

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MADISON TRACE, LLC; AMERICAN
RESIDENTIAL COMMUNITIES, LLC; AND
NEW SOUTH RESIDENTIAL, LLC,

Petitioners,

vs.

Case No. 22-0004BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

BEACON AT CREATIVE VILLAGE
PARTNERS, LTD.,

Intervenor.

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1) and (3), Florida Statutes (2021),¹ on February 4, 2022, in Tallahassee, Florida.

APPEARANCES

For Petitioners Madison Trace, LLC; American Residential Communities, LLC; and New South Residential, LLC:

J. Timothy Schulte, Esquire
Zimmerman, Kiser & Sutcliffe, P.A.
315 East Robinson Street
Post Office Box 3000
Orlando, Florida 32802

¹ Unless otherwise stated, all citations to the Florida Statutes are to the 2021 version.

For Respondent Florida Housing Finance Corporation:

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Intervenor Respondent Beacon At Creative Village Partners, LTD:

M. Christopher Bryant, Esquire
Oertel, Fernandez, Bryant & Atkinson, P.A.
Post Office Box 1110
Tallahassee, Florida 32302-1110

STATEMENT OF THE ISSUE

The issue in this bid protest matter is whether Respondent's, Florida Housing Finance Corporation, intended award of funding under Request for Applications 2021-202 was contrary to its governing statutes, rules, or the solicitation specifications.

PRELIMINARY STATEMENT

This matter involves the protest by Petitioners, Madison Trace, LLC, American Residential Communities, LLC, and New South Residential, LLC (collectively referred to as "Madison Trace"), to the intended decision of Respondent Florida Housing Finance Corporation ("Florida Housing") of an award under Request for Applications 2021-202 ("RFA 2021-202").

On July 20, 2021, Florida Housing issued RFA 2021-202 soliciting applications to allocate competitive tax credits for affordable housing developments to be located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties, Florida.²

² No protests were made to the specifications or terms of RFA 2021-202.

On December 10, 2021, Florida Housing posted notice of its intent to award funding for the development that qualified for the Family Designation in Orange County to Intervenor Beacon At Creative Village Partners, LTD ("Beacon").

On December 28, 2021, Madison Trace timely filed a formal written protest challenging the eligibility and selection of Beacon's application.³

On January 3, 2022, Florida Housing referred Madison Trace's protest to the Division of Administrative Hearings ("DOAH") for assignment to an Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on February 4, 2022. Joint Exhibits 1 through 6 were admitted into evidence. Madison Trace's Exhibits 1, 2, 5, and 7 were also admitted into evidence. Madison Trace called Marisa Button as a witness, from whom all parties elicited testimony. Beacon also offered the testimony of W. Scott Culp. In addition, the parties stipulated to a number of facts in a Joint Pre-Hearing Statement filed on February 2, 2022.

The Transcript of the final hearing was electronically filed with DOAH on February 28, 2022. At the close of the hearing, the parties were advised of a ten-day time frame after receipt of the hearing transcript to file post-hearing submittals. All parties filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

³ Madison Trace subsequently moved to amend its written protest on January 20, 2022, and January 27, 2022. Both motions were granted.

FINDINGS OF FACT

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to provide and promote public welfare by administering the governmental function of financing affordable housing in the state of Florida. For purposes of this administrative proceeding, Florida Housing is considered an agency of the state of Florida.

2. Madison Trace submitted an application (Application Number 2022-116C) to Florida Housing seeking an allocation of competitive housing credits through RFA 2021-202 for a proposed affordable housing development to be located in Orlando, Florida. American Residential Communities, LLC, and New South Residential, LLC, are "Developer" entities for Madison Trace as defined by Florida Housing in Florida Administrative Code Rule 67-48.002(28). Florida Housing deemed eligible, but did not select, Madison Trace's application for funding under RFA 2021-202.

3. Beacon also applied for the housing credits to be allocated through RFA 2021-202 for a proposed affordable housing development in Orlando, Florida. Florida Housing deemed Beacon's application (Application Number 2022-122C) eligible for funding and selected Beacon for an award of housing credits for Orange County, Florida.

4. As background, Florida Housing is designated as the housing credit agency for the state of Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code. As such, Florida Housing is authorized to establish procedures to distribute low-income housing tax credits (commonly referred to as "housing credits" or "tax credits") and to exercise all powers necessary to administer the allocation of those credits. § 420.5099, Fla. Stat.

5. Florida Housing's low-income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. The affordable housing industry relies heavily on public funding, subsidies, and tax credits to support projects that may not be financially sustainable in light of the sub-market rents they charge. The housing credits provide an "equity

infusion" into prospective housing developments. For this reason, housing credits allow developers to reduce the amount necessary to fund housing projects. Concomitantly, applicants who are awarded housing credits can (and must) offer the subject property at lower, more affordable rents.

6. Florida Housing uses a competitive solicitation process to award the housing credits. Florida Housing initiates the solicitation process by issuing a request for applications ("RFA"). §§ 420.507(48) and 420.5093, Fla. Stat.; and Fla. Admin. Code Ch. 67-48 and 67-60.

7. The RFA competitive solicitation process begins when Florida Housing requests its Board of Directors (the "Board") to approve Florida Housing's plan for allocating resources through various RFAs. If the Board approves the plan, Florida Housing begins work on each individual RFA.

RFA 2021-202:

8. The RFA at issue in this matter is RFA 2021-202, entitled "Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties." The purpose of RFA 2021-202 is to distribute funding to develop affordable, multifamily housing in the named Florida counties. Through RFA 2021-202, Florida Housing intends to provide an estimated \$18,791,580.00 of housing credit financing.

