

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

QUAIL ROOST TRANSIT VILLAGE I, LTD.,

Petitioner,

vs.

Case No. 20-3094BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

675 ALI BABA, LLC,¹

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on August 12, 2020, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner Quail Roost Transit Village I, Ltd. (“Quail Roost”):

Brittany Adams Long, Esquire
Radey Law Firm, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301

¹ 675 Ali Baba, LLC, participated as an Intervenor in this case as a matter of right, given its status as the proposed successful applicant whose award is being contested by Petitioner Quail Roost Transit Village I, Ltd. No order granting intervention was requested or entered and therefore 675 Ali Baba, LLC, was inadvertently omitted from the style of the case until now.

For Respondent Florida Housing Finance Corporation (“Florida Housing”):

Betty Zachem, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Intervenor 675 Ali Baba, LLC (“Ali Baba”):

Michael P. Donaldson, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

The issues are whether the actions of Florida Housing concerning the review and scoring of the responses to Request for Applications 2020-208 (“RFA”), titled “SAIL and Housing Credit Financing for the Construction of Workforce Housing,” were contrary to the agency’s governing statutes, rules, policies, or the RFA specifications and, if so, whether the challenged award was contrary to competition, clearly erroneous, or arbitrary and/or capricious.

PRELIMINARY STATEMENT

On February 24, 2020, Florida Housing issued the RFA, requesting applications for an allocation of State Apartment Incentive Loan (“SAIL”) funding and housing credits toward the construction or rehabilitation of affordable Workforce Housing developments. The application deadline for the RFA was March 30, 2020. The RFA was modified on March 13, 2020, and on March 19, 2020, but the application deadline was unchanged. There were 22 applications submitted in response to the RFA, including applications from Quail Roost and Ali Baba.

On June 11, 2020, Florida Housing posted its Notice of Intent to Award funding pursuant to the RFA, entitled “RFA 2020-208 Board Approved

Scoring Results.” The Notice of Intent stated Florida Housing’s intention to award funding to three applicants, including Ali Baba.

Quail Roost timely filed a Notice of Protest and Petition for Formal Administrative Hearing (the “Petition”). Ali Baba timely intervened. On July 13, 2020, Florida Housing referred the case to the Division of Administrative Hearings (“DOAH”) for the assignment of an ALJ and the conduct of a formal hearing. The case was set for hearing on August 12, 2020, on which date it was convened and completed.

On August 10, 2020, the parties submitted a Joint Pre-hearing Stipulation that has been used in the preparation of this Recommended Order. The Pre-hearing Stipulation identified three issues: 1) Quail Roost contended that Ali Baba should be found ineligible for failure to disclose a member of the Board of Directors of its developer on its Principals Disclosure Form, and for misidentifying the name of the project manager in the Principals Disclosure Form; 2) Quail Roost contended that Ali Baba should be found ineligible because the latitude and longitude of the coordinates it provided in its application for its Scattered Sites were not accurate; and 3) Quail Roost contended that Ali Baba should be found ineligible because the contract documents it provided to demonstrate site control did not constitute valid contracts under Florida law.

By the time of the Pre-hearing Stipulation, Florida Housing had come to agree with Quail Roost’s position on the first two issues and therefore agreed with Quail Roost that Ali Baba was not eligible for funding. At the outset of the final hearing, Quail Roost announced that it was dropping the third issue. Thus, despite the nominal alignment of the parties, Florida Housing and Quail Roost were in fact aligned in taking the position that Ali Baba should be found ineligible.

At the hearing, Quail Roost presented the testimony of Marissa Button, Florida Housing's Director of Multifamily Allocations. Ali Baba presented the testimony of Dr. Willie Logan, the Chief Executive Officer and President of Opa-Locka Community Development Corporation.

Joint Exhibits 1 through 7 were admitted into evidence. Quail Roost's Exhibits 1 through 6 were admitted into evidence. Quail Roost's Exhibit 6 was the deposition of Jean Salmonsens, an Assistant Director of the Multifamily Program Department at Florida Housing. Ali Baba's Exhibits 3 through 7 were admitted into evidence.

