

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2020-034VW

PALMETTO LEASED HOUSING
ASSOCIATES I, LLLP

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**PETITION FOR WAIVER OF THE
RULE 67-21.026(13)(g), FLORIDA ADMINISTRATIVE CODE (2019)**

Pursuant to section 120.542, Florida Statutes, and rule 28-104.002, Florida Administrative Code, Petitioner, Palmetto Leased Housing Associates I, LLLP ("Palmetto" or "Petitioner") submits this Petition to Respondent Florida Housing Finance Corporation ("Florida Housing") for a waiver of Rule 67-21.026 (13)(g), F.A.C. Palmetto is proposing to develop an affordable housing development in Palmetto, Florida financed with tax-exempt bonds allocated by the Manatee County Housing Finance Authority and Florida Housing 4% low income housing tax credits. Petitioner has executed a construction contract with CB-Dominium, LLC, a joint venture between Dominion Construction & Architectural Services, LLC and Current Builders Construction Services, Inc., a division of Current Builders, Inc ("CB-Dominium") which will serve as the General Contractor of the Development. CB-Dominium will in turn, subcontract the construction of the building shell to CB Structures, Inc., an affiliated company of Current Builders Construction Services, Inc. Petitioner seeks a waiver of rule 67-21.026 (13)(g), FAC so that CB-Dominium may subcontract with CB Structures, Inc.. In support of this Petition, Palmetto, states as follows:

PETITIONER AND ATTORNEY

1. The name, address, telephone number and email address for Petitioner is Devon Quist, Dominion Development & Acquisitions, 2905 Northwest Blvd., Ste 150, Plymouth, Minnesota 55441 (Devon.quist@dominiuminc.com) For purposes of this proceeding, the contact information for Petitioner is that of the undersigned counsel.

2. The name, address, telephone number, and email address for Petitioner's attorney is Maureen McCarthy Daughton, Maureen McCarthy Daughton, LLC, 1400 Village Square Blvd., Ste 3-231, Tallahassee, Florida 32312; 850-345-8251; mdaughton@mmd-lawfirm.com.

3. Palmetto submitted its application for 4% low income housing tax credits on or before May 7, 2019. Palmetto proposes to build a five (5) story, 224-unit community in Palmetto, Manatee County, Florida. This Development will provide affordable housing for tenants with head of household over the age of 62 who income qualifies earning no more than average 60% of Area Medium Income. Palmetto closed on financing on April 28, 2020.

4. Bids were sought for the five (5) story wood framed Development consisting of approximately 285,886 gross square footage. Two complete bids were received, one from CB Structures, Inc., and the other from SH Exterior, LLC.¹ The total bid from CB Structures, Inc. ("CB Structures"), was \$6,086,052.00, the bid from SH Exterior was \$456,707.45 more than the CB Structures Bid, totaling \$6,542,759.45.²

¹ Tri-City Builders Group Corp., and Pioneer Framing Contractor submitted incomplete bids and were not considered.

² Additionally, the SH Exterior bid omitted two components, Dumpster and Monument Sign Wall, that were included within the bid price of CB Structures.

5. Additionally, SH Exteriors, LLC, is not bondable,³ an important consideration where there are limited number of subcontractors available in the marketplace big enough and with the financial stability to handle complex wood frame construction projects.

6. The joint venture entity would like to engage CB Structures, Inc. as the subcontractor to construct the shell for the proposed development because its bid is the lowest. All labor and materials provided by CB Structures will be at cost with no profit or fees built in with the exception of the costs incurred by CB Structures to compensate a field superintendent to oversee the shell work.⁴ The cost of the shell work, including approximately \$113,000.00 for the field superintendent, concrete, masonry and wood framing at \$5,781,749.00 will be approximately 20% of the total construction cost of \$28,251,487.00.⁵ The General Contractor fee on the costs subcontracted to CB Structures will be limited to 7%.

7. CB Structures, Inc. is a division of Current Builders, Inc, with over 250 employees. CB Structures has over thirty (30) years of experience in constructing shell structures for all types of developments. Since 2004, when CB Structures incorporated, it has been serving as a third-party subcontractor for the construction of shells for numerous affordable housing developments.⁶

8. CB Structures has the knowledge base to design the most cost-effective and sustainable structures for any specifications. One of the reasons that CB Structures was created was because many of the existing companies were not bondable, lacked the necessary experience and were

³ Bondable means that the contractors' capital, character and capacity have been analyzed by a surety underwriter. The surety underwriter in deeming a subcontractor bondable determines the contractor can perform certain types of work within established parameters. When the subcontractor isn't bondable the owners/General Contractors financial investment is at risk if the job is not completed.

⁴ See attached as Exhibit 1 the Affidavit of Michael Taylor, President of CB Structures, Inc.

