STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

JOE MORETTI PHASE THREE, LLC,

Petitioner,

vs.

DOAH Case No.: 17-1543BID
FHFC Case No.: 2017-013BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

VERBENA, LLC, and GM SILVER CREEK, LTD.

Intervenors.
_____/

STIRRUP PLAZA PHASE THREE, LLC,

Petitioner,

vs.

DOAH Case No.: 17-1544BID
FHFC Case No.: 2017-014BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

VERBENA, LLC, and GM SILVER CREEK, LTD.

Intervenors.
_____/

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Jennifer L. Marshall /DATE: 7/28/2017

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on July 28, 2017. Joe Moretti Phase III, LLC ("Moretti"), Stirrup Plaza Phase III, LLC ("Stirrup") ("Petitioners"), GM Silver Creek, LTD ("Silver Creek") and Verbena, LLC ("Verbena") ("Intervenors") were Applicants under Request for Applications 2016-114: Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the "RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(2) and (3)(e), Fla. Stat. (2016), and Fla. Admin. Code R. 67-60.009(3)(b), and the Exceptions to the Recommended Order, and Responses thereto.

On October 28, 2016, Florida Housing issued the RFA, which solicited applications to compete for an allocation of low income housing credit funding. Responses to the RFA were due on December 15, 2016. On December 15, 2016, Applications were submitted in response to the RFA by several Developers including Petitioners and Intervenors. On February 3, 2017, Florida Housing posted notice of its intended decision to award funding to three Applicants. Through the ranking and selection process outlined in the RFA, Intervenors Verbena and Silver Creek were deemed eligible for funding and Verbena was recommended for funding, as well as third-party Applicants Ambar Key, LLC, and Northside Property IV, Ltd.

Through a separate case regarding this RFA, which was settled with a consent agreement presented to and approved by the Board, third-party Applicant Ambar Key agreed it was ineligible for funding. Petitioners Moretti and Stirrup were determined to be ineligible for funding due to their proposed developments being subject to existing Extended Low-Income Housing Agreements ("EUAs"). Petitioners timely filed their notices of intent to protest followed by formal written protests. Motions to Intervene were filed by Verbena as well as Silver Creek; those motions were subsequently granted.

Page 7 of the RFA, Section 3.A states: "Applicants should review subsection 67-48.023(1), F.A.C., to determine eligibility to apply for the Housing Credits offered in this RFA." Additionally, in Section 3.F.3, the RFA requires that Applicants funded under RFA 2016-114 must comply with Florida Administrative Code, Chapters 67-60 (Application requirements), 67-48 (credit underwriting and program requirements for Housing Credits), and 67-53 (Compliance requirements). In relevant part, Rule 67-48.023(1) of the Florida Administrative Code states:

> Unless otherwise permitted in a competitive solicitation process, an Applicant is not eligible to apply for Competitive Housing Credits if any of the following pertain to the proposed Development:
>
> . . .
>
> (c) The proposed Development site or any part thereof is subject to any Land Use Restriction Agreement or Extended Use Agreement, or both, in conjunction with any Corporation affordable housing financing intended to

> foster the development or maintenance of affordable housing…

The RFA also required that Applicants demonstrate that "as of the Application Deadline sewer capacity, package treatment or septic tank service is available to the entire proposed Development site…" The RFA instructed Applicants to provide, as Attachment 11, either the Verification of Availability of Infrastructure – Sewer Capacity, Package Treatment, or Septic Tank form (Form Rev. 08-16) or a "letter from the waste treatment service provider that is Development-specific and dated within 12 months of the Application Deadline."

Petitioners timely filed notices of intent to protest and formal written protests challenging the Board's finding that they were ineligible for funding. Specifically, they alleged that they timely submitted a request to amend the EUAs on their proposed development sites to remove the proposed development sites from the EUAs prior to the Application deadline. In response to the protests, Verbena filed a Motion to Intervene, alleging that it could be displaced from funding if Moretti's challenge was successful, and further alleging that Moretti's Application was ineligible for funding not only due to the existence of an EUA on the proposed development site, but also because the Application contained a sewer letter that did not comply with the terms of the RFA. Moretti filed a Motion in Limine to preclude Verbena from bringing up any challenge to its sewer letter.

The matters were referred to the Division of Administrative Hearings (DOAH) and consolidated. A formal hearing took place on April 12, 2017, in Tallahassee, Florida before the Honorable Administrative Law Judge Garnett W. Chisenhall ("Hearing Officer"). The parties filed timely Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order on June 9, 2017. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer determined Florida Housing's actions or inactions pertaining to the Moretti and Stirrup EUA amendment requests were not arbitrary, capricious, or contrary to competition, resulting in Moretti and Stirrup remaining ineligible for funding under RFA 2016-114. The Recommended Order recommended that Florida Housing:

> [I]ssue a final order awarding funding to Ambar Key, Ltd.; Verbena, LLC; and Northside Property IV, Ltd.

The Parties filed various Exceptions to the Recommended Order and Responses to Exceptions, which are addressed as follows:

RULING ON INTERVENOR SILVER CREEK AND FLORIDA HOUSING'S JOINT EXCEPTION TO RECOMMENDATION

1. Silver Creek and Florida Housing filed a Joint Exception to the recommendation set forth in the Recommended Order to the extent the

Recommended Order recommended Florida Housing award funding to third-party Applicant Ambar Key.

2. The basis for the exception is the consent agreement between Silver Creek and Ambar Key, wherein Ambar Key conceded its application was ineligible for funding.

3. Florida Housing and Silver Creek request a Final Order be entered which: a) dismisses the formal written protests filed by Moretti and Stirrup; and b) distributes funding under RFA 2016-114 through the ranking and selection process conducted pursuant to the RFA and the outcome of pending litigation under the same RFA.

4. No parties filed a response to the Joint Exception.

5. After a review of the record, the Board finds that the Exception to and requested modification to the Recommendation set forth in the Recommended Order are reasonable and accepts the Joint Exception.

RULING ON PETITIONERS' EXCEPTIONS

Petitioners' Exceptions to Findings of Fact

6. Petitioner takes exception to the Findings of Fact set forth Paragraphs 85, 86, 87, and 88 of the Recommended Order.

7. After a review of the record, the Board finds that the Findings of Fact set forth in Paragraphs 85, 86, 87, and 88 of the Recommended Order are supported

by competent, substantial evidence, and the Board rejects Petitioners' Exceptions to the Findings of Fact set forth in Paragraphs 85, 96, 87, 88 of the Recommended Order.

Petitioners' Exceptions to Conclusions of Law

8. Petitioner takes exception to the Conclusions of Law set forth in Paragraphs 108, 109, 110, 112, 120, 121 of the Recommended Order.

9. The Board finds that it has substantive jurisdiction over the issues presented in Paragraphs 108, 109, 110, 112, 120, 121 of the Recommended Order.

