

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUVAL PARK, LTD.,

Petitioner,

vs.

Case No. 13-2898BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____/

OSPREY APARTMENTS, LLC,

Petitioner,

vs.

Case No. 13-2899BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____/

RECOMMENDED ORDER

Pursuant to notice, an evidentiary hearing was held in the above-styled consolidated cases on October 8, 2013, in Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent's intended decision to fund the application of Petitioner Duval Park, Ltd. (Duval Park), is contrary to its governing statutes, rules, policies, or the proposal specifications.

PRELIMINARY STATEMENT

Respondent, Florida Housing Finance Corporation (Respondent or Florida Housing), issued Request for Proposals 2013-08 (the RFP), by which it solicited applications to compete for funding for high-priority affordable housing developments for persons with special needs. Seven applications were filed in response to the RFP, including applications by Petitioners Duval Park and Osprey Apartments, LLC (Osprey).

On June 21, 2013, Florida Housing posted notice of its intended decision to award funding to Duval Park. Osprey, whose response achieved the second highest score from Florida Housing's

evaluation committee, timely filed a notice of intent to protest and a formal written protest pursuant to section 120.57(3), Florida Statutes (2013).^{1/}

Osprey's written protest raised three issues. First, Osprey contended that Duval Park's response failed to correctly identify the developer's principals, a threshold requirement. Next, Osprey challenged the scoring of two application sections, addressing developer and management company experience with permanent supportive housing, contending that Duval Park's scores should have been lower than Osprey's scores. Finally, Osprey contended that the "reconciliation process," which was used to reconcile the scores of two application sections that were reviewed and scored by two different evaluators, was arbitrary and capricious. As an indicator, Osprey's written protest noted that in some instances, an evaluator did not stick to the score assigned during the independent review, but, rather, changed his or her score after discussion at the public meeting at which the reconciliation process was conducted.

Duval Park also timely filed a notice of intent to protest and a formal written protest. The Duval Park written protest generally supported Florida Housing's decision, but challenged the evaluation committee's scoring in a few areas in which Duval Park contended it should have received more points than it did.

Following an unsuccessful resolution meeting pursuant to section 120.57(3)(d)1., Florida Housing referred the two protests to the Division of Administrative Hearings, where they were consolidated and set for hearing. Following an unopposed motion for continuance to accommodate witness availability, the hearing was rescheduled for October 8 and 9, 2013.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation in which they set forth a number of agreed facts and agreed issues of law. The parties' stipulations have been incorporated below to the extent relevant.

At the outset of the hearing, Osprey announced that it was withdrawing the first and third issues raised in its written protest: the challenge to the sufficiency of Duval Park's identification of the developer's principals; and the challenge to the reconciliation process as arbitrary and capricious.

The parties presented Joint Exhibits 1 through 22, which were admitted in evidence; no additional exhibits were offered. Osprey presented the testimony of two witnesses: Stephanie Berman, president/CEO of Carrfour Supportive Housing, Inc. (Carrfour), the developer for Osprey's proposed project; and William Aldinger, Florida Housing's assistant policy director and supportive housing coordinator. Duval Park presented the testimony of three witnesses, representing the three entities jointly developing its proposed project: Shawn Wilson, president

of Blue Sky Communities, LLC (Blue Sky); Lori Sandonato, director of housing for Abilities, Inc., d/b/a ServiceSource (ServiceSource); and Jack Humberg, director of housing and ADA services for Boley Centers, Inc. (Boley). Florida Housing did not call any additional witnesses.

Through the testimony of one of Duval Park's witnesses, Duval Park acknowledged that it was no longer claiming that the scoring of its response was arbitrary and capricious, as contended in its written protest. Therefore, although Duval Park remains designated as a petitioner, its participation in the hearing ended up being more like an intervenor supporting Respondent's initial decision. As a result of the parties' narrowing of the issues at hearing, the evidentiary hearing concluded in one day.

The two-volume hearing Transcript was filed on October 24, 2013. The parties timely filed their proposed recommended orders (PROs) by the deadline of November 4, 2013. The PROs have been carefully considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Florida Housing is a public corporation that administers low-income housing tax credit programs. As of July 1, 2012, Florida Housing was authorized to use up to ten percent of its annual allocation of low-income housing tax credits to fund high-priority affordable housing developments selected through a

competitive solicitation process, such as the RFP. See Ch. 2012-127, § 4, Laws of Fla. (2012) (creating § 420.507(48), Fla. Stat.). Examples of "high priority" affordable housing developments include housing for veterans and their families, and housing for persons with special needs.