⁵ The total Contract Amount is \$31,514,928.00, however excluding the General Contractors fees, permit fees, bond costs and other fees by the General Contractor the total Contract Amount is reduced to \$28,251,487.00.

⁶ The list includes but is not limited to Verbena (performed work as 3rd party subcontractor), Heron Pond, University Park, Pinnacle at Peacefield (3rd party subcontractor) and Arbor View Apartments (2016-161C)(Received approval by the FHFC to subcontract CB Structures, Inc.).

significantly more expensive. It is notable, that the highest rate of default in the shell industry is among those companies providing wood frame construction, which is what the Development at issue requires.

9. Rule 67-21.026(13)(g), Florida Administrative Code, prohibits construction costs from being subcontracted to any entity that has common ownership or is an Affiliate of the General Contractor or the Developer. It appears that application of this rule would prohibit the joint venture entity from engaging CB Structures as its subcontractor.

10. The requested waiver is permanent in nature.

RULE FOR WHICH WAIVER IS SOUGHT

11. Rule 67-21.026 (13)(g) provides:

(13) The General Contractor must meet the following conditions:

....

(g) Ensure that no construction cost is subcontracted to any entity that has common ownership or is an Affiliate of with the General Contractor or the Developer. For Purposes of this paragraph, "Affiliate" has the meaning Given it in subsection 67-21.002(5), F.A.C., except that the term "Applicant" therein shall mean "General Contractor"

STATUTES IMPLEMENTED BY RULE

12. Pursuant to section 420.5099(1), Florida Statutes, Florida Housing is designated as the "housing credit agency" for Florida within the meaning of section 42 of the Internal Revenue Code. Florida Housing is responsible for the allocation plan that includes priorities and selection criteria. Section 420.5099(2) also requires Florida Housing to "adopt allocation procedures that will ensure the maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability

of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.” Thus, the rules subject to this waiver request implement sections 420.5099(1) and (2), Florida Statutes, as well as other provisions of Part V of chapter 420, Florida Statutes, the Florida Housing Finance Corporation Act.

JUSTIFICATION FOR REQUESTED WAIVER

13. Section 120.542(1), Florida Statutes, provides that “[s]trict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances”. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.” That procedure requires those seeking a variance of, or waiver from, a rule to demonstrate that application of the rule would create a substantial hardship or would violate principles of fairness. §120.542(2), Fla. Stat.⁷ Petitions for variances and waivers are also required to demonstrate the purposes of the underlying statute will be achieved. *Id.*

14. The controlling statutes and Florida Housing’s Rules are clearly designed to allow the flexibility necessary to provide relief when strict application, would lead to an unreasonable, unfair or unintended result. Approving the instant request would allow the Development to proceed to completion providing much needed affordable housing in Manatee County.

15. It is the Petitioner’s belief that utilizing an affiliate of Current Builders will increase operational oversight and lend itself to a clear reduction of costs and an overall more efficient process.

⁷ “Substantial hardship” means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver for purposes of this section, “principles of fairness” are violated when the literal application of a rule affects a particular person in a manner not significantly different from the way it affects other similarly situated persons who are subject to rule.

16. Petitioners' have been working with Staff and understand and intend to comply with the purpose of the rule in question, which is to ensure that neither Developer or the General Contractor exceeds permissible limits on profit through the use of affiliated entities. Petitioners also agree to limiting the General Contractor fees, overhead and profit to no more than 7% on the CB Structure amount and to 100% auditing by an independent Certified Public Accountant of all payments between the joint venture entity and CB Structures. Additionally, the independent CPA will audit and confirm all payments to the field superintendent and report on those costs within the General Contractors Cost Certification. Lastly, in addition to the audit of CB Structures mentioned in this Section the independent CPA will confirm and/or verify an additional 40% of the Development's construction costs per the Final Cost Certification Application Package.

17. While Petitioner understands the purpose of the rule in question, its application here demonstrates the differing results dependent upon the identity of the hiring entity. By way of example, CB Structures could be hired by any unaffiliated third-party to perform the *same work* that CB Structures could not perform here without the waiver. Moreover if Petitioner has to utilize a subcontractor that is both more expensive and not bondable, that greatly increases the risk that the construction is not timely completed leading to a significant delay in the provision of affordable housing units or far worse issues which may significantly increase the cost of the work to the joint venture entity. While it would certainly be more convenient to utilize the services of CB Structures, this request is not based on the convenience, but rather based on the increased price and the very real heightened risk associated with utilizing a subcontractor that is not bondable for this type of work. If this request is not approved it will result in financial hardship to Petitioner in the form of increased oversight costs as well as the increased bid price and the very real risk of even higher costs if the work is not timely completed.