10. After a review of the record, the Board finds that the Conclusions of Law set forth in Paragraphs 108, 109, 110, 112, 120, 121 of the Recommended Order are reasonable and supported by competent, substantial evidence, and rejects Petitioner's Exceptions to the Conclusions of Law presented in Paragraphs 108, 109, 110, 112, 120, 121 of the Recommended Order.

RULING ON INTERVENOR VERBENA'S EXCEPTIONS

Verbena's Exception to Conclusion of Law Footnote 8 of Paragraph 121

11. Verbena seeks an Exception to Footnote 8 to Conclusion of Law Paragraph 121, where the Hearing Officer ALJ denied Moretti's Motion in Limine as being moot because the ALJ determined that Florida Housing did not act in an arbitrary or capricious manner. Verbena's exception seeks clarification in the Final

Order that the merits of its argument against Moretti's sewer letter have not been addressed or resolved.

12. The Board finds that it does not have substantive jurisdiction over the issue presented in Footnote 8 to Paragraph 121 of the Recommended Order, because the ruling is a procedural determination by the Hearing Officer. Accordingly, The Board rejects Petitioners' Exception to Footnote 8 to Conclusion of Law Paragraph 121.

Verbena's Exception to Conclusion of Law Paragraph 121

13. Verbena's Exception to Conclusion of Law Paragraph 121 seeks a modification to the Final Order, clarifying that Florida Housing's determination that the Petitioners' Applications were ineligible for funding because the existing EUA covering the development sites for each Application was consistent with the requirements of Rule 67-48.023(1), F.A.C., consistent with the terms of the RFA, and that Florida Housing's actions were not contrary to its governing statutes, agency rules or policies, or the terms of the RFA.

14. The Board finds that Verbena's Exception to Conclusion of Law Paragraph 121 with requested modification is reasonable, and supported by competent substantial evidence because the Hearing Officer found that Florida Housing's actions or inactions pertaining to the Moretti and Stirrup EUA amendment requests were not arbitrary, capricious, or contrary to competition, and

that the Petitioners' development sites were subject to existing EUAs which rendered then ineligible for funding pursuant to Rule 67-48.023(1), F.A.C. Accordingly, the Board accepts Verbena's Exception with requested modification to Conclusion of Law Paragraph 121.

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 with the exception of Paragraph 121 of the Conclusions of Law, which should be modified to reflect that Florida Housing's determination was consistent with the requirements of Rule 67-48.023(1), F.A.C., consistent with the terms of the RFA, and that Florida Housing's actions were not contrary to its governing statutes, agency rules or policies, or the terms of the RFA.

17. The Recommendation of the Recommended Order should be modified to:

a. dismiss the formal written protests filed by Joe Moretti Phase Three, LLC and Stirrup Plaza Phase Three, LLC, and

b. distribute funding under RFA 2016-114 through the ranking and selection process conducted pursuant to the RFA and the outcome of pending litigation under the same RFA.

ORDER

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

18. 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.

19. The Conclusions of Law in the Recommended Order are adopted with the exception of Conclusion of Law Paragraph 121, which is modified to state:

> 121. Therefore, Florida Housing's actions or inactions pertaining to the Moretti Phase Three and Stirrup Plaza Phase Three requests were not arbitrary, capricious, or contrary to competition.[1] Florida Housing's determination that the Petitioners' Applications were ineligible for funding was consistent with the requirements of Rule 67-48.023(1), F.A.C., and consistent with the terms of the RFA. Florida Housing's actions were not contrary to its governing statutes, agency rules or policies, or the terms of the RFA.

IT IS HEREBY ORDERED that the relief requested in the Petitions is **DENIED,** the Petitions are **DISMISSED,** and Florida Housing's scoring and ranking of RFA 2016-114 is **AFFIRMED,** and funding under RFA 2017-114 shall me distributed through the ranking and selection process conducted pursuant to the RFA.

[1] In light of this ruling, there is no need to address Moretti Phase Three's Motion in Limine. Accordingly, it is denied as being moot.

DONE and ORDERED this 28th day of July 2017.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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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

JOE MORETTI PHASE THREE, LLC,

Petitioner,

vs. Case No. 17-1543BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

VERBENA, LLC; AND GM SILVER CREEK, LTD.,

Intervenors.
_____/

STIRRUP PLAZA PHASE THREE, LLC,

Petitioner,

vs. Case No. 17-1544BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

VERBENA, LLC; AND GM SILVER CREEK, LTD.,

Intervenors.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 12, 2017, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners Joe Moretti Phase Three, LLC and Stirrup Plaza Phase Three, LLC:

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Carlton Fields Jorden Burt, P.A.
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For Respondent Florida Housing Finance Corporation:

Marisa G. Button, Esquire
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Florida Housing Finance Corporation
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For Intervenor Verbena, LLC:

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For Intervenor GM Silver Creek, Ltd.:

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STATEMENT OF THE ISSUE

The issue for determination in this consolidated bid protest proceeding is whether the Florida Housing Finance Corporation ("Florida Housing") acted arbitrarily, capriciously, or contrary to competition by deeming the applications of Joe Moretti Phase Three, LLC. ("Moretti Phase Three") and Stirrup Plaza Phase Three, LLC. ("Stirrup Plaza Phase Three") ineligible for Request for Applications 2016-114, Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County ("RFA 2016-114").

PRELIMINARY STATEMENT

On February 16, 2017, GM Silver Creek, Ltd. ("GM Silver Creek") filed a "Petition for Formal Administrative Hearing" with Florida Housing challenging the final scoring and ranking given to Ambar Key, Ltd's ("Ambar Key") application for RFA 2016-114.

On February 20, 2017, Moretti Phase Three and Stirrup Plaza Phase Three separately filed "Formal Written Protest[s] and Petition[s] for Administrative Hearing[s]" challenging Florida Housing's determination that Moretti Phase Three's and Stirrup Plaza Phase Three's applications were ineligible for funding pursuant to RFA 2016-114.

On March 13, 2017, Florida Housing referred all three cases to DOAH for administrative hearings pursuant to

section 120.57(3), Florida Statutes. Moretti Phase Three's case was assigned DOAH Case No. 17-1543, Stirrup Plaza Phase Three's case was assigned DOAH Case No. 17-1544, and GM Silver Creek's case was assigned DOAH Case No. 17-1545.

Because the three cases involved "substantially similar issues of law and closely related issues of fact," Florida Housing filed an "Unopposed Motion to Consolidate Cases" on March 14, 2017.

On March 26, 2017, the undersigned granted Florida Housing's "Unopposed Motion to Consolidate Cases."