The one-volume Transcript of the final hearing was filed with DOAH on August 24, 2020. The parties timely filed their Proposed Recommended Orders on September 3, 2020. The Proposed Recommended Orders have been duly considered in the writing of this Recommended Order.

Except where otherwise indicated, all references to the Florida Statutes in this Recommended Order are to the 2020 edition.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

THE PARTIES

1. Quail Roost was an applicant for funding in the RFA. Quail Roost's application was assigned number 2020-461SC and was preliminarily deemed eligible for consideration for funding, but was not selected for funding.

2. Ali Baba was an applicant for funding in the RFA. Ali Baba's application was assigned number 2020-476BS and proposed a development named City Terrace in Miami-Dade County. Ali Baba's application was

preliminarily deemed eligible and was selected for funding under the terms of the RFA.

3. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to promote the public welfare by administering the governmental function of financing affordable housing in Florida. 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. § 420.5099, Fla. Stat. Florida Housing has the responsibility and authority to establish procedures for allocating and distributing low income housing tax credits. For purposes of this proceeding, Florida Housing is an agency of the State of Florida.

THE COMPETITIVE APPLICATION PROCESS

4. The low-income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. Housing credits are awarded competitively to housing developers in Florida for qualifying rental housing projects. These credits are then typically sold by developers for cash to raise capital for their projects. The effect is to reduce the amount of money that the developer is required to borrow commercially. In return for the subsidized debt reduction, a housing credit property is required to offer lower, more affordable rents. Developers must also agree to keep rents at affordable levels for periods of thirty to fifty years.

5. Florida Housing is authorized to allocate low-income housing tax credits, SAIL funding, and other named funding by section 420.507(48). Florida Housing has adopted Florida Administrative Code Chapter 67-60 to govern the competitive solicitation process. Rule 67-60.009(1) provides that parties wishing to protest any aspect of a Florida Housing competitive solicitation must do so pursuant to section 120.57(3), Florida Statutes.

6. Funding is made available through a competitive application process commenced by the issuance of a request for applications. Rule 67-60.009(4)

provides that a request for application is considered a “request for proposal” for purposes of section 120.57(3)(f).

7. Applicants request a specific dollar amount of housing credits to be awarded to the applicant each year for a period of ten years. A successful applicant usually sells the rights to the future income stream of housing credits to an investor to generate the amount of capital needed to build the development. This sale is usually by way of an ownership interest in the applicant entity. The amount of funding that Florida Housing can award to an applicant depends on such factors as an RFA-designated percentage of the projected Total Development Cost; a maximum funding amount per development based on the county in which the development will be located; and whether the development is located within certain designated areas of some counties.

8. The RFA was issued on February 24, 2020, with responses due on March 30, 2020. The RFA was modified on March 13, 2020, and March 19, 2020, but the application deadline was unchanged. No challenges were made to the terms of the RFA.

9. Florida Housing expects to award up to \$17,954,000 in SAIL funding and up to \$2,980,000 of housing credits through the RFA.

10. Florida Housing received 22 applications in response to the RFA.

11. A Review Committee was appointed to review the applications and make recommendations to Florida Housing’s Board of Directors (the “Board”). The Review Committee found 19 applications eligible and three applications ineligible for funding. Through the ranking and selection process outlined in the RFA, three applications were preliminarily recommended for funding, including that submitted by Ali Baba. The Review Committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

12. On June 11, 2020, Florida Housing’s Board met and considered the recommendations of the Review Committee.

13. Also, on June 11, 2020, at approximately 4:35 p.m., Quail Roost and all other applicants in the RFA received notice via the Florida Housing website of the Board's eligibility determinations and of the preliminary selection of certain eligible applicants for funding, subject to satisfactory completion of the credit underwriting process. The notice consisted of two spreadsheets, one listing the Board approved scoring results in RFA 2020-208 and one identifying the applications which Florida Housing proposed to fund.

14. Ali Baba's was one of the applications proposed for funding. Under the scoring and ranking mechanism of the RFA explained below, Quail Roost's application would be selected for funding were Ali Baba's application to lose points or be found ineligible.