9. Florida Housing issued RFA 2021-202 on July 20, 2021. RFA 2021-202 set forth the information each Applicant was required to provide. This information included a number of submission requirements, as well as a general description of the type of project that would be considered for funding.

10. Applications for the housing credit funding were due to Florida Housing by August 31, 2021. Florida Housing received 21 applications for housing credits under RFA 2021-202, including applications from both Madison Trace and Beacon.

11. Florida Housing appointed a three-person Review Committee from amongst its staff to evaluate and score the applications. The Review Committee independently reviewed, deemed eligible or ineligible, scored, and ranked applications pursuant to the terms of RFA 2021-202, as well as chapters 67-48 and 67-60, and applicable federal regulations.

12. Through the scoring and evaluation process outlined in RFA 2021-202 Section Five, the Review Committee found both Madison Trace and Beacon eligible for funding under RFA 2021-202. Beacon's application, however, received a scoring advantage because Beacon qualified for Local Government Areas of Opportunity points. With its application, Beacon produced evidence of a "local government" contribution from Orange County, which demonstrated to Florida Housing that Orange County was committed to Beacon's housing project. Madison Trace's application, on the other hand, did not include a local government contribution. Consequently, Beacon's application received five additional points over Madison Trace's application. (RFA 2021-202, Section Five A.2.) Beacon, therefore, was the highest-ranking Applicant for an award of the tax credits in Orange County.

13. Following its assessment, the Review Committee recommended eight applications to the Board for funding in the designated counties. Included in the Review Committee's recommendations was Beacon's application for the Family Demographic for Orange County.

14. On December 10, 2021, the Board formally approved the Review Committee recommendations. As part of its determinations, the Board selected Beacon's application. The Board awarded Beacon \$2,375,000.00 in housing credits.

The Madison Trace Protest:

15. Madison Trace protests the Board's selection of Beacon's development instead of its own. Madison Trace, the second ranked Applicant for Orange County, challenges Florida Housing's determination of the eligibility of, and award to, Beacon. If Madison Trace successfully demonstrates that Florida

Housing erred in accepting, then scoring, Beacon's application, or the evidence demonstrates that Beacon's application was ineligible or nonresponsive, then Madison Trace will be entitled to an award of housing credits for Orange County through RFA 2021-202 instead of Beacon.⁴

16. Madison Trace raises four objections to Beacon's application. Specifically, Madison Trace points to three alleged deficiencies in Beacon's "Site Control" documentation, as well as Beacon's alleged failure to disclose a "Developer" in its application. Madison Trace argues that these flaws render Beacon's application ineligible for funding. Consequently, Florida Housing should have disqualified Beacon from an award under RFA 2021-202.

17. To explain RFA 2021-202's provisions requiring Site Control, as well as Florida Housing's selection of Beacon for its intended award, Florida Housing (and Madison Trace) presented the testimony of Marisa Button. Ms. Button is Florida Housing's Managing Director of Multifamily Programs. In her job, Ms. Button oversees the allocation of federal and state resources for the development and rehabilitation of multifamily affordable rental housing throughout the state of Florida. She is also responsible for Florida Housing's RFA process.

18. Regarding Site Control, Ms. Button reported that RFA 2021-202 Section Four A.7.a required each Applicant to demonstrate Site Control over the property the Applicant intended to develop using the housing tax credits. Ms. Button relayed that evidence of Site Control provides Florida Housing reasonable assurances that the Applicant's housing development will proceed if it receives an award of funding.

19. Ms. Button further explained that an Applicant evinced its Site Control by providing with its application a "properly completed and executed" Florida Housing Finance Corporation Site Control Certification form (the

⁴ No party alleged that Madison Trace's application failed to satisfy all eligibility requirements or was otherwise ineligible for funding under RFA 2021-202.

"Site Control Form"), a blank template of which was included in RFA 2021-202 at Exhibit A, Attachment 8.

20. Ms. Button added that, during the scoring process, the Review Committee did not consider the enforceability or validity of the actual contents of the Site Control Form. Instead, the Review Committee simply ensured that the Applicant provided complete documentation. (RFA 2021-202, Section Four A.7.a). Ms. Button disclosed that, should an Applicant's Site Control documents not meet the RFA specifications, Florida Housing reserved the right to rescind any award during the credit underwriting process, which occurs after the competitive solicitation phase is finished.

21. RFA 2021-202 Section Four A.7.a states that for the Site Control Form to be "considered complete," the Applicant must attach documentation "demonstrating that it is a party to an eligible contract or lease, or is the owner of the subject property. Such documentation must include all relevant intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, and subleases."

22. RFA 2021-202 Section Four A.7.a further instructs, in pertinent part:

(1) An eligible contract must meet all of the following conditions:

(a) It must have a term that does not expire before February 28, 2022, or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than February 28, 2022;

(b) It must specifically state that the buyer's remedy for default on the part of the seller includes or is specific performance;

(c) The Applicant must be the buyer unless there is an assignment of the eligible contract, signed by the assignor and the assignee, which assigns all of

the buyer's rights, title and interests in the eligible contract to the Applicant.

Madison Trace's challenge regarding Site Control focuses on Beacon's compliance with these specifications. Madison Trace specifically asserts the following arguments:

A. Contrary to RFA 2021-202 Section Four A.7.a, the "eligible contract" Beacon submitted with its application does not include all "relevant" documents:

23. Madison Trace complains that the "eligible contract" Beacon attached to its application did not include all "relevant" documents as expressly mandated by RFA 2021-202 Section Four A.7.a. As stated above, RFA 2021-202 Section Four A.7.a required each Applicant to "[d]emonstrate site control by providing ... the properly completed and executed [Florida Housing] Site Control Certification form." For the Site Control Form to be "considered complete," the Applicant was required to submit documentation that includes:

all *relevant* intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, and subleases. (emphasis added).