In response to a "Petition to Intervene" filed by Verbena, LLC ("Verbena") alleging that it could be displaced from funding if Moretti Phase Three's challenge is successful, the undersigned issued an Order on March 23, 2017, granting the aforementioned Petition. However, the undersigned specified that

> [i]n issuing this ruling, the undersigned has not overlooked Joe Moretti Phase Three, LLC's "Response to Verbena, LLC's Motion to Intervene" and the assertion that Verbena, LLC will be seeking to raise issues that should not be considered. Joe Moretti Phase Three, LLC may raise this argument through a motion in limine filed on or before March 29, 2017, and Verbena, LLC may file a response within seven days thereafter.

On March 23, 2017, the undersigned issued an Order granting Ambar Key's "Petition for Leave to Intervene."

Moretti Phase Three filed a "Motion in Limine" on March 29, 2017, asserting that Verbena "intends to raise additional issues that go beyond the scope of this proceeding and the challenged agency action." In support thereof, Moretti Phase Three argued that "[i]t is settled law in Florida that an intervenor must accept the record and pleadings as he finds them and cannot raise new issues, but rather is limited to arguing the issues raised by the parties as they apply to him."

In a response filed on April 5, 2017, Verbena explained its position as to why it should be allowed to introduce an issue into the instant proceeding:

> As additional grounds to support Florida Housings' determination that Moretti's application is ineligible, Verbena sets forth in its Petition to Intervene an argument that the requisite "sewer availability letter" in Moretti's application does not meet the requirements of the RFA which requires the applicant to demonstrate, as of the application deadline, that sewer capacity, package treatment or septic tank service is available to the entire proposed development site. That argument is framed by the documents at issue in this proceeding and relates directly to the material issue of whether Florida Housing's scoring of Moretti's application was inconsistent with the RFA or Florida Housing's policies and whether the review and actions taken by Florida Housing were

> arbitrary or capricious, clearly erroneous and contrary to competition.
>
> * * *
>
> Unless and until Moretti filed a challenge to the determination that it was ineligible, there was no reason or basis for Verbena to initiate an unnecessary proceeding. It was only when Verbena's preliminary funding award was put at issue that Verbena had a reason and an opportunity to point out additional grounds for determining Moretti is ineligible. Accordingly, the instant case is Verbena's only opportunity to raise any and all scoring issues it believes are relevant to Moretti's application.

On April 11, 2017, GM Silver Creek, Ambar Key, and Florida Housing filed a joint motion asking the undersigned to sever and relinquish jurisdiction over Case No. 17-1545. In support thereof, the aforementioned parties asserted that they had reached agreements regarding certain aspects of Ambar Key's and GM Silver Creek's applications.

The final hearing commenced as scheduled on April 12, 2017. At the outset of the final hearing, the undersigned orally granted the aforementioned joint motion, and an Order to that effect was issued on April 20, 2017.

At the outset of the final hearing, the undersigned also addressed Moretti Phase Three's Motion in Limine by electing to defer ruling, and the Motion in Limine is addressed in the Conclusions of Law below.

Moretti Phase Three presented the testimony of Anthony Del Pozzo, the Vice President of Finance for the Related Group, and Ken Reecy, Florida Housing's Director of Multifamily Programs.

The undersigned accepted Joint Exhibits 1 through 13 into evidence.

Florida Housing introduced one Exhibit that was accepted into evidence.

As agreed to during the final hearing, Verbena filed its composite Exhibit 1 on April 26, 2017.

The Transcript from the final hearing was filed on April 27, 2017.

After receiving a one-day extension of time via an Order issued on May 4, 2017, Moretti Phase Three, Stirrup Plaza Phase Three, Verbena, and Florida Housing filed timely Proposed Recommended Orders on May 9, 2017. GM Silver Creek's Proposed Recommended Order was officially filed at 8:00 a.m. on May 10, 2017. All of the aforementioned Proposed Recommended Orders have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Facts Regarding Florida Housing and Affordable Housing Tax Credits

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes.[1/] Its purpose is to promote public welfare by administering the governmental function of financing affordable housing in Florida.

2. 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. Accordingly, Florida Housing has the responsibility and authority to establish procedures for allocating and distributing low-income housing tax credits.

3. The low-income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. 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 reduces the amount of capital that developers have to borrow. Because the total debt is lower, a tax credit property can (and must) offer lower, more affordable rents.

4. 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.

6. The demand for tax credits provided by the federal government exceeds the supply. Accordingly, Florida Administrative Code Chapter 67-60 provides that Florida Housing allocates its tax credits, which are made available to Florida Housing on an annual basis by the U.S. Treasury, through the bid protest provisions of section 120.57(3), Florida Statutes.

7. In their applications for tax credits, applicants request a specific dollar amount of housing credits to be supplied each year for a period of 10 years. Applicants will normally sell the rights to that future stream of income tax credits (through the sale of almost all of the ownership interest in the applicant entity) to an investor to generate the amount of capital needed to build the development.

8. Tax credits are made available through a competitive application process commenced by the issuance of a Request for Applications ("RFA"). An RFA is equivalent to a "request for proposal." See Fla. Admin. Code R. 67-60.009(4)(providing that

"[f]or purposes of Section 120.57(3), F.S., any competitive solicitation issued under this rule chapter shall be considered a 'request for proposal.'").

9. "Applicants not selected for funding under any competitive solicitation issued pursuant to [Chapter 67-60, F.A.C.] may only protest the results of the competitive solicitation process pursuant to the procedures set forth in Section 120.57(3), F.S., and Chapter 28-110, F.A.C." Fla. Admin. Code R. 67-60.009(2).

Facts Specific to RFA 2016-114

10. RFA 2016-114 describes its purpose as follows:

> This Request for Applications (RFA) is open to Applicants proposing the development of affordable, multifamily housing located in Miami-Dade County.
>
> Under this RFA, Florida Housing Financing Corporation (the Corporation) expects to have up to an estimated $5,682,725 of Housing Credits available for award to proposed Developments located in Miami-Dade County. The Corporation is soliciting applications from qualified Applicants that commit to provide housing in accordance with the terms and conditions of this RFA, inclusive of Exhibits A, B, C, an D, applicable laws, rules and regulations, and the Corporation's generally applicable construction and financial standards.

11. Florida Housing's Board of Directors approved the issuance of RFA 2016-114 on June 24, 2016.

12. Prior to the issuance of RFA 2016-114, Florida Housing conducted a public workshop on August 25, 2016.

13. A draft version of RFA 2016-114 was posted on Florida Housing's website on September 15, 2016.

14. The final version of RFA 2016-114 was issued on October 28, 2016, and applications were due by 11:00 a.m., Eastern Time on December 15, 2016.

15. There were no challenges to the terms of RFA 2016-114 after it was issued.

16. A provision within RFA 2016-114 stated that "[a]pplicants should review subsection 67-48.023(1), F.A.C., to determine eligibility to apply for the Housing Credits offered in this RFA."

17. The aforementioned rule provides in pertinent part that an applicant is ineligible to apply for competitive housing credits if

> [t]he proposed Development site or any part thereof is subject to any Land Use Restriction Agreement or Extended Use Agreement, or both, in conjunction with any Corporation affordable housing finance intended to foster the development or maintenance of affordable housing . . . ."