15. Quail Roost timely filed the Petition. Ali Baba timely intervened. The Petition was referred to the DOAH.

16. The RFA provided point scoring for mandatory "eligibility items." The RFA then set forth an "Application Sorting Order" of funding goals and priorities that were used to break ties in the point scoring. Only applications that met all the eligibility items could participate in the ranking scheme that determined funding selection.

17. The RFA included only one point scoring item. Applicants could receive five points for submission of a Principals Disclosure Form stamped by Florida Housing as "Approved" during the Advance Review Process. The Advance Review Process is available online and includes instructions and samples to assist the applicant in completing the Principals Disclosure Form. Section Four A.3.c.(2) of the RFA states: "Note: It is the sole responsibility of the Applicant to review the Advance Review Process procedures and to submit any Principals Disclosure Form for review in a timely manner in order to meet the Application Deadline."

18. The stated goal of the RFA was to fund one application in Monroe County and one application in a "Large County," i.e., Broward, Duval, Hillsborough, Miami-Dade, Orange, Palm Beach, or Pinellas County.

19. The Application Sorting Order was set forth as follows at Section Five B.2. of the RFA:

The highest scoring Applications will be determined by first sorting together all eligible Applications from highest score to lowest score, with any scores that are tied separated in the following order:

a. First, by the Application's eligibility for the Proximity Funding Preference (which is outlined in Section Four A.5.e. of the RFA) with Applications that qualify for the preference listed above Applications that do not qualify for the preference;

b. Next, by the Application's Leveraging Level which is outlined in Item 3 of Exhibit C of the RFA (with Applications that have a lower Leveraging Level listed above Applications with a higher Leveraging Level);

c. Next, by the Application's eligibility for the Florida Job Creation Funding Preference (which is outlined in Item 4 of Exhibit C) with Applications that qualify for the preference listed above Applications that do not qualify for the preference; and

d. By lottery number, resulting in the lowest lottery number receiving preference.

20. The RFA's "Funding Test" provision at Section Five B.3. stated that applications "will only be selected for funding if there is enough Workforce SAIL funding available to fully fund the Applicant's Workforce SAIL Request Amount, and, Monroe County Applications will only be selected for funding if there is enough Workforce SAIL funding available to fully fund the Applicant's Workforce SAIL Request Amount, and enough Competitive 9% Housing Credit funding available to fully fund the Applicant's Competitive 9% Housing Credit Request Amount." The total available

amount was \$17,954,000 in SAIL funding, with at least \$2,520,000 of that amount reserved for Monroe County.

21. Section Five B.4. of the RFA described a “County Award Tally” that provided as follows:

As each Application is selected for tentative funding, the county where the proposed Development is located will have one Application credited towards the County Award Tally. The Corporation will prioritize eligible unfunded Applications that meet the Funding Test and are located within counties that have the lowest County Award Tally above other eligible unfunded Applications with a higher County Award Tally that also meet the Funding Test, even if the Applications with a higher County Award Tally are higher ranked.

22. The RFA’s “Funding Selection Order” was set forth as follows at Section Five B.5.:

- a. The first Application selected for funding will be the highest ranking eligible Application that is eligible for Monroe County Goal.
- b. The next Application selected for funding will be the highest ranking eligible Application that is eligible for the Large County Goal.
- c. Once the goals are met or if there are no eligible Applications that can meet the goals, then the Corporation will select the highest ranking eligible unfunded Application(s) subject to the Funding Test and County Award Tally.
- d. If funding remains after funding all eligible Application(s) that can meet the Funding Test or because there is no eligible unfunded Application that can be fully funded, then no further Applications will be selected for funding and any remaining Total Remaining SAIL funding, as well as any unallocated 9% HC funding, will be distributed as approved by the Board.

PRINCIPALS DISCLOSURE FORM

23. The RFA required applicants to upload the Principals Disclosure Form, the full title of which is “Principals of the Applicant and Developer(s) Disclosure Form” (Form Rev. 05-2019).

24. As an eligibility item, Section Four A.3.c.(1) of the RFA required that the Principals Disclosure Form:

must identify, pursuant to Subsections 67-48.002(94), 67-48.0075(8) and 67-48.0075(9), F.A.C., the Principals of the Applicant and Developer(s) as of the Application Deadline. A Principals Disclosure Form should not include, for any organizational structure, any type of entity that is not specifically included in the Rule definition of Principals.