24. To demonstrate Site Control, the "eligible contract" Beacon included with its application was a Purchase Agreement, dated July 19, 2021, for certain property located in Orange County, Florida. (Beacon application, Attachment 8). As explained below, the Purchase Agreement was between the City of Orlando as Seller of the property and Creative Village Development, LLC ("CVD"), as Buyer. With the Purchase Agreement, Beacon included nine additional pages, consisting of Exhibits A through G, which were incorporated by reference in section 9.2 of the Purchase Agreement. (The Purchase Agreement, plus attachments, is 20 total pages.)

25. What Beacon did not include with its application were copies of additional documents, which were incorporated by Purchase Agreement section 9.1. These documents include a Purchase Option Agreement (referred to in the Purchase Agreement as "POA") and a Master Development Agreement (referred to in the Purchase Agreement as "MDA").⁵ Consequently, Madison Trace argues that Beacon's Site Control documentation is incomplete because Beacon did not include "relevant" documents that are necessary to interpret and apply the terms of the Purchase Agreement.

26. In response to Madison Trace's challenge, Ms. Button testified that Florida Housing does not consider either the POA or the MDA as "relevant" documents that Beacon should have included with its application. Ms. Button stated that Florida Housing views the term "relevant" to refer to documents that invoke a requirement set forth in the RFA. Contrary to Madison Trace's argument, Ms. Button asserted that no provisions or terms within the Purchase Agreement establish that the POA or the MDA had any bearing on whether Beacon's Site Control Form meets the express terms of RFA 2021-202.

27. Beacon, to address this allegation, presented the testimony of W. Scott Culp. Mr. Culp is a principal of Atlantic Housing Partners II, LLC ("Atlantic Housing II"), the Developer of the property for which Beacon seeks housing credits. Mr. Culp was directly involved in all aspects of Beacon's application for housing credits under RFA 2021-202.

⁵ Purchase Agreement, section 9.1. specifically states:

All of the provisions of the POA and MDA referred to herein are incorporated herein by reference for all purposes; provided, however, any reference in such provisions to the POA shall be deemed for purposes of this Section to mean or refer to this Purchase Agreement.

The POA and MDA are also mentioned in approximately a dozen other paragraphs throughout the Purchase Agreement.

28. Initially, Mr. Culp relayed that Beacon is in the business of developing affordable, primarily rental, housing communities. He further insisted that Beacon's application satisfies all eligibility requirements of RFA 2021-202, including Site Control, and was properly selected for funding by Florida Housing.

29. Mr. Culp confirmed that the Purchase Agreement attached to Beacon's application as Attachment 8 contains all the information Beacon submitted to establish its Site Control over the property for which it seeks housing credits. Likewise, Mr. Culp declared that all the information necessary to demonstrate Beacon's Site Control can be found in the Purchase Agreement (with Exhibits A through G). Mr. Culp explained that the Purchase Agreement, together with its incorporated Exhibits, consists of a single contract between three parties: the property landowner/Seller (City of Orlando), the Buyer/Assignor (CVD), and the Assignee (Beacon). According to Mr. Culp, the Purchase Agreement distinctly identifies Beacon as CVD's Assignee.

30. Supporting Mr. Culp's testimony, the recitals on the first page of the Purchase Agreement establish the existence and status of the "Assignee of Buyer, pursuant to Exhibit B and Exhibit F attached to this Purchase Agreement." Thereafter, Exhibit B, entitled "Assignment of Option to Buyer," directly refers to Beacon as the "'Assignee of Buyer' as defined in Section 1.1 of this Purchase Agreement."⁶ Exhibit F of the Purchase Agreement, entitled "General Assignment," states that CVD:

[H]ereby assigns, sells, transfers, sets over and delivers unto [Beacon] ("Assignee" or "Assignee of Buyer") all of Assignor's estate, right, title and interest in and to the following which relates to the land described on Exhibit A attached hereto.

⁶ Purchase Agreement, section 1.1, defines "Assignee of Buyer" as "The party named in Exhibit B attached to this Purchase Agreement."

31. Mr. Culp pressed, therefore, that the terms of the Purchase Agreement (with Exhibits A through G) contain all the "relevant" Site Control information necessary to provide Florida Housing "reasonable assurances" that Beacon's housing development will proceed if it receives tax credit funding. Further, contrary to Madison Trace's argument, no evidence indicates that language in either the POA or the MDA will affect or impact the City of Orlando's sale of the property to CVD, or CVD's assignment of the property to Beacon.

B. Contrary to RFA 2021-202 Section Four A.7.a(1)(a), the "eligible contract" Beacon attached to its application is not "effective" because the property buyer has not closed on the development property:

32. Ms. Button testified that when considering an Applicant's Site Control documents, Florida Housing recognizes that in certain circumstances the Applicant might not be the corporate entity that will actually buy or own the property which it intends to develop. Therefore, as set forth in RFA 2021-202 Section Four A.7.a(1)(c), Florida Housing is prepared to accept applications where the Applicant is not the property buyer, but is assigned "all of the buyer's rights, title and interests in the eligible contract."

33. Such was the case for Beacon's housing project. Beacon intends to develop certain property identified as Lot 2, Creative Village, Phase I, in Orlando, Florida (the "Development Property"). The Development Property is currently owned by the City of Orlando. For Beacon to obtain the right to build on the Development Property, the plan is for CVD to buy the Development Property from the City of Orlando, then assign its rights to Beacon. Therefore, in its application, because it will not be the actual buyer, Beacon submitted with its Site Control Form the documents through which CVD purported to assign its rights to the Development Property to Beacon (the Purchase Agreement with Exhibits A through G).