2. Prior to issuing the RFP, Florida Housing conducted some demonstration RFPs for developments serving special needs households, but the RFP represents the first actual use of the competitive solicitation process to award low-income housing tax credits. Previously, low-income housing tax credits were awarded through what was known as the universal application cycle, a process described as cumbersome, lengthy, and inflexible. As part of the universal application cycle, an applicant could indicate by checking a box that it intended to provide affordable housing to special needs households. However, the general universal application process did not lend itself to a targeted proposal detailing how the unique needs of specific special-needs population groups would be addressed.

3. The competitive solicitation process was seen as a way to allow applicants to respond to particular high-priority development needs identified by Florida Housing. In setting forth their development proposals for defined target population groups, applicants would be able to tell their story: applicants would identify and describe the unique needs and household

characteristics of the specific special-needs population group that is the focus of their application; applicants could detail and demonstrate their know-how with regard to the resources available in the community where the proposed development is located, to meet the unique needs of the target population; and applicants would be able to discuss the relevant experience of the developer and management teams that make them well-suited to carry out the proposed development and meet the unique needs of the targeted population group.

The RFP

4. The RFP solicited responses or applications proposing the development of "permanent supportive housing" (as defined in the RFP) for persons with special needs. Florida Housing issued the RFP with the expectation of funding two or more proposals.

5. The RFP provided that applicants could propose developments for persons with special needs generally, or applicants could choose to focus on serving veterans with special needs. If an applicant chose to focus on veterans with special needs, the applicant was required to pick one of two specific subcategories: either veterans with service-connected disabling conditions transitioning from a Veterans' Administration (VA) hospital or medical center; or chronically homeless/institutionalized veterans with disabling conditions who were significant users of public resources, such as emergency care and

shelter. The RFP specified that it was Florida Housing's goal to fund at least one development proposing to serve veterans with special needs. Preference would be given to proposed developments focusing on serving special-needs veterans in the first subcategory, i.e., veterans transitioning from VA hospitals and medical centers.

6. Duval Park, Osprey, and five other applicants timely submitted applications in response to the RFP. Both Duval Park and Osprey proposed permanent supportive housing developments to serve veterans with special needs transitioning from VA hospitals and medical centers.

7. As described in the RFP, an evaluation committee comprised of Florida Housing employees reviewed and scored the applications. Members of the evaluation committee were instructed to independently evaluate and score the application sections assigned to them. The RFP specified that at least one public meeting would be held at which the evaluators were allowed to discuss their evaluations, make any adjustments deemed necessary to best serve the interests of Florida Housing's mission, and develop recommendations for the Florida Housing Board of Directors.

8. For most application sections, a single evaluator was assigned to review and score the seven responses. For example, Mr. Aldinger was the evaluator who reviewed and scored the two

application sections addressing developer and management company experience with permanent supportive housing.

9. Two application sections were assigned for evaluation and scoring by two evaluation committee members. The two evaluators first independently reviewed and scored all seven application responses for the two sections. Then the two evaluators met in a noticed public meeting to conduct a "reconciliation process," in which they discussed their evaluations of the responses to the two application sections and reconciled differences in their scores.

10. The evaluation committee ultimately concluded that Duval Park's application was entitled to a total of 119 points out of 133 possible points, and that Osprey's application was entitled to 117 points. A large gap in scoring separated these two highest-scoring applicants from the other five applicants; the next highest score was 95 points.

11. The evaluation committee presented its recommendation to the Florida Housing Board of Directors, along with a summary of the scores assigned by the evaluation committee. The committee's recommendation was that Florida Housing should award funding to Duval Park for its proposed development. Florida Housing's Board adopted the committee's recommendation.