25. As stated above, applicants received 5 points if the uploaded Principals Disclosure Form was stamped “Approved” during the Advance Review Process. Ali Baba’s Principals Disclosure Form went through the Advance Review Process and was stamped “Approved for Housing Credits” by Florida Housing staff on March 16, 2020. Ali Baba’s application was awarded the requisite 5 points.

26. Rule 67-48.002(94)(a) defines “Principal” for entities including corporations, limited partnerships, limited liability companies, trusts, and public housing authorities. For a corporation, “Principal” means “each officer, director, executive director, and shareholder of the corporation.”

27. Quail Roost alleges that Ali Baba is ineligible for funding and should lose 5 points for failure to disclose all of the principals of the applicant and its developer, Opa-Locka Community Development Corporation, Inc. (“Opa-Locka Corp.”). Specifically, Quail Roost alleges that the name of Chad Jackson, a member of the Board of Directors of Opa-Locka Corp., was not disclosed on Ali Baba’s Principals Disclosure Form.

28. Ali Baba concedes that members of the Board of Directors of the Opa-Locka Corp. are by definition principals who must be included on the

Principals Disclosure Form. Ali Baba also conceded that Mr. Jackson was a member of the Board of Directors and was not included on Ali Baba's Principals Disclosure Form.

29. Dr. Willie Logan, the President and CEO of Opa-Locka Corp., testified that Mr. Jackson is a local low-income housing resident who is an appointed member of the Board of Directors of Opa-Locka Corp. Dr. Logan testified that a resident such as Mr. Jackson must be on the Board of Directors in order for Opa-Locka Corp. to receive funding from the U.S. Department of Housing and Urban Development.

30. Though Mr. Jackson's name is not included on the Principals Disclosure Form, Ali Baba did disclose Mr. Jackson's name in a list of its 2019-2020 Board of Directors included as part of Attachment 3 of its application. Non-Profit entities are required to submit "the names and addresses of the members of the governing board of the Non-Profit entity" in Attachment 3. Ali Baba argues that this submission should be sufficient to render Ali Baba's failure to include Mr. Jackson's name on the Principals Disclosure Form a minor irregularity.

31. Marisa Button, Director of Multifamily Programs for Florida Housing, testified as to the reasons Florida Housing requires disclosure of all principals on the Principals Disclosure Form. The RFA includes a financial arrearage requirement stating that an application will be deemed ineligible for funding if the applicant or any affiliated entity is in financial arrears to Florida Housing. Ms. Button testified that Florida Housing uses the information on the Principals Disclosure Form to ensure that the financial arrearage requirement is met and no principals are in financial arrearages to Florida Housing.

32. Ms. Button testified that Florida Housing also uses the Principals Disclosure Form as a cross-reference to determine whether any of the disclosed entities or individuals have been de-obligated or barred from participation in Florida Housing's programs.

33. Ms. Button testified that Florida Housing considers it a material deviation from the RFA requirements when an applicant fails to disclose a principal on the Principals Disclosure Form. She testified that the disclosure of Mr. Jackson's name elsewhere in Ali Baba's application does not change the analysis because Florida Housing cannot take it upon itself to presume that an individual not named in the Principals Disclosure Form is a principal of the applicant.

34. Ms. Button explained that before adopting the RFA process in which a number of solicitations are issued for various funding sources over the course of a year, Florida Housing used a single annual application called the "Universal Cycle." She stated that Attachment 3 is a holdover from the Universal Cycle process, which did not require the filing of a Principals Disclosure Form. Florida Housing used Attachment 3 to verify an applicant's status as a nonprofit entity for those projects that included funding goals for nonprofits.

35. Ms. Button testified that Florida Housing currently reviews Attachment 3 to ensure that entities designating themselves as nonprofits have included their supporting information. It is in no way interchangeable with the Principals Disclosure Form.

36. Ms. Button also noted that the list of Ali Baba's Board of Directors included in Attachment 3 was dated March 26, 2020. The application deadline was March 30, 2020. Ms. Button testified that, even if Florida Housing were inclined to allow Attachment 3 to supplement the Principals Disclosure Form, the time difference between the two documents would render Attachment 3 unreliable as an indicator of Ali Baba's principals as of the application deadline.