(emphasis added).

18. An Extended Use Agreement ("EUA") is an agreement between an applicant seeking tax credits and Florida Housing.

An EUA runs with a particular piece of property and is meant to assure that the property is devoted to affordable housing.

19. In addition, Florida Administrative Code Rule 67-48.002(44) defines an "EUA" in the context of this tax credit program as "an agreement which sets forth the set aside requirements and other Development requirements under the housing credit program." Set aside requirements reflect how much of the development is set aside for low-income tenants.

20. An applicant can seek to have an EUA amended by filing a request with Florida Housing. The request would begin with a staff member of Florida Housing, move to Florida Housing's assistant director of multifamily programs, and then to the director of multifamily programs for an ultimate decision.

21. The process by which an EUA is amended is not set forth in a rule or policy manual.

22. There is no established time by which Florida Housing must act on a request to amend an EUA.

23. There is no typical time by which Florida Housing grants or denies a request to amend an EUA.

24. Also, there is nothing requiring Florida Housing to expedite a decision on whether to grant or deny a request to amend an EUA.

25. Florida Housing received 25 applications in response to RFA 2016-114. Florida Housing received, processed,

evaluated, scored, and ranked each of the applications pursuant to the terms of RFA 2016-114, Florida Administrative Code Chapters 67-48 and 67-60, and applicable federal regulations.

26. The Executive Director of Florida Housing, Ken Reecy, appointed a Review Committee of Florida Housing staff to conduct the aforementioned evaluation, scoring, and ranking.

27. Florida Housing only considered an application for funding if it was deemed "eligible" based on whether that application complied with Florida Housing's various content requirements.

28. Of the 25 applications submitted, Florida Housing deemed 19 to be "eligible," and six were deemed "ineligible."

29. Florida Housing proposed to award funding to three developments: Ambar Key, Verbena, and Northside Property IV, Ltd.

30. As discussed below, Florida Housing deemed the Moretti Phase Three and Stirrup Plaza Phase Three applications to be ineligible because the properties associated with those applications were still subject to EUAs at the December 15, 2016, deadline for RFA 2016-114.

Facts Regarding Moretti Phase Three's and Stirrup Plaza Phase Three's Applications

31. Moretti Phase Three submitted an application seeking $2,400,000 in annual allocation of housing credits to finance the construction of a 103-unit development.

32. Stirrup Plaza Phase Three submitted an application seeking $1,950,000 in annual allocation of housing credits to finance the construction of an 85-unit development.

33. The Moretti Phase Three and Stirrup Plaza Phase Three applications represent subsequent phases of existing developments, and both of those developments are devoted to affordable housing.

34. All of the land associated with both developments had been subject to EUAs since 2015.

35. Because Moretti Phase Three and Stirrup Plaza Phase Three wanted to obtain tax credit financing, they needed to have those EUAs amended.[2/]

36. Anthony Del Pozzo is the vice president for Moretti Phase Three and Stirrup Plaza Phase Three. Mr. Del Pozzo focuses much of his attention on affordable housing and has assisted with the preparation of 30 to 50 tax credit applications to Florida Housing.

37. After RFA 2016-114 was issued, Mr. Del Pozzo contacted Florida Housing via telephone calls and e-mails in order to ascertain the process by which the EUAs could be amended.

38. Mr. Del Pozzo's initial e-mail to Florida Housing regarding amending the EUAs was transmitted on November 1, 2016, and stated the following:

> Libby, I will be sending this request to you, Amy and Lisa to modify the EUA's for our Joe Moretti (first phase) and Stirrup Plaza (first phase) properties, both of which are 9% deals. I will also have to modify the EUA for our Seville Place deal, which was financed with bonds and 4% credits. Will that one also go to the same people or should I reach out to Bill Cobb or someone else?? Thanks!!

39. Mr. Del Pozzo's initial e-mail was acknowledged by an Florida Housing employee (Libby O'Neil) later that day.

40. On November 2, 2016, Mr. Del Pozzo transmitted an e-mail to Amy Garmon, Libby O'Neil, and Lisa Nickerson of Florida Housing formally requesting to amend the Moretti Phase Three EUA:

> Please accept this e-mail as our formal request to modify the legal description of the EUA for Joe Moretti Preservation Phase One, LLC. Attached please find a copy of the recorded EUA, a sketch with Phase I modified legal description and a site plan showing the entire site and the portion where the Phase One building is located (cross-hatched). As you can see from the sketch we are modifying the legal description to include only the portion of the property where the building is located.

> We will be submitting a portion of the remainder of the property for 9% tax credits in the 2016 RFA.[3/]

(emphasis added).

41. Lisa Nickerson is a multifamily programs manager at Florida Housing, and one of her duties involves working with developers seeking EUA amendments. Ms. Nickerson completed the initial processing of all EUA Amendment requests at all times relevant to the instant case. However, Ms. Nickerson was not responsible for approving EUA amendments.

42. On November 3, 2016, Ms. Nickerson responded to Mr. Del Pozzo's November 2, 2016, e-mail with the following e-mail:

> We are happy to assist. Because this is a change to the legal description, we will treat it as a site change. Before we can amend the EUA we need the following, as outlined in the carryover agreement:
>
> - $500 processing fee
>
> - Affidavit from a Florida licensed surveyor certifying that the tie-breaker measurement point has not moved and that the change in the development site has not affected any zoning requirements. If the tie-breaker measurement point has moved from the location provided in the application, the change in location cannot affect the score and a new surveyor certification form is required.
>
> Upon receipt of the above items, we will process [an] amendment to the EUA.

43. On November 8, 2016, Mr. Del Pozzo sent Ms. Nickerson an e-mail stating that he has a "PDF copy of the Survey Affidavit." Mr. Del Pozzo then asked if he needed the surveyor to send him "an original for my package to FHFC??"

44. Ms. Nickerson responded three minutes later by stating that Florida Housing "can use the PDF to start drafting the amendment, but we will need the original for the file."

45. On November 9, 2015, Ms. Nickerson sent an e-mail to Mr. Del Pozzo stating that she had reviewed the affidavit and found that application number was incorrect. She gave Mr. Del Pozzo the correct application number, asked him to make that change, and resend the affidavit.

46. In another e-mail transmitted to Mr. Del Pozzo on November 9, 2016, Ms. Nickerson also asked him to send an updated legal description.

47. At 6:52 p.m. on November 9, 2016, Mr. Del Pozzo transmitted an e-mail asking Ms. Nickerson to confirm "if this revised affidavit is acceptable. As requested, I've also attached a copy of the legal description. Thanks again for all your help."

48. At 10:04 a.m. on November 10, 2016, Mr. Nickerson responded with an e-mail stating, "This looks good. As soon as I receive the originals and the $500 fee I will send the amended EUA for you to sign."