Osprey's Protest Issue Remaining for Determination

12. Following the parties' withdrawal of most of their protest issues, the only remaining disputed issue for resolution in this proceeding is Osprey's claim that Duval Park should have received "at least three" less points than Osprey for the sections addressing developer and management company experience.^{2/}

13. Mr. Aldinger's assignment as the evaluation committee member responsible for reviewing and scoring these application sections comports with his expertise. Mr. Aldinger has served as Florida Housing's supportive housing coordinator since 2006. In that role, he has been coordinating with governmental bodies and industry stakeholders to develop strategies for focusing Florida Housing's resources on the provision of supportive housing to special needs households. The RFP was developed in furtherance of this effort, and Mr. Aldinger was one of the RFP's authors.

14. Mr. Aldinger assigned the same number of points to the Duval Park and Osprey applications in both sections. Each application received 24 out of 25 possible points for developer experience, and all ten of the points available for management company experience.

15. Osprey's contention is that its narratives for these two application sections show its objective superiority. Osprey's "objective superiority" argument is primarily based on a quantitative comparison, in which its narrative showed experience

developing and operating a larger number of permanent supportive housing units than did Duval Park's narrative. Osprey also contends that its narrative was qualitatively better in providing greater detail regarding its experience developing and operating permanent supportive housing. As part of its argument, Osprey contends that Duval Park strayed from the RFP instructions by describing experience with more than just permanent supportive housing, but that the evaluator gave Duval Park credit anyway.

16. The RFP instructions provide the starting point to assess Osprey's contentions. First, the RFP provided the following definition of "permanent supportive housing":

Rental housing that is affordable to the focus households with household incomes at or below 60 percent of area median income (AMI), that is leased to the focus households, for continued occupancy with an indefinite length of stay as long as the Permanent Supportive Housing tenant complies with the lease requirements. Permanent Supportive Housing shall facilitate and promote activities of daily living, access to community-based services and amenities, and inclusion in the general community. Permanent Supportive Housing shall strive to meet the needs and preferences of the focus households.

This RFP definition was acknowledged to be somewhat broader than how that phrase might be understood by some industry models. For example, Mr. Aldinger testified that transitional housing could be permanent supportive housing within the RFP definition, as

long as a lease agreement is used. Permanency is not required, only an "indefinite" length of stay. The fact that leases are for finite terms of 12 or 24 months would not be dispositive; rather, the length of stay would be considered "indefinite" if tenants are not required to leave at the end of their lease terms, if they are not ready to leave and are otherwise in compliance with the lease terms. The provision of supportive services to meet the needs of the focus population is a key part of the RFP definition.

17. The RFP instructions for the developer experience narrative were as follows:

Developer Experience with Permanent Supportive Housing (**Maximum 25 points**):

The Applicant must describe the experience of the Developer, co-Developer, and/or Principal in developing and operating Permanent Supportive Housing, and more specifically, housing for the households the Applicant is proposing to serve. Describe the role(s) and responsibilities of any Developer, co-Developer, and/or Principal listed in the Applicant's responses to Items A.2.c. and 3.a. of Section 6 of the RFP, related to the proposed Development, and describe the experience and qualifications relevant to carrying out the roles and responsibilities for this proposed Development. (emphasis added).

18. The RFP instructions for the first application section must also be considered because they tie into the developer/manager experience sections. The instructions for the first

application section required the applicant to provide a detailed description of the focus population group, and the instructions also explained how that description would be used, as follows:

[T]he Applicant must provide a detailed description of the resident household characteristics, needs, and preferences of the focus population(s) the Applicant is proposing to serve. This description will provide a point of reference for the Corporation's evaluation and scoring of the Application, providing the foundation for the appropriateness of the experience of the Developer(s) and Management Company, proposed Construction Features and Amenities, Resident services and Access to Community Based Services and Amenities. (emphasis added).

19. As part of this first application section, applicants focusing on special-needs veterans transitioning from VA facilities were required to designate the specific VA facilities with which the applicants expected to be working and coordinating. Osprey, whose proposed development is in Liberty City, Miami-Dade County, designated Miami VA Healthcare System (Miami VA) in Miami. Duval Park, whose proposed development is in unincorporated Pinellas County, designated Bay Pines VA Healthcare System (Bay Pines VA) in Pinellas County, as well as the James A. Haley Veterans Hospital and the Tampa Polytrauma Rehabilitation Center, both in Tampa, Hillsborough County.

20. Osprey and Duval Park both provided extensive narratives describing their target populations and detailing the unique needs and preferences of their target populations.