37. Quail Roost pointed to another discrepancy in Ali Baba's Principals Disclosure Form. As stated above, the name of the applicant entity is "675 Ali Baba, LLC." The project manager of 675 Ali Baba, LLC, is "675 Ali Baba

Manager, LLC.” However, Ali Baba’s Principals Disclosure Form identified the manager as “Ali Baba Manager, LLC.”

38. Ali Baba concedes that its manager was not accurately disclosed on the Principals Disclosure Form. Dr. Logan testified that this was a mere typographical error and that to his knowledge no entity called “Ali Baba Manager, LLC,” existed. Ali Baba pointed to multiple other places in its application that correctly identified the manager as “675 Ali Baba Manager, LLC.”

39. Ms. Button testified that Florida Housing considers the misnaming of the management entity to be a material error for the same reason it finds the omission of an individual principal to be a material error: Florida Housing cannot perform due diligence checks on the entity if it is not correctly identified. Ms. Button acknowledged that Florida Housing has treated typographical or grammatical errors as minor irregularities in the past; however, this was not a minor irregularity because the failure to correctly name the manager affected Florida Housing’s ability to investigate the entity for financial arrears or debarment.

40. As in the case of Mr. Jackson, the fact that 675 Ali Baba Manager, LLC, was correctly identified elsewhere in Ali Baba’s application did not affect the analysis. Ms. Button testified that Florida Housing does not, and cannot, under its rules and the principles of competitive bidding, look beyond the Principals Disclosure Form to determine the identities of the applicant’s principals.

SCATTERED SITES

41. As an eligibility requirement in the RFA, applicants were required to provide information regarding the location of their proposed developments. Section Four A.5.d.(1) of the RFA required that a Development Location Point (“DLP”) be stated for the latitude/longitude coordinates in decimal

degrees, rounded to at least the sixth decimal place. The DLP identified by Ali Baba is not in dispute in this proceeding.

42. Section Four A.5.d.(2) of the RFA stated that if the proposed development consists of Scattered Sites, i.e, non-contiguous parcels,² then in addition to the DLP information, the applicant must “provide the latitude and longitude coordinates of one point located anywhere on the Scattered Site” for each Scattered Site. As with the DLP, the coordinates for the Scattered Sites were required to be stated in decimal degrees and rounded to at least the sixth decimal place.

43. In its application, Ali Baba proposed a development that included three Scattered Sites. Ali Baba provided the following latitude and longitude coordinates for those sites: A) 25.901060, -80.251883; B) 25.901267, -80.251473; and C) 25.901884, -80.253365.

44. Ms. Button testified that Florida Housing takes the coordinates in the application at face value and does not verify whether the coordinates provided for the Scattered Sites are actually on the proposed sites.

45. During discovery in this proceeding, Quail Roost established that, due to a mapping error, Ali Baba’s identified coordinates for the three Scattered Sites were not located on the Scattered Sites, but approximately 35, 73, and 75 feet off the Scattered Sites, respectively.

46. As an eligibility item, the RFA included a mandatory distance requirement. In Miami-Dade County, the distance between the DLP and the coordinates provided for any Scattered Sites must be at least 0.5 miles from the closest development that is identified as serving the same demographic as that proposed by the applicant.

47. Ms. Button testified that the mandatory distance requirement ensures that Florida Housing does not fund developments in close proximity to other

² A detailed definition of “Scattered Sites” is set forth in rule 67-48.002(106).

recently funded developments serving the same demographic, thus avoiding issues with leasing and occupancy rates for new developments.

48. To confirm distances from other developments, the RFA instructs applicants to use Florida Housing's Development Proximity List, dated August 16, 2019 ("Proximity List"). The Proximity List contains information on recently funded developments, including latitude and longitude coordinates, addresses, and whether the demographic of the development is classified as Family, Elderly, Non-ALF, ALF, or Workforce Housing.

