

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

CITY VISTA ASSOCIATES, LLC,

Petitioner,

vs.

FHFC Case No.:2014-049BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

WISDOM VILLAGE CROSSING, LP, and
HTG BROWARD 3, LLC,

Intervenors

RECOMMENDED ORDER

Pursuant to notice, on May 12, 2014, an informal administrative hearing was held in this case in Tallahassee, Florida, before Florida Housing Finance Corporation's appointed Hearing Officer, Christopher McGuire.

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STATEMENT OF THE CASE

The issue in this case is whether Respondent Florida Housing Finance Corporation's ("Florida Housing") decisions to award or deny funding under Request for Applications ("RFA") 2013-003, as proposed on December 13, 2013, are contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. More specifically, whether Florida Housing's decision to award low-income housing tax credits to Wisdom Village and Oakland Preserve, and its rejection of the City Vista Application, No. 2014-185C, 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.

PRELIMINARY STATEMENT

On or before November 12, 2013, Petitioner and Intervenor submitted applications to Florida Housing seeking allocations for low-income tax credits pursuant to RFA 2013-003, to fund affordable housing projects in Broward County, Miami-Dade County, and Palm Beach County.

Petitioner timely filed a challenge to proposed funding awards pursuant to Section 120.57(3), Florida Statutes and Rule 28-110.004, Florida Administrative Code. Each Intervenor entered the case in accordance with Rule 106.205(3), Florida Administrative Code. An informal

hearing was conducted pursuant to Sections 120.569 and 120.57(2) and (3), Florida Statutes, before Florida Housing Hearing Officer Christopher McGuire on May 12, 2014. There are no disputed issues of material fact.

At the 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. Some of those facts are reiterated below for clarity. 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 informal hearing, Joint Exhibits (J-1 through J-5) were admitted into evidence. The final hearing was recorded, but no transcript was ordered. All parties timely submitted Proposed Recommended Orders on May 19, 2014. The parties' Proposed Recommended Orders have been given consideration in the preparation of this Recommended Order.

EXHIBITS

- Exhibit 1: RFA 2013-003 for Affordable Housing Developments Located in Broward, Miami-Dade and Palm Beach Counties issued by Florida Housing Finance Corporation
- Exhibit 2: RFA 2013-003 Sorting Order
- Exhibit 3: RFA 2013-003- Review Committee Recommendations
- Exhibit 4: Attachment 3 to City Vista Application No. 2014-185C
- Exhibit 5: Attachment 7 to City Vista Application No. 2014-185C

FINDINGS OF FACT

1. Florida Housing is, under Section 420.5099, Florida Statutes and 26 USC 42, the low income housing tax credit allocating agency for the State of Florida and is granted the authority under Section. 420.507(48), Florida Statutes, to issue competitive solicitations for the purpose of providing affordable housing in Florida. Florida Housing's address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301.

2. Florida Housing is granted authority to allocate tax credits and other funding by means of request for proposal or other competitive solicitation in Section 420.507(48), Florida Statutes, and has adopted Rule 67-60, Florida Administrative Code, to govern the competitive solicitation process for several different programs, including the one for tax credits.

3. Rule 67-60 was newly enacted on August 20, 2013, replacing prior procedures used by Florida Housing for allocating tax credits, and providing that the bid protest provisions of section 120.57(3), Florida Statutes govern its process for allocating tax credits.¹

4. According to the RFA, Florida Housing expected to award up to approximately \$10,052,825 in tax credits for qualified affordable housing projects in Miami-Dade, Broward and Palm Beach Counties.

5. The RFA provides for the Applications to be evaluated and scored by a Review Committee made up of staff from Florida Housing. Each Application can receive a maximum of 27 points. When there are more applicants with perfect scores than there are funds available, tax credits are awarded on the basis of a lottery number randomly assigned when the Application is filed.

6. City Vista timely submitted an Application, No. 2014-185C in response to RFA

¹ To be more specific, administrative appeals are governed by section 120.57(3), Florida Statutes except that no bond is required. Florida Administrative Code Rule 67-60.009.

2013-003, seeking an allocation of \$2,561,000 in annual federal tax credits to help finance the development of its project, a 127-unit high-rise apartment complex.

7. On November 22 and December 10, 2013, the designated Review Committee met and considered the Applications to the RFA. A list including scores and recommendations for funding was presented to the Board of Directors of Florida Housing.

8. In its consideration, the Review Committee determined that Petitioner's Application should be awarded 27 points, with a lottery number of 11, higher than the two Broward Applications recommended for funding. However, the Committee also determined that Petitioner's Application should not be considered eligible for funding because it did not meet all the mandatory requirements. Specifically, the Committee determined that the Petitioner failed to demonstrate site control because the contract for sale submitted with the Application was not in the name of the Applicant.

9. On December 13, 2013, Florida Housing's Board of Directors accepted the Review Committee's ranking and funding recommendation, including the Committee's determination that Petitioner's Application was ineligible for funding.

10. Section 4.A.7 of RFA 2013-003, at page 23, lists the requirements for Site Control. The instructions provide, in relevant part:

(7) Site Control:

The Applicant must demonstrate site control by providing, as Attachment 7 to Exhibit A, the documentation required in Items a., b., and/or c., as indicated below.

- a) Eligible Contract - For purposes of the RFA, an eligible contract is one that has a term that does not expire before a date that is six (6) months after the Application Deadline or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than six (6) months after the Application Deadline; specifically states that the buyer's

remedy for default on the part of the seller includes or is specific performance; and ***the buyer MUST be the Applicant unless an assignment of the eligible contract which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant, is provided.*** (*Emphasis added; capitalization in original.*)

11. City Vista included an Agreement for Sale and Purchase as Attachment 7 to its Application. The Agreement was by and between Pompano Beach Community Redevelopment Agency (Seller) and Landmark Development Corp (Buyer). City Vista is not the buyer and in fact is not referenced in the Agreement. There is also no indication in the Agreement or anywhere else in the Application that Landmark Development Corp. is acting as an agent for City Vista for purposes of this Agreement.