Osprey's narrative described the information learned from interviewing social workers in each of the programs under the umbrella of the Miami VA, with whom Carrfour would be coordinating for transitioning veterans. Osprey's narrative also described a VA grant to Carrfour of \$1,000,000 per year for supportive services for veteran families, through which Carrfour provides a comprehensive case management program called Operation Sacred Trust. This program has an outreach team that works closely with social workers throughout the Miami VA.

21. The Duval Park narrative discussed and documented the work of the St. Petersburg Housing Authority Wounded Warrior Community Advisory Group to assess housing needs for veterans. Developer-partner ServiceSource's director of housing was a participant. As part of the assessment, the advisory group conducted veterans' focus groups to hear from the veterans themselves regarding their needs and preferences, including the particular supportive services needed to allow veterans to transition to an independent living setting. The Duval Park narrative also described the information about transitioning veterans learned through ongoing projects with the VA facilities designated for the proposed development, including a Memorandum of Understanding between James A. Haley Veterans Hospital and ServiceSource's Warrior Bridge program.

22. As called for by the RFP instructions, Mr. Aldinger used each application's detailed description of the target population in section one as the foundation for evaluating that application's developer and management experience narratives. The experience narratives were properly evaluated in accordance with the RFP instructions in the context of each applicant's specific proposal to focus on a defined population group transitioning from designated VA facilities, whose unique needs were fleshed out in the first section narratives.

23. Mr. Aldinger reviewed and was impressed with both Osprey's and Duval Park's developer experience narratives, for good reason. As he explained, the two responses took different approaches, but both provided good detail in the limited space allotted.

24. Osprey's narrative described Carrfour, a non-managing member of the applicant entity that will be the developer and, through a subsidiary, manager of the proposed development. Carrfour is a not-for-profit organization created in 1993 by the Greater Miami Chamber of Commerce, with the mission of developing permanent supportive housing to end homelessness. In setting forth Carrfour's experience, the Osprey narrative took a quantitative approach by enumerating Carrfour's 16 mixed-use housing development projects that included permanent supportive housing. Some details were provided for each development, such

as the funding sources, the number of total units, how many of those units were permanent supportive housing units, and how many of the units were currently occupied by veterans. However, the narrative did not explain whether any supportive services provided for these developments were specifically geared to meeting the special needs of veterans. The types of supportive services were not identified for any of the 16 developments. For three developments, the description stated only that "a full array of supportive services" was provided or that "on-site supportive services" were provided. Supportive services were not mentioned in the descriptions of the other 13 developments.

25. Other than providing the number of units then occupied by veterans, Osprey's developer experience narrative had no information to demonstrate experience providing housing specifically developed to meet the unique needs of the focus population for its proposed development: veterans with service-related disabling conditions transitioning from the Miami VA.

26. Duval Park's developer experience narrative did not match Osprey's approach of enumerating individual permanent supportive housing developments and quantifying the units in each development. Duval Park's response chose instead to describe in general aggregate terms the permanent supportive housing experience of the developer-partners. The Duval Park narrative went into more detail to highlight the developer team experience

with housing projects specifically designed to meet the unique needs of special-needs veterans transitioning from the VA facilities designated in its application, something lacking in the Osprey response.

27. For example, Duval Park's response described developer-partner Boley's substantial experience since it was founded in 1970, in developing more than 500 units of permanent supportive housing in Pinellas County. The narrative also described the even longer-standing experience of developer-partner ServiceSource, founded in 1959 with a mission to provide services to needy people with disabilities. Initially providing employment, training, rehabilitation, and support services (relevant to the roles described for this developer-partner in operating the proposed development), ServiceSource began a housing program in 1995. ServiceSource's permanent supportive housing development experience was summarized in shorthand as including 20 separate "HUD 202/811 awards." The unrefuted testimony established that this shorthand reference was properly understood by Mr. Aldinger to signify 20 permanent supportive housing developments for persons with disabilities.