49. Florida Housing uses the DLP and Scattered Sites coordinates provided by successful applicants to develop the Proximity List for the next funding cycle of applications. The developments receiving funding in this RFA will be added to the Proximity List for prospective applicants in the 2020-2021 funding cycle to evaluate for the mandatory distance requirement. Florida Housing has created a draft Proximity List for the next funding cycle that includes the coordinates provided in the Ali Baba application. The draft Proximity List puts future applicants on notice of applications that are in litigation, including the Ali Baba application.

50. In its application, Ali Baba selected the Workforce Housing demographic. According to the Proximity List, the closest Workforce Housing development is approximately 5 miles from Ali Baba's proposed development. Ali Baba argues that its inaccurate Scattered Sites coordinates should be considered a minor irregularity because the distances from the sites are less than 100 feet and did not change the finding that the Ali Baba development would not be located within 0.5 miles of the closest Workforce Housing development funded by Florida Housing.

51. Ali Baba argues that because the draft Proximity List provides notice that its application is subject to litigation, no reasonable prospective applicant would rely on Ali Baba's coordinates. Ali Baba notes that Florida Housing retains the authority to revise the coordinates on the draft Proximity List. Ali Baba contends that the purpose of the mandatory distance

requirement is to measure proximity to the nearest development and that it is undisputed that Ali Baba's proposed development is more than 0.5 miles away from the nearest Workforce Housing development funded by Florida Housing. Ali Baba urges that the minimal error as to the Scattered Sites coordinates in its application should be deemed a minor irregularity that conferred no competitive advantage on Ali Baba.

52. Ms. Button testified that the error in Ali Baba's coordinates for its Scattered Sites is a material deviation that renders the Ali Baba application ineligible for funding. The fact that the next closest Workforce Housing development was over 5 miles away does not make Ali Baba's error a waivable minor irregularity because the coordinates provided did not meet the requirements of the RFA. Ms. Button testified that Scattered Sites coordinates are an eligibility item and Ali Baba's error thus renders its application ineligible for funding.

53. Absent litigation, Florida Housing would have no way of knowing that an applicant's Scattered Sites coordinates were not accurate. Florida Housing takes the coordinates at face value and does not take measurements or have surveyors confirm the information. Instead, it relies on the application and the fact that the applicant certifies that the information in the application is true and correct. Ms. Button testified that inaccurate coordinates can affect a prospective applicant's decision on whether to apply for funding because applicants rely on the coordinates in the Proximity List to determine whether or not they can meet the mandatory distance requirement.

54. Florida Housing reasonably concludes that an applicant bears ultimate responsibility for the accuracy of the information submitted in its application. The fact that litigation has in this case provided a correction to Ali Baba's erroneous Scattered Sites coordinates does not transform Ali Baba's failure to comply with an eligibility item into a minor irregularity.

CONCLUSIONS OF LAW

55. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1) and (3), Fla. Stat.

56. Quail Roost has standing to challenge Florida Housing's scoring and review decision as to Ali Baba.

57. This is a competitive procurement protest proceeding and as such is governed by section 120.57(3)(f), 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 all 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....

58. Pursuant to section 120.57(3)(f), the burden of proof rests with Petitioner as the party opposing the proposed agency action. *See State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Petitioner must prove by a preponderance of the evidence that Florida Housing's proposed action is arbitrary, capricious, or beyond the scope of Florida Housing's discretion as a state agency. *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913-14 (Fla. 1988); *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981). *See also* § 120.57(1)(j), Fla. Stat.

59. The First District Court of Appeal has interpreted the process set forth in section 120.57(3)(f) as follows:

A bid protest before a state agency is governed by the Administrative Procedure Act. Section

120.57(3), Florida Statutes (Supp. 1996) provides that if a bid protest involves a disputed issue of material fact, the agency shall refer the matter to the Division of Administrative Hearings. The administrative law judge must then conduct a de novo hearing on the protest. See § 120.57(3)(f), Fla. Stat. (Supp. 1996). In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. See *Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services*, 606 So. 2d 380 (Fla. 3d DCA 1992) (interpreting the phrase "de novo hearing" as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act).

State Contracting and Eng'g Corp., 709 So. 2d at 609.

60. The ultimate issue in this proceeding is "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications." In addition to proving that Florida Housing breached this statutory standard of conduct, Petitioner also must establish that Florida Housing's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

61. The First District Court of Appeal has described the "clearly erroneous" standard as meaning that an agency's interpretation of law 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." *Colbert v. Dep't of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004)(citations omitted); see also *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985)("Where there are

two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.”).