49. On November 10, 2016, Mr. Del Pozzo transmitted an e-mail notifying Ms. Nickerson that he "will be submitting a similar modification request for Stirrup Plaza Preservation Phase One, LLC."

50. Accordingly, Ms. Nickerson received later that day a draft affidavit, a copy of the legal description of the property associated with the Stirrup Plaza Phase Three property, and a survey identifying the two parcels that were being carved out.

51. However, on November 14, 2016, Mr. Del Pozzo sent Ms. Nickerson an e-mail stating that "[w]e will be making some additional revisions to the legal description for Stirrup Plaza. Please hold off on the request to modify the EUA on that one until I confirm the correct legal description. I apologize for the inconvenience."

52. By November 14, 2016, Florida Housing had received an explanation letter, a $500 fee, an affidavit, and a new legal description for the Moretti Phase Three EUA amendment.

53. Florida Housing cashed a $500 check pertaining to the Moretti Phase Three application on approximately November 14, 2016.

54. As a result, the request to amend the Moretti Phase Three EUA was transferred to Ken Reecy on November 29, 2016, for final approval.

55. Ken Reecy is Florida Housing's Director of Multifamily Programs and is generally responsible for the program that allocates tax credits in order to finance affordable housing. In addition, Mr. Reecy is the person ultimately responsible for determining whether a request to amend an EUA will be approved.

56. Upon receiving the paperwork associated with the request to amend the Moretti Phase Three EUA, Mr. Reecy noticed that it was seeking to release an unusually large amount of land. That was a concern for Mr. Reecy because releasing that land from the EUA's restrictions would enable it to become a "market rate development that could be worth . . . millions of dollars." In contrast, Florida Housing wants land to remain affordable in the future and thus takes a very conservative approach toward releasing land under restrictions.

57. Due to his concern regarding the amount of land in question and because he was very busy with other work, Mr. Reecy put the Moretti Phase Three EUA amendment aside.

58. At this point in time, Mr. Reecy was unaware that the Moretti Phase Three EUA had to be amended prior to the December 15, 2016, deadline for RFA 2016-114.

59. On December 1, 2016, Ms. Nickerson transmitted an e-mail to Mr. Del Pozzo regarding the Moretti Phase Three amendment stating that, "I received your voicemail. I am waiting for the site change approval to come back to me. Once I

have it, I will email a copy of the EUA amendment with instructions. I am hopeful you will have it early next week, if not before."

60. While all of the required documentation for the Moretti Phase Three EUA amendment was received by November 14, 2016, Florida Housing did not receive the explanation letter or the affidavit pertaining to the Stirrup Plaza Phase Three EUA until December 5, 2016.

61. After receiving the affidavit pertaining to the Stirrup Plaza Phase Three EUA, Ms. Nickerson sent Mr. Del Pozzo an e-mail on December 5, 2016, stating, "Thank you, Tony. I will get this underway, this week."

62. Mr. Reecy received the paperwork for the Stirrup Plaza Phase Three EUA amendment on approximately December 7, 2016. However, he was unaware that this amendment was necessary in order for Stirrup Plaza Phase Three to apply for RFA 2016-114.

63. As the December 15, 2016, deadline for the RFA 2016-114 applications drew near, Florida Housing had yet to approve Moretti Phase Three's and Stirrup Plaza Plaza Phase Three's requests to amend their EUAs. Accordingly, Mr. Del Pozzo wrote the following e-mail to Ms. Nickerson on Monday, December 12, 2016, at 1:54 p.m.:

> I left a voicemail message for Ken [Reecy] this morning, asking him to follow up with me if he had any questions or needed any

> additional information to sign-off on the modifications to the EUAs. I also wanted to make sure he was aware that we are modifying the EUA's so that we can submit new phases to the projects in this year's 9% LIHTC RFA for Miami-Dade County. Applications are due on 12/15. So, we would greatly appreciate it if he could sign off on the modifications in advance of the application deadline. I will take scanned copies whenever they are ready.

64. This was the first time that Mr. Del Pozzo had communicated to Florida Housing staff that there was any sort of time constraint associated with the requests to amend the Moretti Phase Three and Stirrup Plaza Phase Three EUAs.

65. On Tuesday, December 13, 2016, at 11:50 a.m., Mr. Del Pozzo sent the following e-mail to Mr. Reecy and Ms. Nickerson:

> I know that you are both extremely busy, so I'm sorry for being so persistent. As I mentioned to Lisa over the phone and indicated in my e-mail below, we will be submitting new phases of the Joe Moretti and Stirrup Plaza projects for funding in RFA #2016-114 for Miami-Dade County. As such, we have been working with Lisa for the past several weeks to ensure that we have submitted all of the information necessary to modify the Extended Use Agreements for the initial phases of these properties. We are removing the portion of the land that will be part of the new phases from the legal descriptions in the EUAs.
>
> Based on our latest discussions, I believe everything is in order and we are only awaiting final sign-off. If you could please sign off on these modifications in advance of the RFA due date (12/15/16), we

> would greatly appreciate it. Please call me if you have any questions or need any additional information. Thanks for all of your help.

66. Four minutes later, Ms. Nickerson responded to the above e-mail by stating, "We are aware and your requests are currently under review. Thank you for your patience."

67. December 13, 2016, is the first day that Ms. Nickerson was aware that Moretti Phase Three and Stirrup Plaza Phase Three were planning to file applications in response to RFA 2016-114.

68. On Thursday, December 15, 2016, at 8:30 a.m., Albert Milo[4/] sent the following e-mail to Ms. Nickerson and Mr. Reecy:

> Good morning, Lisa I hope you are doing well. Just wanted to follow up again on the EUA modifications for our two projects since today is the Application Deadline. Can you please let me know if FHFC has finalized it? Thanks for your assistance. Have a great day.

69. Mr. Reecy responded at 9:01 a.m. with an e-mail asking Mr. Milo "what is the best number to call you right now?"

70. Mr. Reecy wanted to confer with Mr. Milo because Florida Housing had no verification that the land associated with the Stirrup Plaza Phase Three project was under a declaration of trust ("DOT"). Without a DOT, Mr. Reecy was concerned that the land would not be used for affordable housing.

71. In contrast, Florida Housing already had verification that the land associated with Moretti Phase Three was under a DOT.

72. On December 15, 2016, prior to 11:00 a.m., Mr. Reecy advised a representative from Moretti Phase Three and Stirrup Plaza Phase Three via a telephone call that he would approve Stirrup Plaza Phase Three's EUA Amendment request if he could be provided with verification that the Stirrup Plaza Phase Three development site was subject to a DOT.

73. During the same phone call, Mr. Reecy advised the representative that he did not believe that Moretti Phase Three and Stirrup Plaza Phase Three would be eligible for funding under RFA 2016-114 because their proposed development locations would still be subject to EUAs at the application deadline.