28. Two specific supportive housing projects for veterans, developed and operated by Boley working with the Bay Pines VA, were detailed in Duval Park's developer experience narrative. In 2007, Bay Pines VA awarded Boley a contract for "Safe Haven Model

Demonstration Project" services, described in the notice of contract award as "a specialty model of HCHV residential care as mandated by the . . . zero-tolerance policy to end homelessness within the Veteran population." Through this contract, Boley acquired and rehabilitated a former 20-unit skilled nursing facility to establish Morningside Safe Haven (Morningside), which provides housing and a residential treatment program with counseling for veterans. Half of the 20 veterans housed there have service-connected disabling conditions, and one-third of the veterans transitioned from VA facilities. Pinellas County and HUD provide funding support for this VA pilot program.

29. Osprey contends that Boley's experience developing and operating Morningside should have been ignored in scoring Duval Park's developer experience, because a residential treatment program is not permanent supportive housing. However, according to Mr. Humberg, Morningside is considered permanent supportive housing under HUD guidelines. Veterans sign a 12-month lease to reside in a unit. Although the intent is that tenants will complete treatment and move on, tenants are not required to leave at the end of their 12-month lease terms; they can stay as long as they need to, if they are otherwise compliant with their leases.

30. Even if Morningside did not technically meet the RFP definition of permanent supportive housing, the discussion of

Morningside still would be appropriate for this narrative, pursuant to the RFP instructions. The Morningside experience demonstrates Boley's "experience and qualifications relevant to carrying out" its roles and responsibilities for the proposed development, identified in the same narrative to include mental health counseling, case management, and VA coordination.

31. Also described in Duval Park's narrative was Boley's 2010 development of Jerry Howe Apartments, with 13 units developed specifically for formerly homeless veterans, many of whom have service-connected disabling conditions. Funding for this development was provided by the VA and the City of Clearwater. Boley coordinates with Bay Pines VA in operating this development, with Bay Pines VA providing screening and referral services to identify veterans who are candidates to lease apartment units. Boley's staff members work closely with the veteran tenants to provide supportive services, preparing them for more independent living.

32. Osprey quibbles with whether Jerry Howe Apartments technically qualifies as permanent supportive housing, noting that while the veteran tenants do sign a lease, the intent of the project is to serve as transitional housing for up to 24 months. However, Mr. Aldinger explained that transitional housing would meet the RFP's broad definition of permanent supportive housing if tenants are not required to leave after a finite period of

12 or 24 months. Mr. Humberg confirmed that veterans residing at Jerry Howe Apartments are not required to leave after 24 months, if they are not ready to move on. Mr. Humberg also clarified that Boley owned the apartments before they were redeveloped in 2010, specifically to meet the needs of veterans. Before the 2010 redevelopment, Boley operated the property as permanent supportive housing, just not specifically for veterans. In fact, two of the units remain occupied by prior non-veteran permanent supportive housing tenants, who did not want to move out in 2010 when the property was redeveloped.

33. It is not necessary to debate whether Jerry Howe Apartments technically is permanent supportive housing, although the evidence demonstrated that the development is and has been permanent supportive housing, as defined in the RFP. Certainly, this project demonstrates Boley's experience and qualifications relevant to carrying out its roles and responsibilities for the proposed development and, therefore, is worthy of consideration as part of the developer experience narrative.

34. Duval Park's developer experience narrative also detailed specific veterans' supportive service programs developed by both Boley and ServiceSource. The descriptions of these programs demonstrate experience and qualifications directly relevant to the described roles and responsibilities for Boley and ServiceSource with respect to the proposed development.

35. Duval Park's experience narrative details the many accomplishments of ServiceSource's nationally-recognized Warrior Bridge program, which provides a wide variety of supportive services to veterans. Noteworthy is a 2012 award of over \$1,000,000 from the City of St. Petersburg to ServiceSource to expand housing options for wounded veterans. Under this program, in the past year, ServiceSource partnered with Home Depot to modify 16 homes and facilities serving wounded veterans in the Tampa Bay area to increase accessibility, safety, and energy efficiency. This experience translates directly to the role ServiceSource will serve as a participant in designing the proposed housing development specifically to accommodate the unique accessibility and other needs of special-needs veterans with disabling conditions.

36. ServiceSource's Warrior Bridge program also operates the "Veterans' Mall" in the vicinity of the proposed development. At the Veterans' Mall, household appliances, cookware, business attire, and necessities are made available to wounded veterans transitioning to more independent housing settings. According to Duval Park's narrative, the Veterans' Mall has served more than 325 veterans since opening in October 2011, through partnerships with Bay Pines VA and local community organizations serving veterans. ServiceSource's representative testified that ServiceSource recently secured a five-year commitment from T.J.