34. With the Purchase Agreement, Beacon included Exhibit B, entitled "Assignment of Option to Buyer." Exhibit B states that CVD assigns its

option to the Development Property to Beacon, "provided, however, that this Assignment shall become effective only upon Closing."

35. For its second argument, Madison Trace asserts that, as of the RFA application deadline (August 31, 2021), the closing had not occurred.⁷ Further, neither Exhibit B nor any other Purchase Agreement document establishes when the closing is to occur, and Purchase Agreement, section 2.4, authorizes the Buyer/Assignor (CVD) to terminate the Purchase Agreement at its discretion prior to the closing date. Consequently, Madison Trace contends that the Purchase Agreement does not create a legally binding assignment because the Buyer (CVD) must close on the property before the assignment becomes effective. Therefore, the Purchase Agreement documents do not establish Beacon's Site Control over the Development Property as of the application deadline, and Florida Housing should have found Beacon's application ineligible for funding.

36. In response, Ms. Button was not alarmed at the language in Exhibit B regarding the closing date. On the contrary, Ms. Button testified that the RFA specifications did not prohibit such "closing language" in the Site Control documents, and RFA 2021-202 did not contain any specifications establishing when an assignment of an eligible contract must become operational. Ms. Button testified that, even if the assignment in Exhibit B does not become effective until a closing occurs, the Purchase Agreement as a whole still meets the requirements of RFA 2021-202 for an "eligible contract." She remarked that the Purchase Agreement documents that Beacon submitted with its application provided Florida Housing sufficient assurances that Beacon will obtain the property on which it plans to develop its housing project.

⁷ RFA 2021-202 Section Four A.7.a(1)(a) also states that the "eligible contract" (the Purchase Agreement) "must have a term that does not expire before February 28, 2022." Beacon correctly asserts that the Purchase Agreement does not contain any provisions that expire before February 28, 2022.

37. Ms. Button further commented that, in her experience, it is common practice for developers to include language in purchase and sale agreements that condition a contract on future events. She testified that Florida Housing routinely reviews property sales agreements contingent on the award of housing credits.

38. Mr. Culp explained that the parties to the Purchase Agreement included the "only upon Closing" language in Exhibit B because the Seller (the City of Orlando) only wanted to communicate with the Buyer (CVD) regarding the sale, not the Assignee. Mr. Culp further testified that the Purchase Agreement specifically states that its terms became effective August 1, 2021 (Purchase Agreement, paragraph 1.5), and will remain effective until December 10, 2022 (Purchase Agreement, paragraph 1.13). Mr. Culp urged that this time period should provide ample opportunity for Beacon (as Assignee) to gain full control over the property on which it intends to locate its housing project. Therefore, Mr. Culp asserted that the fact that the City of Orlando and CVD have not yet closed on the purchase of the Development Property does not affect the efficacy or eventuality of the assignment of the property to Beacon.

C. Contrary to RFA 2021-202 Section Four A.7.a(1)(c), the Assignee (Beacon) did not sign the assignment of the eligible contract:

39. RFA 2021-202 Section Four A.7.a(1)(c) states:

The Applicant must be the buyer unless there is an assignment of the eligible contract, *signed by the assignor and the assignee*, which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant. (emphasis added).

40. Madison Trace argues that, contrary to the express terms of RFA 2021-202 Section Four A.7.a(1)(c), Beacon, the Assignee, did not sign the Purchase Agreement. Consequently, CVD's assignment of its rights to Beacon is not legally binding or effective. Madison Trace asserts that, without a

proper signature from Beacon showing Beacon's acceptance of the assignment, Beacon lacks Site Control over the property it intends to develop. In other words, Beacon did not produce with its application a legally enforceable agreement that, on its face, requires the Buyer (CVD) to assign the Development Property to the Assignee (Beacon). Therefore, if the Buyer/Assignor elects not to consummate the sale of the property, the assignment terms will be wholly meaningless, and Beacon will be left with no Site Control. As a result, Beacon's application did not comply with RFA 2021-202 specifications, and Florida Housing should not have found Beacon's application eligible for an award of housing credits.

41. Both Beacon and Florida Housing acknowledge Madison Trace's argument that no "stand-alone" document assigning the buyer's rights, title, and interests under the Purchase Agreement to Beacon is signed by both the Buyer/Assignor (CVD) and the Assignee (Beacon).⁸ Ms. Button further conceded that the Purchase Agreement, itself, does not bear a signature of a Beacon representative.

42. However, both Beacon and Florida Housing assert that the "entirety" of the Purchase Agreement documents clearly contemplate and incorporate: (1) CVD's agreement to purchase the subject property; (2) CVD's assignment of its property rights to Beacon; and (3) Beacon's acceptance of that assignment. Beacon (through Mr. Culp) and Florida Housing (through Ms. Button) point out that the Purchase Agreement incorporates several exhibits. These exhibits contain the signatures and/or initials of two Beacon representatives, Mr. Culp and Jay P. Brock. Both Mr. Culp and Ms. Button maintain that these signatures and initials, taken as a whole, plainly indicate that Beacon agreed to accept the assignment of all the buyer's rights and obligations to the Development Property.

⁸ Both the City of Orlando and CVD signed the Purchase Agreement document.