74. On December 15, 2016, at 9:55 a.m., Mr. Milo sent an e-mail to Mr. Reecy providing him with the copy of the Stirrup Plaza Phase Three DOT:

> Hi Ken as per our conversation here is a copy of the actual DOT for Stirrup Plaza Preservation Phase one. I have also requested a letter from PHCD confirming the same. As I mentioned this was a Preservation deal that consisted of the rehabilitation of 100 Public Housing units.
>
> Please let me know if you need anything else from us. Thanks for your assistance getting this finalized. We really appreciate it.

75. Exactly one hour later, Mr. Milo sent the following e-mail to Mr. Reecy:

> Hi Ken just want to confirm our conversation this morning where you informed me that you had approved and signed off on the EUA modification for Joe Moretti Preservation Phase One.
>
> As it relates to Stirrup Plaza Preservation Phase One, we have sent you a copy of the DOT and a letter from PHCD confirming the DOT. Please let me know if you require any additional information from us to finalize your approval as you mentioned in our phone conversation. Thanks for your assistance in this matter.

76. Moretti Phase Three and Stirrup Plaza Phase Three filed applications for funding under RFA 2016-114 by the application deadline.

77. As of the 11:00 a.m. application deadline, the Moretti Phase Three and Stirrup Plaza Phase Three proposed developments were subject to existing EUAs.

78. At 1:05 p.m. on December 15, 2016, Ms. Nickerson e-mailed the following information to Mr. Milo:

> Attached, please find the First Amendment to the EUAs for Joe Moretti Preservation Phase One and for Stirrup Plaza Preservation Phase One. The amendments reflect the changes to the legal descriptions found at Exhibit A. Please review and execute the amendments, and return to me with a check made payable to the appropriate county in which the agreements will be recorded. Standard recording fees are $10 for the first page and $8.50 for every page thereafter. However, please contact the appropriate

county for confirmation of their fees and any form of payment restrictions.

79. On December 15, 2016, at 2:37 p.m., Moretti Phase Three and Stirrup Plaza Phase Three e-mailed Florida Housing PDF copies of the executed Amended EUAs and indicated the originals and recording fee checks were being sent via FEDEX the same day.

80. Mr. Reecy received the signed amendments and then signed them himself on December 20, 2016. Mr. Reecy's signature was the final step in the EUA amendment process other than the actual recording of the amended EUAs.

81. The amended EUAs for Moretti Phase Three and Stirrup Plaza Phase Three were recorded on February 6, 2017.

82. Florida Housing scored the applications for RFA 2016-114 on January 25, 2017.

83. On February 3, 2017, Florida Housing announced its intention to award funding to three applicants, two of which were Ambar Key and Verbena.

84. Florida Housing did not select the applications of Moretti Phase Three and Stirrup Plaza Phase Three for funding because those applications were deemed ineligible given that the proposed development sites were subject to EUAs at the time their applications were filed.

Findings Regarding Florida Housing's Treatment of the EUA Amendment Applications

85. The greater weight of the evidence demonstrates that no relevant personnel at Florida Housing knew about the time-sensitive nature of the requests to amend the EUAs before December 12, 2016.

86. If Ms. Nickerson and/or Mr. Reecy had been advised of the time-sensitive nature within a reasonable time prior to December 15, 2016, the greater weight of the evidence indicates they would have made good faith efforts to expedite the process and that the EUAs would have likely been amended prior to the deadline.

87. The greater weight of the evidence demonstrates that no one at Florida Housing did anything to delay the applications, to amend the EUAs, or anything to undermine Moretti Phase Three's or Stirrup Plaza Phase Three's applications for RFA 2016-114.

88. In sum, the greater weight of the evidence demonstrates that Florida Housing did not act arbitrarily, capriciously, or contrary to competition.

CONCLUSIONS OF LAW

89. Florida Housing has jurisdiction over this matter, pursuant to sections 120.569, 120.57(2), and 120.57(3), Florida Statutes. Florida Housing has contracted with DOAH to provide

an Administrative Law Judge to conduct the informal hearing in this case.

90. Florida Housing's decisions in this competitive process impact the substantial interests of each party, and each party has standing to challenge Florida Housing's scoring in this proceeding.

91. This is a competitive procurement protest proceeding and, as such, is governed by section 120.57(3)(f),[5/] which provides as follows 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. . . .

92. As the applicants for funding in this proceeding, Moretti Phase Three and Stirrup Plaza Phase Three have the burden of establishing entitlement to the funding they seek by a preponderance of the evidence. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 933 (Fla. 1996).

93. Moretti Phase Three and Stirrup Plaza Phase Three assert that the actions (or inactions) of Florida Housing at issue in the instant case were arbitrary, capricious, or contrary to competition, and their argument is summarized in the following excerpts from their Proposed Recommended Order:

> It appears this is a case of first impression in that the Petitioners' challenge here is not necessarily tied to a review of any document submitted with the Applications but instead is limited to the consideration of the documentation that would have existed had Florida Housing processed these requests for Amended EUAs in a timely manner. In the instant case there is no disagreement that Amended EUAs had not been executed as of the Application Deadline. According to Florida Housing and Intervenors, therefore Petitioners' Applications did not meet the rule requirements and are ineligible. Mr. Reecy indicated that had the Amended EUAs been signed by the Application Deadline then the Moretti Three and Stirrup Three Applications would have been deemed eligible. However, the reason the Amended EUAs were not timely signed rests upon Florida Housing's own failure to process the Amendments in a timely manner, rather than anything within the control of Petitioners.
>
> * * *
>
> While no malicious intent was argued or found, Florida Housing's delay in approving the requests is the sole reason behind the ineligibility determination. At a minimum Florida Housing's action or inaction has created "an appearance of an opportunity for favoritism," and can be seen as an action that erodes public confidence that contracts are being awarded equitably, and certainly causes the procurement process to appear

> generally unfair. It is found that based on the established facts these actions clearly put Moretti Three and Stirrup Three at a competitive disadvantage and therefore Florida Housing's actions in not using reasonable efforts to review the requests to meet the deadline and then using the deadline as a reason for ineligibility was contrary to competition.

DOAH Has Jurisdiction to Provide the Relief Sought by Moretti Phase Three and Stirrup Plaza Phase Three

94. As a threshold matter, Florida Housing argues that DOAH has no jurisdiction to award the equitable relief sought by Moretti Phase Three and Stirrup Plaza Phase Three.[6/]

95. As stated in Florida Housing's Proposed Recommended Order:

> Petitioners' true underlying challenges as articulated in the Petitions, is not Florida Housing's scoring of the Applications, but rather, Florida Housing's processing of Petitioners' EUA Amendment requests. In effect, Petitioners are seeking equitable relief that would deem the Amended EUAs to be effective prior to the Application Deadline, and/or to estopp [sic] Florida Housing from scoring the Applications in accordance with the applicable RFA and Rule requirements.
>
> * * *
>
> The amendment of the EUA agreements was not final agency action, nor was it some type of relief that Petitioners had a statutory right to receive, nor was it relief with a corresponding "deemer clause" where failure of an agency to respond to a request in a

> definitive time period would result in a deemed approval of the request at issue.
>
> * * *
>
> The EUA amendment requests and the RFA Application submissions are two separate issues and Florida Housing had the discretion to approve or reject the EUA amendment requests.
>
> * * *
>
> DOAH does not have jurisdiction to adjudicate the propriety of the agency action that does not fall under its purview, such as the processing of the requests to amend EUAs.