62. An agency decision is “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, 723-24 (Fla. 1931)).

63. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency action is arbitrary if it is not supported by facts or logic. *See Agrico Chem. Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

64. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined “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).

65. However, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. *Dravo Basic Materials Co. v. Dep't of Transp.*, 602 So. 2d 632 n.3 (Fla. 2d DCA 1992).

66. While an application containing a material deviation is unacceptable, not every deviation from a competitive solicitation is fatal. A deviation is only fatal if it is material. The deviation is “only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition.” *Tropabest Foods, Inc., v. Fla. Dep’t of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1d DCA 1986). *See also Robinson Electrical Co., Inc. v. Dade Cty.*, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

67. Rule 67-60.008, “Right to Waive Minor Irregularities,” provides:

Minor irregularities are those irregularities in an Application, such as computation, typographical, or other errors, that do not result in the omission of any material information; do not create any uncertainty that the terms and requirements of the competitive solicitation have been met; do not provide a competitive advantage or benefit not enjoyed by other Applicants; and do not adversely impact the interests of the Corporation or the public. Minor irregularities may be waived or corrected by the Corporation.

PRINCIPALS DISCLOSURE FORM

68. Section Four A.3.c.(1) of the RFA provides in relevant part:

To meet eligibility requirements, the Principals Disclosure Form must identify, pursuant to Subsections 67-48.002(94), 67-48.0075(8) and 67-48.0075(9), F.A.C., the Principals of the Application and Developer(s) as of the Application Deadline....

69. Rule 67-60.006(1) provides:

The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall be considered ineligible.

70. Quail Roost argued, and Florida Housing came to agree, that Ali Baba's application materially deviated from the requirements of the RFA by failing to disclose two principals, Chad Jackson and 675 Ali Baba Manager, LLC, on its Principals Disclosure Form. Ali Baba contends that the correct identity of its principals was readily discoverable within the four corners of its application and therefore that the failure to include their names on the Principals Disclosure Form should be treated as a minor irregularity.

71. Florida Housing initially determined that Ali Baba's Application was eligible for funding. Based on new information gleaned during discovery, Florida Housing now takes the position that the Ali Baba application should be found ineligible for funding. Florida Housing's current litigation position is not entitled to the same deference as the preliminary decision by the Board to find Ali Baba eligible for funding. The burden still rests on Quail Roost to prove by a preponderance of the evidence that Florida Housing's proposed action in finding Ali Baba eligible for funding is contrary to its governing statutes, rules or policies, or RFA specifications and that Florida Housing's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious.

72. In urging a conclusion that its mistake should be deemed a minor irregularity, Ali Baba relies on *Ambar Riverview, Ltd. v. Florida Housing Finance Corporation*, DOAH Case No. 19-1261BID (Fla. DOAH May 21, 2019; Fla. Hous. Fin. Corp., June 21, 2019), in which the petitioner argued that the successful applicant should be deemed ineligible because it failed to identify the multiple roles of certain disclosed principals. The successful applicant's Principals Disclosure Form identified several persons as "officers" of the corporation but failed to indicate that they were also "directors." Their status as directors was revealed only in Attachment 3 of the application.

73. In *Ambar*, ALJ Darren A. Schwartz concluded that the identification of all principals on the Principals Disclosure Form was sufficient and that there was no requirement to state the multiple roles of each principal in the

Principals Disclosure Form. ALJ Schwartz further concluded that, in any event, the information regarding the multiple roles of the disclosed principals could be found within the four corners of the application and “[a]t most, [the successful applicant’s] failure to identify the multiple roles of its disclosed principals in the Principals Disclosure form is a waivable, minor irregularity.” *Ambar* RO at ¶ 67.