12. Paragraph 24(a) of the Agreement for Sale and Purchase contains the following provision: “This Agreement may be freely assigned by Purchaser to an entity in which Francisco Rojo and Robert Saland own a controlling interest in the managing general partner of the assignee, without Seller’s consent . . .”

13. Robert Saland and Francisco Rojo are the only officers, directors and shareholders of Landmark Development Corp., City Vista’s Developer.

14. Robert Saland and/or Francisco Rojo are also the only Members, Managing Member, Officers, Managers that compromise City Vista, and its Managing Member, City Vista Associates GP, LLC.

15. City Vista and Landmark at all times material to this action were owned and controlled by Francisco Rojo and Robert Saland.

16. On February 4, 2014, City Vista timely filed its Notice of Protest in which it challenged the selection of the applications in the Corporation’s Notice. On February 14, 2014, City Vista timely filed its “Formal Written Protest of Award.” On December 16, 2013, Petitioner

timely filed its Petition. Florida Housing waived the bid protest bond requirement for the RFA. As a developer of affordable housing in need of supplemental funding, Petitioner's substantial interests are affected by Florida Housing's decision not to award the funding pursuant to the RFA.

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's decisions in this case affected the substantial interests of each of the parties, and each has standing to challenge Florida Housing's scoring and review decisions.

2. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof in this case rests with the parties opposing the proposed agency action to prove "a ground for invalidating the award. *See State Contracting & Engineering Corp. v. Dep't of Transportation*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Those challenging the proposed agency action must sustain their burden of proof by a preponderance of the evidence. *Dep't of Transportation v. J.W.C. Co., Inc.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

3. The rules of decision applicable in bid protests are set forth in Section 120.57(3)(f), Florida Statutes, which provides in relevant 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 [hearing officer] 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.

4. It is undisputed that City Vista is not listed as the buyer in the Agreement for Sale and Purchase. Petitioner's argument is that Landmark, as the developer of this proposed project, is City Vista's agent whenever Landmark acts on behalf or for the benefit of City Vista. Petitioner

cites case law suggesting that City Vista may have the power to enforce its rights under the Agreement if in fact Landmark was acting as its agent.

5. The problems with this argument are twofold. First, the plain language of the RFA requires that the buyer must be the Applicant unless an assignment is included in the application. City Vista was not the buyer and there is no provision in the RFA that allows the Applicant's agent to be the buyer. More importantly, however, is the fact that nowhere in the Application is there any indication that Landmark is authorized to act as City Vista's agent for purposes of the Agreement. Certainly it is clear that Landmark and City Vista are controlled by the same natural persons, but there is no evidence, and Petitioner has cited to no case law, statutes, or rules, to support the proposition that each business entity controlled by the same persons is authorized in all cases to act as the agent for all other business entities controlled by those same persons.

6. Petitioner also made statements at the hearing and in its proposed recommended order that Landmark was in fact acting as an agent for City Vista. Petitioner cited to case law for the proposition that adducing evidence to show that a person signing a contract in his own name was acting as an agent does not violate the rule of law that an agreement reduced to writing may not be contradicted or varied by parol. If Petitioner was in a different forum attempting to enforce its rights under the Agreement this would certainly be relevant. In a bid protest case, however, Section 120.57(3)(f), Florida Statutes, provides that "no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered." If Petitioner is not allowed to submit documents to amend or supplement its application, it stands to reason that it also may not submit parol evidence either. This is not simply a case of explaining what is already included in an Application; there is nothing in the Application that demonstrates an agency relationship between City Vista and Landmark for purposes of the purchase agreement.

7. The purchase agreement also contains a provision allowing an assignment of the agreement to “an entity in which Francisco Rojo and Robert Saland own a controlling interest.” Had the agreement referenced a specific entity in which these persons own a controlling interest, namely City Vista, this provision might have been essentially the equivalent of an assignment of rights required by the RFA. It did not, however, and thus it is not.

8. Petitioner also argues that Florida Housing should have waived the failure to attach either a purchase agreement signed by City Vista or an assignment of rights under the agreement to City Vista as a minor irregularity. Rule 67-60.008, Florida Administrative Code, provides that Florida Housing “may waive Minor Irregularities in an otherwise valid Application. Mistakes 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.”

9. If in fact the Application showed that Landmark was acting as an agent for City Vista, and the only issue was that there was no assignment of rights submitted to demonstrate site control, then it would have been appropriate for Florida Housing to have at least considered waiving this failure as a minor irregularity. Again, however, there is no indication in the Application that Landmark was acting as City Vista’s agent, and thus there was no clearly evident mistake on the face of the Application. As far as Florida Housing could tell from the Application, the Applicant submitted a purchase agreement between two independent entities to demonstrate site control, which certainly cannot be considered a minor irregularity.

10. Petitioner has failed to demonstrate that Florida Housing’s proposed action is contrary to the agency’s governing statutes, the agency’s rules or policies, or the solicitation

specifications. Petitioner also failed to demonstrate that Florida Housing's proposed scoring of Petitioner's Application was clearly erroneous, contrary to competition, arbitrary or capricious.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law set forth above, it is RECOMMENDED that a Final Order be entered affirming Florida Housing's scoring of the City Vista Application, No. 2014-185C, and denying all relief requested by Petitioner.

Respectfully submitted this 30th day of May, 2014.



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