43. Specifically, Mr. Culp testified that, contrary to Madison Trace's assertions, several representatives signed the Purchase Agreement (with exhibits) on behalf of Beacon. At the final hearing, Mr. Culp noted the following marks:

a. Purchase Agreement, Exhibit F, entitled "General Assignment," is signed by Jay P. Brock on behalf of Beacon. Beacon is designated on Exhibit F above Mr. Brock's signature line as the "Assignee." Beacon identified Mr. Brock as its "Authorized Principal Representative" in its application. (Beacon application, page 3). Mr. Brock also signed Beacon's Site Control Form cover page. (Beacon application, Exhibit 8, page 1). Mr. Culp staunchly represented that Beacon authorized Mr. Brock to sign the General Assignment document on its behalf.

b. Mr. Culp, himself, initialed all but one page of the Purchase Agreement and exhibits in the lower right corner. Mr. Culp declared that his initials served as his signature.⁹ Mr. Culp testified that he ascribed his initials on behalf of Beacon, and Beacon authorized him to initial/sign on its behalf. Mr. Culp voiced that he marked the Purchase Agreement and attachments as evidence that Beacon acknowledged that it is the Assignee of the Purchase Agreement.

c. On Exhibit F, the General Assignment (page 18 of the Purchase Agreement with exhibits, and the one page Mr. Culp did not initial), Mr. Culp signed as a witness to Mr. Brock's signature.

44. Mr. Culp contended that, given the clear intent of CVD and Beacon to treat the entire Purchase Agreement with exhibits as a single document, the absence of the "Assignee's" signature on the Purchase Agreement document itself does not negate CVD's assignment of its rights to the Development

⁹ At the final hearing, parsing through his function versus Mr. Brock's role, Mr. Culp explained that he was representing Beacon when he initialed the Purchase Agreement. However, Mr. Brock was acting as Beacon's official authorized representative when he signed the General Assignment document (Exhibit F).

Property to Beacon. Mr. Culp proclaimed that Beacon is bound by the Purchase Agreement.

45. Mr. Culp further expressed that the Purchase Agreement, with exhibits, shows that the City of Orlando was clearly aware that CVD intended to assign its rights to the Development Property to Beacon. The Purchase Agreement expressly incorporated Exhibit B into its terms. Exhibit B plainly identifies Beacon as the "Assignee of Buyer." Therefore, the terms of the Purchase Agreement establish that when the City of Orlando and CVD executed the Purchase Agreement document, not only were the parties thereto aware that CVD would assign the Development Property, but they were also aware that Beacon would be the Assignee.

46. Florida Housing (Ms. Button) takes the position that the Purchase Agreement, together with its incorporated exhibits, sufficiently demonstrates that the Assignee, Beacon, accepted the assignment of the Buyer's rights to the Development Property under the Purchase Agreement. Therefore, Ms. Button urged that the Purchase Agreement contains the requisite signatures to meet the requirements of RFA 2021-202. Ms. Button further testified that RFA 2021-202 did not explicitly require a separate, enumerated document signed by both Assignor and Assignee. Neither did RFA 2021-202 require Applicants to designate a specific person to sign the assignment document(s). On the contrary, Ms. Button opined that Beacon's Site Control Form could be signed by anyone who had authority to sign on Beacon's behalf. In addition, Ms. Button represented that Florida Housing has historically recognized initials as "acceptable forms" of a signature on assignment documents.

D. Contrary to RFA 2021-202 Section Four A.3.b(1), Beacon's application does not disclose all of its Developers or co-Developers:

47. For its final challenge, Madison Trace argues Beacon violated RFA 2021-202 specifications by failing to disclose the identity of one of its Developers or co-Developers in its application. Madison Trace identified this

missing entity as Banc of America Community Development Corporation ("BoA CDC").

48. RFA 2021-202 Section Four A.3.b(1) instructs each Applicant to "[s]tate the name of each Developer, including all co-Developers."

49. RFA 2021-202 Section Four A.3.c further provides:

c. Principals Disclosure for the Applicant and for each Developer and Priority Designation (**5 points**)

(1) Eligibility Requirements

To meet the submission requirements, upload the Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 05-2019) ("Principals Disclosure Form") as outlined in Section Three above.

* * *

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 Applicant and Developer(s) as of the Application Deadline.

50. During her testimony, Ms. Button relayed that Florida Housing (and RFA 2021-202) requires Applicants to disclose the identity of its Developers (and Principals) so that Florida Housing is aware of the entities with whom it is dealing. Ms. Button explained that certain entities, such as those companies or individuals who owe arrearages to Florida Housing, are prohibited from participating in a solicitation for housing credits. *See Fla. Admin. Code R. 67-48.004(2)*. Consequently, an Applicant that does not fully disclose or misrepresents its Developers may be rendered ineligible for an award through an RFA.

51. Beacon submitted a Principal Disclosures for the Developer form (the "Developer Disclosure Form") with its application. On its Developer Disclosure Form, Beacon did not list BoA CDC.¹⁰

52. Madison Trace, to support its position, introduced documents at the final hearing showing that on July 19, 2021, just over a month before Beacon submitted its application, BoA CDC and Beacon's general partner, SAS Beacon at Creative Village Managers, L.L.C. ("SAS Beacon"), entered into an Ownership Agreement. The Ownership Agreement provided that BoA CDC:

[I]s entitled to participation in the developer fee ("Developer Fee") earned specifically with regard to the development of an affordable housing project to be known as Beacon at Creative Village (the "Property") ... under Florida Housing Finance Corporation ("FHFC") RFA 2021-202 on Lot 2, Creative Village, Phase I.

The Ownership Agreement was signed by Mr. Brock on behalf of Beacon.