96. However, Florida Housing's reasoning is erroneous and could lead to situations susceptible to favoritism.

97. First of all, Florida Housing's own precedent indicates that an applicant for tax credits can challenge Florida Housing's determination that the applicant is ineligible for funding. See Trinity Towers Preservation Assoc. LLLP v. Fla. Housing Fin. Corp., FHFC Case No. 2012-024UC, 2012 Fla. Div. Admin. Hear. LEXIS 869 (FHFC Final Order June 8, 2012)(adopting a hearing officer's recommended conclusion of law that "[b]ecause Florida Housing determined that Petitioner was ineligible for funding due to failure to meet a threshold requirement, Petitioner's substantial interests are affected by Florida Housing's proposed agency action."); § 120.569(1), Fla. Stat. (providing that "[t]he provisions of this section apply in

all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574.").

98. Moreover, under the circumstances of the instant case, it is inaccurate to take the position that "[t]he EUA amendment requests and the RFA Application submissions are two separate issues."

99. By requiring through rule 67-48.023(1) that lands associated with proposed developments not be subject to an EUA, Florida Housing has tied the EUA amendment process and the RFA application process together. This is especially true in light of the fact that prospective applicants for tax credits must obtain approval for an EUA amendment from Florida Housing.

100. Therefore, under the circumstances of the instant case, Florida Housing's actions (or inactions) pertaining to Petitioners' requests to amend their EUAs are inextricably linked to Florida Housing's proposed agency action deeming Petitioners' applications ineligible for funding under RFA 2016-114.

101. A contrary determination concluding that Florida's Housing actions (or inactions) pertaining to Petitioners' EUA amendment requests are immune from any sort of review would create an opportunity for Florida Housing to engage in favoritism or to act contrary to competition by expeditiously

processing requests from preferred applicants and delaying the processing of requests from less favored applicants.

102. If Florida Housing's rationale was to be generally applied to all types of bid protests, then any applicant who needed some sort of credential or other documentation from the contracting agency would have no means of redress if the contracting agency intentionally withheld that credential/documentation or unreasonably (but non-maliciously) delayed provision of that credential/documentation.

103. Such a result would undermine the intent behind the Administrative Procedure Act and section 120.57(3). See generally Commercial Consultants Corp. v. Dep't of Bus. Reg., 363 So. 2d 1162, 1163 (Fla. 1st DCA 1978)(stating that "[t]he APA applies to all agency action affecting the substantial interests of a party."); Eduardo S. Lombard, Bid Dispute Resolution, Fla. Admin. Practice § 11.4 (10th ed. 2015) (explaining that "[t]he ultimate question in procurement disputes is whether one vendor has received an advantage over other vendors. If one bidder is or potentially could be provided an advantage not enjoyed by the other vendors, the potential for favoritism arises and the ultimate purpose of requiring competitive solicitations is thwarted.").

104. Accordingly, the undersigned concludes that DOAH has jurisdiction to assess whether any delay by Florida Housing in

granting the amended EUAs for Moretti Phase Three and Stirrup Plaza Phase Three was arbitrary, capricious, or contrary to competition.

Florida Housing's Actions and/or Inactions Toward Petitioners' Requests to Amend the EUAs Were Not Arbitrary, Capricious, or Contrary to Competition.

105. As discussed above, Moretti Phase Three and Stirrup Plaza Phase Three argue that Florida Housing's actions (or inactions) pertaining to the requests to amend the EUAs were arbitrary, capricious, or contrary to competition. In other words, the issue for determination is whether Florida Housing acted arbitrarily, capriciously, or contrary to competition when it failed to act more expeditiously in granting the requests to amend the EUAs.

106. An agency takes action "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977)(quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931)).

107. "A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or [one that is] despotic." Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

108. In the instant case, there is no persuasive evidence that Ms. Nickerson, Mr. Reecy, or any other relevant personnel at Florida Housing were aware prior to Mr. Del Pozzo transmitting the following e-mail on December 12, 2016, that Moretti Phase Three and Stirrup Plaza Phase Three were seeking to amend the EUAs so that they could apply for RFA 2016-114:

> I left a voicemail message for Ken [Reecy] this morning, asking him to follow up with me if he had any questions or needed any additional information to sign-off on the modifications to the EUAs. I also wanted to make sure he was aware that we are modifying the EUA's so that we can submit new phases to the projects in this year's 9% LIHTC RFA for Miami-Dade County. Applications are due on 12/15. So, we would greatly appreciate it if he could sign off on the modifications in advance of the application deadline. I will take scanned copies whenever they are ready.

109. There is also no persuasive evidence that Ms. Nickerson, Mr. Reecy, or any other relevant personnel at

Florida Housing were aware prior to the above-quoted e-mail that any sort of time constraint was associated with their requests to amend the EUAs.

110. Without any persuasive evidence that Florida Housing was aware or timely notified that Moretti Phase Three and Stirrup Plaza Phase Three were working under a deadline, the undersigned cannot conclude that Florida Housing's failure to act more expeditiously on the requests to amend the EUAs was arbitrary, capricious, or unreasonably interfered with the objectives of competitive bidding.

111. In contrast, if Mr. Del Pozzo had advised Florida Housing on November 1, 2016, or soon thereafter that it needed the EUAs to be amended by December 15, 2016, then any unreasonable delay by Florida Housing in processing those requests could have potentially served as a basis for concluding that Florida Housing acted arbitrarily, capriciously, or contrary to competition. In other words, any unreasonable delay on Florida Housing's part could have led a reasonable person to infer that Florida Housing preferred other applicants and was intentionally attempting to undermine the applications of Moretti Phase Three and Stirrup Plaza Phase Three.

112. However, there is no persuasive evidence that Florida Housing unreasonably or intentionally delayed the processing of the applications. Ms. Nickerson provided timely responses to

Mr. Del Pozzo's e-mails, she made appropriate requests for more documentation, and she transferred the applications to Mr. Reecy within a reasonable amount of time. While Mr. Reecy had the request to amend the Moretti EUA by November 29, 2016, he did not immediately approve the request because he had a concern regarding the large amount of land involved.[7/]

113. The parties did not cite any analogous cases in their Proposed Recommended Orders, and the undersigned was unable to find any Florida cases with a similar fact pattern.