Maxx to stock the Veterans' Mall with new suits for veterans going on job interviews.

37. The Duval Park developer experience narrative regarding the Warrior Bridge program portrays ServiceSource's experience and qualifications to carry out its described roles and responsibilities for the proposed development, which include community outreach, physical disability counseling, employment assistance, job training, and VA coordination.

38. Another program described in Duval Park's developer experience narrative is Boley's Homeless Veterans Reintegration Program. This is a case management, training, and employment program specifically for veterans, conducted by Boley case managers and employment specialists, demonstrating that they are well-suited to carry out the described roles and responsibilities for Boley with respect to the proposed development, which includes the lead case management role.

39. A reasonable person attempting to compare the two developer experience narratives might say that Osprey's narrative demonstrated greater quantitative experience in developing more units of permanent supportive housing generally, but that Duval Park's narrative demonstrated better qualitative experience among the developer-partners in developing supportive housing specifically for veterans with special needs. Duval Park's narrative was more directly focused on specific experience

developing supportive housing that addresses the unique needs of those special-needs veterans who are transitioning from VA facilities. In addition, Duval Park's narrative better demonstrated experience and qualifications among the developer-partners that are directly relevant to their described roles and responsibilities in carrying out the proposed development. Both narratives were very good and responsive to the RFP instructions, while taking very different approaches. Mr. Aldinger reasonably applied the RFP instructions, reasonably evaluated the two narratives, and reasonably judged them both to be deserving of the same very high score.

40. The credible evidence does not support Osprey's contention that its developer experience narrative was superior, or that Duval Park's narrative strayed beyond the RFP instructions, or that Duval Park's narrative was judged by different standards than Osprey's narrative.^{3/}

41. Osprey also takes issue with the scoring of the two applications' narratives describing management company experience with permanent supportive housing. As noted, Mr. Aldinger evaluated these narratives and awarded each application the maximum ten points for this application section.

42. Osprey's narrative identified Carrfour's not-for-profit subsidiary, Crossroads Management, LLC (Crossroads), as the manager for its proposed Liberty Village development. Although

Carrfour was established in 1993, Crossroads was not created until 2007. Before Crossroads was created, Carrfour did not manage the housing projects it developed; instead, it turned the developments over to traditional property management companies. As Osprey's narrative acknowledges, this created problems, as the traditional management companies lacked the sensitivity and training to address special needs of permanent supportive housing tenants. Since 2007, Crossroads has been taking over management functions for Carrfour developments and is now managing most of the 16 developments listed in the developer experience narrative. Osprey's application was given credit for proposing management with ideal experience.

43. For Duval Park's application, Boley is identified as the management company. In addition, Boley will engage Carteret Management Company (Carteret), which is owned and operated by James Chadwick, a principal of developer-partner Blue Sky, to assist with tax-credit compliance and other matters within Carteret's expertise during the initial phases of the project. Boley's specific experience managing supportive housing for veterans with special needs, previously detailed in the developer experience discussion above, could not reasonably be questioned. As described in the manager experience narrative, Boley manages 561 units of its own permanent supportive housing. Boley also manages 112 additional permanent supportive housing units owned

by other not-for-profit companies (including an 88-unit development owned by ServiceSource). The management narrative describes the profile of the typical Boley-managed housing unit tenant as having mental illness, including post-traumatic stress disorder and/or substance abuse problems, requiring supportive services provided by Boley staff. These supportive services include mental health counseling, case management intervention, and transportation assistance--functions for which Boley will assume responsibility operating the proposed development. The narrative also describes Boley's property management personnel: seven housing staff who handle leasing, income certifications, and other leasing matters; eight maintenance staff to handle property repairs; three drivers who provide transportation; and four accounting staff for property management functions.

44. Osprey does not articulate a specific reason why Duval Park's management company experience narrative should not be entitled to ten points, or why Osprey believes its narrative was qualitatively or quantitatively better than Duval Park's, except to the extent of Osprey's criticisms of the developer experience narratives. Yet Osprey's narrative for manager experience arguably should not fare as well as its narrative for developer experience, given the many more years of management experience demonstrated by Boley and the comparatively few years of management experience by the Crossroads management entity created

by Carrfour in 2007. Nonetheless, Mr. Aldinger credited the Osprey application with the maximum points based on Crossroads' management experience since 2007.