53. Madison Trace calls attention to rule 67-48.002(29), which defines "Developer Fee" as "the fee earned by the Developer." Hence, because BoA CDC is entitled to receive a Developer Fee from the Beacon housing project, Madison Trace argues that BoA CDC should be considered a "Developer" of Beacon. Consequently, because Beacon failed to identify BoA CDC on the Developer Disclosure Form per Section Four A.3.c, Madison Trace asserts that Florida Housing should have deemed Beacon's application ineligible for housing credits under RFA 2021-202.

54. To buttress its argument, Madison Trace elicited testimony from Ms. Button confirming that an Applicant's failure to identify one of its Developers or co-Developers would render the application ineligible for award of housing credits. Ms. Button further acknowledged that an entity that receives a Developer Fee is "usually" considered a Developer on the project.

¹⁰ Beacon identified Atlantic Housing Partners II, L.L.C., as its sole Developer.

55. On the other hand, Ms. Button asserted that she did not believe that BoA CDC meets the definition of a "Developer" of Beacon as set forth in rule 67-48.002(28).¹¹ Further, Ms. Button was not aware of any source or document that established that BoA CDC would operate in the capacity of "Developer" for, or otherwise participate in, Beacon's housing project as of the application deadline (August 31, 2021). In particular, Ms. Button did not believe that BoA CDC became a "Developer" under Florida Housing rules or the RFA specifications by virtue of the language in the Ownership Agreement. She further commented that should Beacon decide to bring a co-Developer onto the project after funding is awarded, Florida Housing has a process in place to review that action. Therefore, Ms. Button contended that Beacon's decision not to list BoA CDC on its Developer Disclosure Form did not conflict with the terms of RFA 2021-202, despite the fact that BoA CDC may participate in the "Developer Fee" from the Beacon housing project.

56. Mr. Culp also firmly rebuffed Madison Trace's allegation that Beacon failed to disclose a Developer entity in its application. Mr. Culp emphatically declared that, at the time of the application deadline, BoA CDC was not a Developer, Principal, or partner in Beacon's housing project. Neither did BoA CDC participate in any way with Beacon's request for housing credits through RFA 2021-202.

57. To Madison Trace's specific point, Mr. Culp represented that BoA CDC funded a significant portion of the upfront costs of the Development Property, which included several million dollars in infrastructure costs. Mr. Culp further conceded that, in the future, Beacon might contract with BoA CDC to

¹¹ Rule 67-48.002(28) defines "Developer" as:

[A]ny individual or legal entity which possesses the requisite skill, experience, and credit worthiness to successfully produce affordable housing as required in the Application. Unless otherwise stated in a competitive solicitation, as used herein, a 'legal entity' means a corporation, association, joint venturer, or partnership legally formed as of Application deadline.

serve as a sub-Developer in the project. However, Mr. Culp maintained that BoA CDC is not currently a Developer on Beacon's project.

58. Regarding the Ownership Agreement, Mr. Culp admitted that SAS Beacon has agreed to give BoA CDC some portion of the "Developer Fee" from the Beacon housing project. Mr. Culp explained that Beacon will pay its Developer, Atlantic Housing II, a developer fee for its services. Thereafter, should Atlantic Housing II contract with any other entities for services, such as BoA CDC, Atlantic Housing II will pay them directly for their contributions, not Beacon.

59. Mr. Culp further represented that, despite entering into a contract entitled "Ownership Agreement," SAS Beacon did not convey "ownership" of any portion of Beacon or its housing project to BoA CDC. Instead, the Ownership Agreement only established that BoA CDC would obtain a security interest in SAS Beacon's "net cash flow in connection with [the Development] Property." The security interest would only exist until BoA CDC's "participation in the Developer Fee ... is paid in full." (Ownership Agreement, paragraph E). Therefore, Mr. Culp declared that BoA CDC only obtained an "indicia of ownership" in the Development Property without actually becoming an owner. For this reason, when Beacon prepared its Developer Disclosure Form, Mr. Culp instructed Beacon to remove any reference to BoA CDC. Mr. Culp further reflected that, based on BoA CDC's organizational structure and the number of its shareholders, it would be difficult, if not impossible, to provide a comprehensive report of all BoA CDC owners and principals on Beacon's Principals of the Applicant and Developer(s) Disclosure Form.

60. Ms. Button concluded her testimony by maintaining that Florida Housing appropriately deemed Beacon's application eligible for housing credit funding. Ms. Button asserted that Beacon's application, particularly its Site Control Form and its Developer Disclosure Form, fully complied with Florida Housing's governing statutes, rules, and the RFA 2021-202

specifications. Therefore, Florida Housing's decision to award housing credits to Beacon did not contravene applicable law.

61. Ms. Button's explanation detailing why Beacon's application was eligible for consideration for housing credits under RFA 2021-202 is credible and is credited. Ms. Button persuasively testified that the information Beacon included with its application legally complied with RFA 2021-202 requirements and allowed Florida Housing to effectively evaluate its request for funding for its housing project. Ms. Button further capably refuted Madison Trace's allegation that Beacon's application was deficient in some manner, or that Beacon failed to present information required by RFA 2021-202 specifications.

62. Similarly, Mr. Culp's testimony is credible and is credited. Mr. Culp cogently explained how Beacon's application contained all the information necessary to fulfill the RFA 2021-202 requirements. Mr. Culp further persuasively countered Madison Trace's protest alleging that Beacon's application was deficient in some manner. Mr. Culp effectively explained how Beacon's application, including its Site Control documentation and its Developer disclosure information, satisfied all eligibility requirements of RFA 2021-202.

63. Accordingly, based on the evidence in the record, Madison Trace did not demonstrate, by a preponderance of the evidence, that Florida Housing's award of housing credits to Beacon was clearly erroneous, contrary to competition, arbitrary, or capricious. Therefore, Madison Trace did not meet its burden of proving that Florida Housing's intended award of housing credit funding to Beacon under RFA 2021-202 was contrary to its governing statutes, rules, or policies, or the solicitation specifications.