114. However, after expanding the search for relevant case law beyond Florida, the undersigned found MVS USA, Inc. v. U.S., 111 Fed. Cl. 639 (2013).

115. MVS involved a Request for Quote ("RFQ") for a spectrum of satellite communication services to support the Joint Battle Command-Platform Blue Force Tracking under the Future Commercial Satellite Communications Services Acquisition Program ("the FCSA Program"). The FCSA Program was a partnership between the General Services Administration ("GSA") and the Defense Information Systems Agency ("DISA"). Id. at 643.

116. On November 15, 2012, DISA issued an RFQ seeking quotes for the aforementioned satellite services. The quotes were due by December 14, 2012, and the contract was to be

awarded by February 1, 2013. Id. at 645. Bidders had to have security clearance.

117. On December 6, 2012, MVS submitted an application for security clearance to Anne Miller, a GSA contract specialist. Ms. Miller then forwarded the application to Donald Carlson, the FCSA Program Security Manager. MVS at 645.

118. On February 13, 2013, DISA determined that MVS had submitted the lowest-priced technically acceptable quote. However, MVS's quote was ineligible because MVS did not have the required security clearance. As a result, DISA awarded the contract to Northrup Grumman. Id. at 646.

119. In ruling against MVS's challenge to GSA's actions in handling MVS's request for security clearance, the Court of Federal Claims ruled as follows:

> The record reflects a long period of inaction between December 6, 2012, and February 1, 2013, on the part of GSA. During that time, MVS did not contact GSA to inquire about its application for a facility security clearance until it received a letter from DISA requesting a final quotation revision and proof of facility clearance. *See* AR 32-1788 to -89 (Request for Final Quotation Revision). MVS represents that its inactivity was reasonable, because it contends that the evaluation notices sent by DISA in late December made no mention that MVS's submission with respect to a facility clearance was deficient. *See* Hr'g Tr. 72:2-18. It claims that it acted promptly to resolve the matter after receiving notice from DISA that proof of a security clearance

would be needed in February. *See* Hr'g Tr. 72:18-22. The court concurs that MVS's actions are understandable in light of the circumstances. MVS did not hinder the facility clearance application process in any manner.

Regarding GSA's actions, Mr. Carlson provides an explanation for his delay in processing MVS's facility clearance request. He notes that between December 6, 2012, and February 1, 2013, he worked "on the development of [six] DD-254 packages, including MVS's, as well as . . . numerous others that were in various stages of development or modification award processing." Decl. of Donald V. Carlson ("Carlson Decl.") ¶ 14 (May 10, 2013), ECF No. 44. He states that he also worked on a security audit report and was on personal leave for sixteen days during that time period. *Id.* Mr. Carlson additionally says he halted the processing of DD Form 254 requests for a two-week period in January while DSS "was questioning whether a bona fide need existed for any facility clearances under SINs 132-54 and 132-55 under Schedule 70." *Id.* ¶ 15. He resumed processing requests after that issue was resolved and "worked on all the vendors['] requests for facility clearances and did not expedite the request of any particular vendor." *Id.* ¶ 16. Mr. Carlson, however, notes that he did expedite the processing of MVS's request as soon as he was informed that the matter required prompt consideration. *Id.* ¶ 17.

Under these circumstances, the court cannot say that MVS's quote and attendant request for a facility security clearance did not receive fair consideration as required by FAR 8.405-2(c)(3)(iii). While Mr. Carlson certainly did not act with alacrity, vigor, or timeliness, he provided a propinquent level of bureaucratic service and consideration. He did not actively ignore any indications that MVS's request was

> urgent, and he provided MVS with appropriate action once he became aware of the exigency. In sum, MVS has not demonstrated that the government, acting through GSA or DISA, has committed a violation of FAR 8.405-2(c)(3)(iii).

MVS at 652-53.

120. Just like Mr. Carlson, Florida Housing's staff: (a) provided a reasonable level of bureaucratic service and consideration; (b) did not ignore any indications that the Moretti Phase Three and Stirrup Plaza Phase Three requests were urgent; and (c) provided appropriate action when they became aware of the urgency.

121. Therefore, Florida Housing's actions or inactions pertaining to the Moretti Phase Three and Stirrup Plaza Phase Three requests were not arbitrary, capricious, or contrary to competition.[8/]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation issue a final order awarding funding to Ambar Key, Ltd.; Verbena, LLC; and Northside Property IV, Ltd.

DONE AND ENTERED this 9th day of June, 2017, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2017.

ENDNOTES

[1/] Unless stated otherwise, all statutory references will be to the 2016 version of the Florida Statutes.

[2/] Moretti Phase Three and Stirrup Plaza Phase Three had one or more representatives present at the workshop for RFA 2016-114, and an argument could be made that they could have moved to amend the EUAs at issue as soon as it became evident that RFA 2016-114 would prohibit any proposed development from being subject to an EUA. However, Mr. Del Pozzo persuasively explained that draft RFAs are subject to change and that moving to amend an RFA prior to it being finalized could lead to wasted effort.

[3/] Mr. Del Pozzo asserted at the final hearing that the underlined portion of his e-mail should have put Florida Housing on notice that Moretti Phase Three was preparing an application for RFA 2016-114 because that was to be the last RFA for 2016. However, the undersigned finds that sentence to be insufficiently explicit to support a finding that such notice was conveyed to Florida Housing.

[4/] While Mr. Del Pozzo is the Vice President of Finance for the Related Group, Mr. Milo is the Principal and Senior Vice President of the Related Group.

[5/] Although competitive solicitation/bid protest proceedings are described in section 120.57(3), as being de novo in nature, courts acknowledge that these de novo proceedings are not like other substantial interest proceedings under section 120.57. Hearings pursuant to 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 § 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).

[6/] DOAH's jurisdiction was not set forth as an issue in the Pre-hearing Stipulation or a motion to dismiss, and was not discussed during the formal hearing. Under normal circumstances, that would lead the undersigned to rule that an issue was not properly raised. See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037, 1038-39 (Fla. 4th DCA 2015)(stating that "[p]retrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced."); Fla. Admin. Code R. 28-106.204(2)(providing that "[u]nless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after assignment of the presiding officer, unless the motion is based upon a lack of jurisdiction or incurable errors in the petition."). However, Florida Housing's argument appears to implicate DOAH's subject matter jurisdiction. Therefore, the undersigned elected to address Florida Housing's jurisdiction argument because "[p]arties may not confer subject matter jurisdiction by waiver, failure to object, or consent where none is given by law." Dep't of High. Saf. & Motor Veh., Div. of Highway Patrol v. Kropff, 491 So. 2d 1252, 1254 n.1 (Fla. 3d DCA 1986).

[7/] Mr. Reecy persuasively testified that he did not delay the requests. Also, he would have acted more quickly if he had known of the time constraint.

[8/] In light of this ruling, there is no need to address Moretti Phase Three's Motion in Limine. Accordingly, it is denied as being moot.

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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.