45. No credible evidence was presented to support the contention that Duval Park's management experience narrative was not entitled to at least the same number of points as Osprey's management experience narrative.

46. As repeatedly acknowledged by all parties throughout the hearing, Florida Housing was fortunate to have received two excellent proposals by Osprey and Duval Park that were head and shoulders above the other responses. Florida Housing then was faced with the difficult task of deciding which, between two excellent choices, should receive the funding nod, if only one of the two could be funded.

47. Based on the evidence and the findings above, Mr. Aldinger's assignment of the same number of points for developer experience (24 points out of a possible 25 points) and for management company experience (the maximum of 10 points) to the two excellent proposals was not clearly erroneous, arbitrary, capricious, or contrary to competition. His conclusion that both applicants demonstrated nearly ideal development experience and ideal management company experience for their proposals was reasonable. The evidence established that Mr. Aldinger made the points assignments he did after evaluating all of the relevant

information he was allowed to consider pursuant to the RFP instructions. His scoring of these two application sections was shown to be an honest, good faith exercise of his expert judgment applied to sort out the various pros and cons of the responses.

48. Osprey did not identify any statute or rule that it contends was violated by the scoring of the Osprey and Duval Park developer and management experience narratives. Osprey argued, but did not prove, that the scoring of these two applications was contrary to the RFP specifications. Osprey argued that Mr. Aldinger's evaluation was contrary to the RFP because he considered differences between the two projects in assessing developer experience. Osprey characterized this as double-counting, because the same aspects of the projects were scored in other sections. Osprey also contended that considering the differences between the two proposed developments and the different approaches by the two applicants was tantamount to applying different standards in evaluating the two applications.

49. Osprey's criticism was not borne out by the evidence. Instead, Mr. Aldinger described a reasonable process, consistent with the RFP terms explaining that developer experience would be assessed in the context of the attributes of the target population described in the first section of the application, and also in context with the roles and responsibilities described for the developer team members in carrying out the proposed

development. The same RFP instructions and the same standards were applied to the evaluation of the two applications; it was the applications that were different, not the standards.^{4/}

50. Although not actually raised as a distinct challenge, Osprey suggested an additional argument in its PRO, not articulated in its written protest or in the Joint Pre-hearing Stipulation. Osprey argued in its PRO that Florida Housing should have used two evaluators to score the developer and manager experience narratives, as a "check and balance" against arbitrary scoring.

51. Osprey's new argument stands in stark contrast to the only challenge to the evaluation process articulated in Osprey's written protest and in the Joint Pre-hearing Stipulation. Before the hearing, Osprey challenged the evaluation procedure used for two application sections that were scored by two evaluators. Rather than providing any check-and-balance comfort, the two-evaluator process was viewed as defective by Osprey because the initial scores independently assigned by each evaluator were reconciled in a public discussion meeting at which differences in scores were harmonized, meaning that when the initial scores differed, the evaluators agreed to adjust their initial scores.

52. Osprey has established only that for some application sections, a single evaluator was used, while for other application sections, two evaluators were used and their separate

scores were reconciled. No credible evidence was offered to prove that use of two evaluators was better than using one evaluator (or vice versa, as Osprey initially argued).

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(3), Fla. Stat.

54. Section 420.507 provides the statutory authority for Florida Housing to allocate a percentage of low-income housing tax credits by means of an RFP process for certain types of projects. The statute provides:

The corporation shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers which are in addition to all other powers granted by other provisions of this part:

* * *

(48) To award its annual allocation of low-income housing tax credits, nontaxable revenue bonds, and State Apartment Incentive Loan Program funds appropriated by the Legislature and available to allocate by request for proposals or other competitive solicitation. The corporation shall reserve up to 5 percent of each allocation for high-priority affordable housing projects, such as housing to support economic development and job-creation initiatives, housing for veterans and their families, and other special needs populations in communities throughout the state as determined by the corporation on an annual basis. The corporation shall reserve an

additional 5 percent of each allocation for affordable housing projects that target persons who have a disabling condition, as defined in s. 420.0004, and their families. These allocations must prioritize projects or initiatives piloting or demonstrating cost-effective best practices that meet the housing needs and preferences of such persons. Any tax credits or funds not allocated because of a lack of eligible projects targeting persons who have a disabling condition shall be distributed by the corporation for high-priority housing projects.

