managed company.

(2) In a member-managed company, unless otherwise provided in its articles of organization or operating agreement:

(a) Management shall be vested in its members or elected managing members in proportion to the then-current percentage or other interest of members in the profits of the limited liability company owned by all of the members or elected managing members.

\* \* \*

(3) If the articles of organization or the operating agreement provide for the management of the limited liability company by a manager or managers, the management of the limited liability company shall be vested in a manager or managers and the limited liability company shall be a manager-managed company.<sup>2</sup>

6. It is undisputed that the LLC at issue here is a member-managed company, and as such does not have a separate manager. It is also undisputed that the only person or entity meeting the definition of “Principal” for this LLC is Michael J. Levitt, who was listed on the application as the sole member of the LLC. Florida Housing’s position is that Janie Poe

---

<sup>2</sup> To the extent it is relevant, governing New Jersey law includes similar language and does not conflict with or change the meaning of Chapter 608, Florida Statutes.

should have included some kind of statement that Mr. Levitt was in fact the only Principal for the LLC or that the LLC was in fact member-managed, and that failure to do so must result in Janie Poe being denied funding for its proposed project.

7. As noted above, the definition of Principal in the RFP included “any officer, director, shareholder, manger, member, general partner or limited partner of an Applicant or Developer.” There was extensive discussion at the hearing as to whether the word “or” should be read as “or,” “and,” or “and/or.” I conclude that it is not necessary to resolve this grammatical dispute, because however one might read this sentence in other situations, in the present case the LLC in question had only a single Principal, who happened to be a member rather than an officer, director, shareholder, manager, general partner, or limited partner. Janie Poe accurately listed all Principals of the LLC, and its failure to list all other non-existent Principals cannot be considered a violation of the terms of the RFP.

8. Florida Housing has argued that the RFP, in order to elicit a full and complete disclosure of principals, required that the Applicant account for each position associated with the entity type. Without this, Florida Housing could not be certain that there was not some unidentified person associated with the Applicant or Developer who might be in arrears. The problem with this argument is simply that the RFP nowhere requires the Applicant to account for each position or to specify whether an organization does or does not have managers, directors, etc. Assuming that an applicant is being truthful on the application, then the list of Principals will include every person that meets the definition of a Principal, and if there is no manager, director, or officer listed then Florida Housing must assume that no such person exists.

9. Florida Housing has also argued that Janie Poe should have known that it was required to specify whether or not the LLC had a separate manager because the issue had been raised during the 2011 Universal Application Cycle. As noted above, Janie Poe's application had been found wanting for failure to identify the Principal(s) of the Michael Development Holding Company, LLC. When Janie Poe submitted its cure form, it listed Mr. Levitt as both a sole member and a managing member. Even then, however, it was Janie Poe's failure to identify any Principals that led to the problem rather than its failure to specify whether or not a separate manager existed. Janie Poe had no reason to know that its application could have been rejected had it simply, and accurately, listed Mr. Levitt as the sole member and made no mention of the fact that there was no separate manager.

10. Both parties have cited to the case of Evernia Place Partners, LP v. FHFC, Final Order No. 2012-040UC (December 17, 2012) to support their positions. That case involved an application submitted during the 2011 application cycle in which the Principals of two LLCs were not listed. The Applicant listed the Principals for its Developer as:

Roundstone Development, LLC, a Nevada limited liability company  
Clifton E. Phillips, President  
Craig E. Landess, Vice President

Members:  
Clifton E. Phillips  
HRS Holdings, LLC  
Realty Advisors, LLC

11. Florida Housing ultimately concluded in that case that the RFP required the Applicant to list the Principals not only of the Developer (Roundstone Development) but also of the members of the Developer (HRS Holdings and Realty Advisors). The Final Order did not address the issue of whether managers, or the lack thereof, must be specified, and in fact actually illustrates that during the 2011 application cycle Florida Housing did not consistently

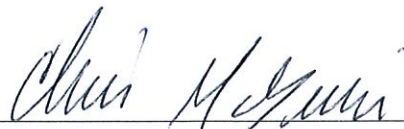
reject applications for failure to identify managers of LLCs. It also illustrates that LLCs can have officers as well as members and managers. If anything, this case simply demonstrates that Florida Housing did not have a clear policy requiring applicants to list separately all of the various positions in the definition of Principal at the time Janie Poe's application was submitted.

12. For these reasons I conclude that Florida Housing's rejection of Janie Poe's application for failure to include information that was not specifically required in the RFP, that was not specifically required in relevant rules or statutes, and that was not specifically required under a clearly articulated policy or practice of Florida Housing, was an action taken without support of facts or logic, and was thus arbitrary. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759, 763 (Fla. 1<sup>st</sup> DCA 1978), *cert denied* 376 So.2d 74 (Fla. 1979).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered holding that Florida Housing erroneously rejected the Janie Poe application and awarding Janie Poe its requested funding.

Respectfully submitted this 25<sup>th</sup> day of October, 2013.



Christopher D. McGuire  
Hearing Officer for Florida Housing  
Finance Corporation  
2643 Lucerne Drive  
Tallahassee, Florida 32303  
cdmcguire@yahoo.com

Copies furnished to:

Michael P. Donaldson  
Carlton Fields, P.A.  
P.O. Drawer 190  
215 S. Monroe St., Suite 500  
Tallahassee, Florida 32302  
mdonaldson@carltonfields.com

Hugh R. Brown  
Deputy General Counsel  
Florida Housing Finance Corporation  
227 North Bronough Street, Ste. 5000  
Tallahassee, Florida 32301-1329  
Hugh.Brown@floridahousing.org