18. Florida Housing has granted similar waivers for other Developments facing similar circumstances thus denial of this request would violate principles of fairness.⁸

19. The requested waiver will not adversely affect any party. A denial of the requested waiver, however, would result in substantial economic hardship to Palmetto in addition to added risk. Additionally, denial of the waiver request would violate principles of fairness, as other similarly situated Developments have been granted relief from a similar housing credit rule, 67-48.0072(17)(g), F.A.C.

20. The statutes underlying the rule will be served by the approval of Palmetto's waiver request. Section 420.504(4), Florida Statutes, states that Florida faces "a serious shortage of decent, safe, and sanitary housing in the state available to persons and families of low, moderate, and middle income..." One of the primary purposes of the Act is to facilitate the availability of affordable housing. Granting the waiver request will further these goals.

⁸Specifically, Arbor View, which was under a similar rule 67-48.0072 (17)(g), FAC.

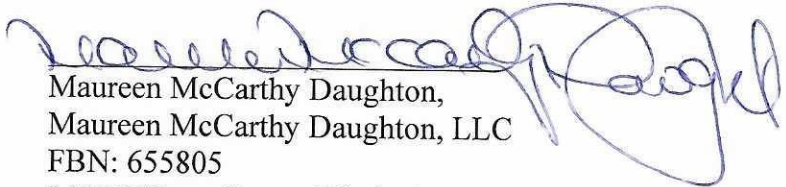
ACTION REQUESTED

21. For the above stated reasons, Palmetto, respectfully requests that the Florida Housing Board of Directors:

- Grant the requested waiver of Rule 67-21.026(13)(g), F.A.C.

Dated this 17th of June 2020.

Respectfully submitted,



Maureen McCarthy Daughton,
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1400 Village Square Blvd., Ste 3-231
Tallahassee, Florida 32312
Telephone (850)-345-8251
Mdaughton@mmd-lawfirm.com

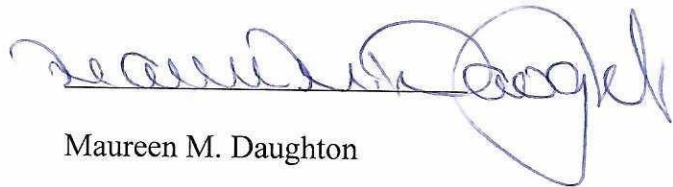
Counsel for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document was filed this 17th day of June 2020, by electronic delivery to:

Florida Housing Finance Corporation
Attn: Corporation Clerk
227 North Borough Street, Suite 5000
Tallahassee, Florida 32301
Corporationclerk@floridahousing.org

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us



Maureen M. Daughton

AFFIDAVIT OF
MICHAEL TAYLOR

STATE OF FLORIDA
COUNTY OF SARASOTA

BEFORE ME, this day appeared, Michael Taylor who being duly sworn, deposes and says:

1. My name is Michael Taylor and I am over the age of 21 and competent to provide this affidavit.

2. I am the President of CB Structures, Inc. ("CB Structures"), a highly capable and qualified Shell contractor operating in the State of Florida and of Current Builders, Inc., which provides Commercial General Contracting services.

3. Palmetto Leased Housing Associates, I, LLLP ("Palmetto") is proposing to develop an affordable housing development in Palmetto, Florida financed with tax-exempt bonds allocated by the Manatee County Housing Finance Authority and Florida Housing 4% low income housing tax credits.

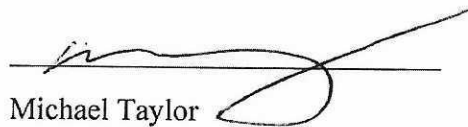
4. CB Structures, submitted a bid to the General Contractor, a joint venture entity between Dominion Construction & Architectural Services, LLC and Current Builders Construction Services, Inc., a division of Current Builders, Inc. (hereinafter "joint venture entity") to construct the shell for the proposed development.

5. I confirm that all labor and materials provided by, CB Structures, will be at cost with no mark-up, fee, or profit built into the price, except for the costs incurred for the compensation of a field superintendent hired to oversee the work performed by CB Structures. Affiant will ensure

Ex 1

there will be no overlap between the duties of the field superintendent hired to oversee the work of CB Structures and that of the Superintendent for the General Contractor.

FURTHER AFFIANT SAYETH NAUGHT


Michael Taylor

STATE OF FLORIDA
COUNTY OF SARASOTA

Sworn to (or affirmed) and subscribed before me this 2nd day of June,
2020 by Michael, who is personally known to me or who has produced _____
C. Taylor
as identification.


Notary Public

State of Florida

Commission Number and Expiration Date: _____



Kristina Interlandi
Commission # GG144211
Expires: September 19, 2021
Bonded thru Aaron Notary