55. These consolidated competitive solicitation protests are governed by section 120.57(3)(f), which provides as follows:

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.

56. As the party claiming that Florida Housing's proposed action does not meet the standards in section 120.57(3)(f), Osprey bears the burden of proof in this proceeding. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

57. The court in Colbert v. Department of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly

erroneous standard to mean that "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." (citations omitted).

58. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which has been described in Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931), as protecting the public against collusive contracts and securing fair competition upon equal terms to all bidders.

59. A capricious action has been defined as an action, "which is taken without thought or reason or irrationally." Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). "An arbitrary decision is one that is not supported by facts or logic[.]" Id. The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The

standard has also been formulated by the court in Dravo Basic Materials Co. v. Department of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

60. Although competitive-solicitation protest proceedings are described in section 120.57(3)(f) as de novo, courts acknowledge that a different kind of de novo is contemplated than for other substantial-interest proceedings under section 120.57. Competitive-procurement protest hearings are a "form of intra-agency review[,]" in which the object 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).

61. Applying these standards to this case, Osprey has not met its burden of proving that Florida Housing's decision to award funding to Duval Park is clearly erroneous, arbitrary, capricious, or contrary to competition. Osprey failed to demonstrate that Florida Housing's intended funding award to Duval Park is contrary to any statute, rule, policy, or RFP specification.

62. Instead, as found above, the evaluator's scoring of the two application sections challenged by Osprey was shown to be a

rational, good faith exercise of the evaluator's honest judgment, upon consideration of the relevant factors according to the RFP instructions.

63. Osprey's belated PRO argument questioning the use of a single evaluator to review and score the developer and management experience narratives is rejected as beyond the scope of its formal written protest and beyond the scope of the Joint Pre-hearing Stipulation. If this untimely argument were considered, it would be rejected. Even if Osprey had proven that using two evaluators would provide a better "check and balance" (or if Osprey had proven its original opposite contention that using one evaluator would be better than using two evaluators), the issue for determination is not whether Florida Housing could have devised a "better" process.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Florida Housing Finance Corporation, enter a final order consistent with its initial decision to award funding for the Duval Park, Ltd., proposed development, and dismissing the formal written protests of Osprey Apartments, LLC, and Duval Park, Ltd.

DONE AND ENTERED this 25th day of November, 2013, in
Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2013.

ENDNOTES

^{1/} All statutory references are to the Florida Statutes (2013).

^{2/} Osprey's scoring challenge necessarily was focused on attempting to prove that Duval Park was given too many points for these two application sections, not whether Osprey's scores should have been higher. Osprey could not have received three more points, as its combined score for the two sections was only one point below the maximum available points.

^{3/} Osprey also attempted to prove that the developer experience narratives in other applications were not scored by the same standards applied to scoring Duval Park's narrative. According to Osprey's PRO, other applications received substantially lower scores than Osprey because their narratives demonstrated less experience developing permanent supportive housing and that Duval Park's narrative also should have received fewer points. Osprey did not prove this claim. The only applications in evidence are Osprey's and Duval Park's; the developer experience narratives for the other applications were not offered in evidence, as would be necessary to make comparisons. The limited questions of Mr. Aldinger about his scoring of other developer experience narratives established only that Mr. Aldinger gave lower scores

for developer experience to two narratives because permanent supportive housing experience was not discussed.

^{4/} In questioning Mr. Aldinger, Osprey offered its theory that a secret criterion weighed against its project because of its location in Miami-Dade County. Osprey failed to prove any secret criterion. Instead, Mr. Aldinger credibly and reasonably explained that he evaluated the experience narratives in the context required by the RFP instructions, by assessing experience in the context of each application's specific proposal. He used the section one detailed descriptions of the focus population's characteristics as the foundation for evaluating experience. He looked for experience working in the community with the VA facilities designated for proposed development. He looked for experience working with the available resources in the particular community that will be needed for the target population.

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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.