74. *Ambar* is readily distinguishable from the instant case. Ali Baba is correct that the full information as to its principals may also be found “within the four corners of the application” as was the case in *Ambar*. However, Ali Baba neglects to note the significant distinction between its situation and that presented in *Ambar*: Ali Baba did not name all of its principals in its Principals Disclosure Form. The successful bidder in *Ambar* disclosed the names of all its principals on the Principals Disclosure Form, which allowed Florida Housing to perform its due diligence regarding the principals’ financial arrears and/or debarment. Ali Baba did not merely neglect to disclose all *roles* played by its principals, it omitted the *names* of its principals, thus depriving Florida Housing of the ability to perform its due diligence in the fashion required by the RFA and Florida Housing’s rules.

75. Quail Roost cogently argues that treating the omission of Chad Jackson’s name from the Principals Disclosure Form as a minor irregularity would give nonprofit entities a competitive advantage over for-profit entities. Ali Baba’s argument as to Mr. Jackson rests on the fact that his name appears on the Board of Directors list included in Ali Baba’s Attachment 3. As noted in the Findings of Fact, Attachment 3 is required only of nonprofit entities. Allowing Ali Baba to save its application by resorting to Attachment 3 would be to give Ali Baba an extra opportunity to provide the principal information, an opportunity not afforded to for-profit entities.

76. Quail Roost has met its burden and demonstrated by a preponderance of the evidence that Florida Housing’s proposed action finding the Ali Baba

Application eligible is contrary to the specifications of the RFA and clearly erroneous.

SCATTERED SITES

77. Quail Roost argued, and Florida Housing came to agree, that Ali Baba materially deviated from the requirements of the RFA by failing to list correct latitude and longitude coordinates for its Scattered Sites. Ms. Button testified that this was a material error because Florida Housing could not accurately determine whether Ali Baba's application met the mandatory distance requirement of the RFA. Also, the inclusion of inaccurate coordinates on the Proximity List could affect other entities' decisions on whether to apply for funding in the future.

78. Ali Baba contends this is another minor irregularity because the distances of the coordinates from the Scattered Sites were all less than 100 feet and because the Ali Baba application in fact met the mandatory distance requirement.

79. Ali Baba also contends that the coordinates on the Proximity List can be changed. Ali Baba also points out that no one could reasonably rely on its coordinates on the current draft Proximity List because they are highlighted as being in litigation. Ali Baba's argument ignores the fact that the inaccurate coordinates would not have been identified had Quail Roost not raised the issue in litigation. Florida Housing relies on applicants to provide accurate information. Absent Quail Roost's protest, Ali Baba's inaccurate coordinates would have been on the draft Proximity List without an "in litigation" notation and future applicants might have suffered for it.

80. Even assuming Florida Housing's ability to change applicant-submitted information on the Proximity List, it is not permissible for Ali Baba to submit information that amends its application without violating the statutory prohibition on an agency considering any "submissions made after the bid or proposal opening which amend or supplement the bid or proposal."

§ 120.57(3)(f), Fla. Stat. To correct the Proximity List, Florida Housing would be required to accept revised data from Ali Baba or to simply make its own educated guess as to the correct coordinates. In either event, the end result would be an illicit amendment of the Ali Baba application after the close of the application process.

81. Ali Baba's error in its coordinates for its Scattered Sites omitted material information in response to the RFA because the coordinates listed were not on the proposed affordable housing sites. Ali Baba's application clearly failed to meet the requirement of Section Four A.5.d.(2) that the coordinates listed must include "one point located anywhere on the Scattered Site." It is undisputed that the coordinates provided by Ali Baba were relatively close to the Scattered Sites but were not on them.

82. This failure to comply with an express term of the RFA cannot be dismissed as a minor irregularity. Florida Housing has demonstrated that the coordinates provided by a successful applicant in this RFA are used in the Proximity List for the next application cycle. But for Quail Roost's protest, prospective applicants would have made business decisions on applying for funding based on a draft Proximity List that included Ali Baba's incorrect coordinates.

83. Quail Roost has demonstrated by a preponderance of the evidence that Florida Housing's proposed action finding the Ali Baba Application eligible is contrary to the specifications of the RFA and clearly erroneous.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order as to 2020-208 finding that Ali Baba is ineligible for funding and awarding funding to Quail Roost, subject to the successful completion of credit underwriting.

DONE AND ENTERED this 23rd day of September, 2020, in Tallahassee,
Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 23rd day of September, 2020.

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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.