CONCLUSIONS OF LAW

64. DOAH has jurisdiction over the subject matter and the parties to this competitive procurement protest pursuant to sections 120.569, 120.57(1), and 120.57(3). *See also* Fla. Admin. Code R. 67-60.009(2).

65. Madison Trace challenges Florida Housing's selection of Beacon's application for an award of housing credit funding under RFA 2021-202. Pursuant to section 120.57(3)(f), the burden of proof in this matter rests on Madison Trace as the party protesting the proposed agency action. *See State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Section 120.57(3)(f) further provides that in a bid protest:

[T]he 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.

66. The phrase "de novo proceeding" in section 120.57(3)(f) describes a form of intra-agency review. The purpose of the ALJ's review is to "evaluate the action taken by the agency." *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); and *State Contracting*, 709 So. 2d at 609. A de novo proceeding "simply means that there was an evidentiary hearing ... for administrative review purposes" and does not mean that the ALJ "sits as a substitute for the [agency] and makes a determination whether to award the bid *de novo*." *J.D.*, 114 So. 3d at 1133; *Intercontinental Props., Inc. v. Dep't of Health & Rehab. Servs.*, 606 So. 2d 380, 386 (Fla. 3d DCA 1992). "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." *State Contracting*, 709 So. 2d at 609.

67. Accordingly, Madison Trace, as the party protesting the intended award, must prove, by a preponderance of the evidence, that Florida Housing's proposed action is either: (a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of RFA 2021-202. The standard of proof that Madison Trace must meet to establish that Florida Housing's intended award violates this statutory standard of conduct is that Florida Housing's decision was: (a) clearly erroneous; (b) contrary to competition; or (c) arbitrary or capricious. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.; and *AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852, 854 (Fla. 1st DCA 2016).

68. The "clearly erroneous" standard has been defined to mean "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations." *Colbert v. Dep't of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). A factual determination is "clearly erroneous" when the reviewer is "left with a definite and firm conviction that [the fact-finder] has made a mistake." *Tropical Jewelers Inc. v. Bank of Am., N.A.*, 19 So. 3d 424, 426 (Fla. 3d DCA 2009); *see also Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956)(when a finding of fact by the trial court "is without support of any substantial evidence, is clearly against the weight of the evidence or ... the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous.'").

69. An agency action is "contrary to competition" if it unreasonably interferes with the purpose of competitive procurement. As described in *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931):

[T]he object and purpose [of the bidding process] ... is to 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 its various forms; to secure the best

values ... at the lowest possible expense; and to afford an equal advantage to all desiring to do business ... , by affording an opportunity for an exact comparison of bids.

In other words, the "contrary to competition" test forbids agency actions that: (a) create the appearance and opportunity for favoritism; (b) reduce public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are abuses, i.e., dishonest, fraudulent, illegal, or unethical. *See* § 287.001, Fla. Stat.; and *Harry Pepper & Assoc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

70. Finally, section 120.57(3)(f) requires an agency action be set aside if it is "arbitrary, or capricious." An "arbitrary" decision is one that is "not supported by facts or logic, or is despotic." *Agrico Chemical Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979). A "capricious" action is one which is "taken without thought or reason or irrationally." *Id.* *See also Hadi v. Liberty Behav. Health Corp.*, 927 So. 2d 34, 40 (Fla. 1st DCA 2006).

71. To determine whether an agency acted in an "arbitrary" or "capricious" manner, consideration must be given to "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the 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, 632 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."

72. Florida Housing's governing statutes, rules, or policies in this matter include chapter 67-60, which Florida Housing implemented pursuant to its rulemaking authority under section 420.507(12). Florida Housing adopted chapter 67-60 to administer the competitive solicitation process. According to rule 67-60.006(1):

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 [Florida Housing], the Application shall be considered ineligible.

73. The pertinent solicitation specifications include the following:

a. RFA 2021-202 Section Three F.3., which provides that, by applying, each Applicant certifies that:

Proposed Developments funded under this RFA will be subject to the requirements of the RFA, inclusive of all Exhibits, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the requirements outlined in Rule Chapter 67-48, F.A.C. and the Compliance requirements of Rule Chapter 67-53, F.A.C.

b. RFA 2021-202 Section Four A.3.c(1), which provides, in pertinent 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 Applicant and Developer(s) as of the Application Deadline.

c. RFA 2021-202 Section Five A.1, which provides that:

[O]nly Applications that meet all ... Eligibility Items will be eligible for funding and considered for funding selection.

The Merits of Madison Trace's Protest:

74. Turning to the merits of Madison Trace's protest, based on the competent substantial evidence in the record, Florida Housing's decision to award housing credits under RFA 2021-202 to Beacon is not contrary to its governing statutes, rules, or policies, or the solicitation specifications. The evidence and testimony presented at the final hearing demonstrates that Beacon's application complied with the applicable statutes, rules, and criteria set forth in the RFA and was fully eligible to receive funding under RFA 2021-202. Accordingly, Florida Housing's intended award to Beacon's housing project was not clearly erroneous, contrary to competition, arbitrary, or capricious and should not be overturned.

75. Regarding its specific objections, Madison Trace did not prove that Beacon's application is ineligible for housing credits based on its submission of an (allegedly) invalid Site Control Form. Regarding its first challenge, whether Beacon failed to submit all "relevant" documents, Madison Trace did not demonstrate that either the POA or the MDA contain "relevant" information that required their inclusion in Beacon's application. Although the Purchase Agreement references the POA and MDA in several paragraphs, no terms therein indicate that either document expands or limits the rights and obligations of the Assignee (Beacon) in the Development Property. Neither does the Purchase Agreement indicate that either the POA or the MDA consists of "intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, [or] subleases" regarding CVD's assignment to Beacon. Accordingly, Madison Trace did not prove, by a preponderance of the evidence, that Beacon failed to include "relevant" documentation regarding its Site Control as required by RFA 2012-202 Section Four A.7.a.

76. Similarly, Madison Trace's complaint regarding the lack of an established closing date in the Purchase Agreement for the City of Orlando's sale of the Development Property to CVD also fails. The pertinent provision

of RFA 2021-202 directs that no terms of the "eligible contract" (the Purchase Agreement) must expire before February 28, 2022. (RFA 2021-202 Section Four A.7.a(1)). Ms. Button credibly explained that, although the Assignor (CVD) had not formally assigned the Development Property to Beacon as of the application deadline, the Purchase Agreement provided reasonable assurances that Beacon will timely obtain the rights to the property should it be awarded housing credits. Mr. Culp further effectively detailed that the terms of the Purchase Agreement remain enforceable until December 10, 2022, which should provide the City of Orlando, CVD, and Beacon sufficient time to formalize the sale and assignment of the Development Property.

77. Madison Trace also failed to prove that Florida Housing should have rejected Beacon's Site Control Form because Beacon (allegedly) did not sign the Purchase Agreement per RFA 2021-202 Section Four A.7.a(1)(c). A review of the Purchase Agreement, with attached exhibits, clearly shows that Beacon representatives placed their "marks" on the assignment documents. Madison Trace essentially questions whether Beacon is obligated to comply to the terms of an assignment through the initials/signature on the Purchase Agreement (Mr. Brock's signature on Exhibit F and Mr. Culp's initials throughout the Purchase Agreement and attachments). Mr. Culp credibly stated that both he and Mr. Brock were authorized to sign on behalf of Beacon, thereby committing Beacon to the assignment. Mr. Culp's testimony is bolstered by the fact that Beacon's application specifically identifies Mr. Brock as its "Authorized Principal Representative." Ms. Button also persuasively articulated that the entirety of the Site Control documentation contains sufficient evidence that Beacon signed the Purchase Agreement document as the Assignee, and that CVD and Beacon will be bound by their agreement to complete the assignment of CVD's rights in the Development Property to Beacon.

78. Finally, Madison Trace contends that Beacon failed to disclose a Developer or co-Developer of its housing project. However, the preponderance

of the evidence adduced at the final hearing shows that BoA CDC was not a "Developer" of Beacon "as of the Application Deadline" (August 31, 2021), as required by RFA 2021-202 Section Four A.3.b(1).

79. Based on the evidence in the record, the fact that BoA CDC may "participate" in the Developer Fee, alone, does not prove Madison Trace's argument. Although the Ownership Agreement between BoA CDC and SAS Beacon referred to the "Developer Fee," no language in the Ownership Agreement indicates that either party used that expression as the term is defined in rule 67-48.002(28) or (29). Neither do the Ownership Agreement provisions show that the parties intended to install BoA CDC as a developer (or Principal or owner) of the Beacon housing project. No other evidence establishes that BoA CDC should be considered a Developer of Beacon.

80. In addition, Mr. Culp convincingly explained that the purpose of SAS Beacon's agreement to enable BoA CDC to "participate" in the Developer Fee was to grant BoA CDC a security interest in the "net cash flow" of the Development Property. However, Madison Trace has identified no provision of RFA 2021-202, or Florida Housing's statutes, rules, or policies, that indicates such an arrangement transforms BoA CDC into a "Developer" of Beacon under rule 67-48.002(28). Accordingly, the fact that Beacon did not include BoA CDC on its Developer Disclosure Form did not render Beacon's application ineligible for an award of housing credits under RFA 2012-202.

81. In sum, based on the weight of the competent substantial evidence introduced at the final hearing, Florida Housing and Beacon present the more persuasive argument that the documents Beacon submitted with its application satisfied the Site Control requirements set forth in RFA 2021-202 Section Four A.7.a. Further, Florida Housing and Beacon articulated good faith, factual, persuasive reasons why Beacon was not required to list BoA CDC as a "Developer" in its application per RFA 2021-202 Section Four A.3.c.

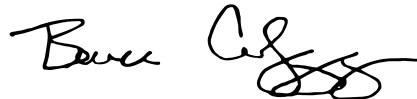
82. Consequently, Madison Trace did not demonstrate that Florida Housing's award of housing credits under RFA 2021-202 was made in a

manner that was clearly erroneous, contrary to competition, arbitrary, or capricious. Therefore, Madison Trace did not meet its burden of proving that Florida Housing's decision to award housing credits to Beacon is contrary to Florida Housing's governing statutes, rules, or policies, or the solicitation specifications. Accordingly, as a matter of law, Florida Housing is entitled to proceed with the award of housing credits to Beacon under RFA 2021-202.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order dismissing the protest of Madison Trace. It is further recommended that the Florida Housing Finance Corporation select Beacon's application as the recipient of housing credit funding in Orange County, Florida, under RFA 2021-202.

DONE AND ENTERED this 1st day of April, 2022, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of April, 2022.

COPIES FURNISHED:

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

J. Timothy Schulte, Esquire
Zimmerman, Kiser & Sutcliffe, P.A.
315 East Robinson Street
Post Office Box 3000
Orlando, Florida 32802

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

M. Christopher Bryant, Esquire
Oertel, Fernandez, Bryant
& Atkinson, P.A.
Post Office Box 1110
Tallahassee, Florida 32302-1110

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

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.