

Appeal of: _____ :
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ELAINE DUNN REALTY, : HUDBCA Nos. 97-C-110-C3
97-C-111-C4 :
Appellant :
 :
Contract Nos. C406592AA005 :
and C406S927A005 :
_____ :

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DECISION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

November 10, 1998

Statement of the Case

Elaine Dunn Realty (EDR or Appellant) filed timely appeals from two final written decisions of a contracting officer terminating for default two Real Estate Asset Management (REAM) contracts with the United States Department of Housing and Urban Development (HUD or Government). The two appeals were joined for hearing and decision because of similar facts. In each case, the Government terminated the contract for default based on alleged submissions of false claims and overbillings by EDR. EDR challenged the terminations for default on the grounds that EDR followed billing practices it had used for eight years without complaint from HUD; that HUD gave no notice of its intent to rely on the plain meaning of either contract, that billing procedures were not set out in the contracts, that HUD failed to send a notice of deficiency prior to sending out cure notices, and that the terminations were taken in retaliation against EDR for filing a protest concerning small business set-asides on REAM contracts. EDR prays that the terminations for default be rescinded as defective and erroneous, and that Appellant be paid the full amount due on both contracts.

A hearing was held on these cases, on September 15-18, 1997, jointly with a hearing on Limited Denials of Participation (LDPs) imposed on Elaine Dunn, George Dunn, and William French, arising from performance on the two contracts. The decisions on the LDPs were issued on December 5, 1997. This is the decision on the propriety of the termination for default of EDR's two REAM contracts.

Findings of Fact

1) Elaine Dunn Realty (EDR), a real estate brokerage and property management business located in the State of Georgia, was awarded two REAM contracts by the Georgia State Office of HUD in August, 1992, for Area 2 and

Area 9 in the State of Georgia, with four additional option years after the base year of 1992-1993. The purpose of a REAM contract is to maintain HUD-owned properties so that they can be sold as soon as possible. The REAM contractor is the property manager with responsibility for the properties in the contract inventory from assignment to sale of the properties. The schedule of work, description of contract services, and specifications were contained at Section C-4 of the contracts on a service matrix. Both contracts had the same service requirements. (AF Tabs 2.1, 2.27; Tr. 59-60).

2) Both contracts provided at Section B, Part I, as amended by Amendment 2 to the Invitation for Bids (IFB), that EDR would be entitled to be paid 30% of the contract fee after HUD received and approved the initial inspection report, and the remaining 70% when the sale of the property closed. Section G-4 (a)(1) of the contracts, as amended by Amendment 2 to the IFB, provided that EDR should send to the contracting officer, not later than the tenth day of the month following the period covered by such statement, an invoice for the 30% management fee for those properties for which HUD received and approved the initial inspection report, and a 70% management fee for those properties which were closed during the period. (AF Tab 2.1.)

3) HUD continued to exercise the additional option years on both REAM contracts through 1995. HUD did not exercise the option year for 1996 because it was changing its method of procurement of REAM services throughout Georgia. By a series of amendments to both contracts, the performance period was extended on a month-to-month basis. The compensation schedule based on the 30% and 70% management fee payments was replaced by specified fees to be paid monthly. The monthly compensation schedule greatly increased the price of both contracts. The amendments changing the compensation schedule and fees stated that "all other terms and conditions remain unchanged." The last amendment to each of the REAM contracts was signed by EDR on October 21, 1996, and by the contracting officer on October 30, 1996, stating the completion date would be extended to December 31, 1996. (AF Tabs 2.19-2.25, 2.44-2.51, Tr. 75, 554.)

4) Government Technical Representatives (GTRs) were assigned by HUD to monitor EDR's REAM contract performance on a rotating basis. GTRs would do selective inspections of EDR's properties, inspect EDR's office operations once a year, including files maintained under the two contracts, and review and approve EDR invoices sent to HUD for payment. Between 1992 and 1995, various GTRs assigned to monitor EDR would make corrections on invoices prepared by EDR which were certified by Elaine Dunn ("Dunn"), President of EDR, as accurate. EDR never challenged or questioned any of the changes made to EDR invoices by the GTRs. In 1995, Carol Warren was the EDR employee who prepared the invoices for EDR, but when she left EDR in late 1995, Dunn assumed the duty of preparing EDR's invoices, as well as certifying to their accuracy. (AF Tab 4.27; Tr. 245, 296-297, 662-663.)

5) Dunn did not look at the contents of each property file to prepare EDR's invoices to HUD. She did not look at inspection reports, communications from closing attorneys, notes about closing, invoices from subcontractors, or other documentation that would be necessary to prepare accurate invoices. She copied the information from the immediately previous invoice, and she would only remove a property listing from the invoice if she saw a closing notice from a closing attorney. There were many closing notices in EDR's files that Dunn apparently did not notice, because she continued to list such properties on the invoices for months after EDR had received the closing notice. Dunn also certified all invoices sent to HUD as being true and correct without verifying their accuracy. She made no attempt to avoid making the same mistakes

repeatedly on invoices, and took no action to assure the accuracy of EDR's invoices that were sent to HUD for approval for payment, despite the fact that she had an associate degree in accounting. She relied upon what she viewed as a course of conduct by HUD GTRs to correct invoices, and she considered the invoices prepared by EDR to be a "scratch" or draft invoice only, to be corrected and finalized by the GTR. Although Dunn attended training sessions for REAM contractors, at which REAM contractors were repeatedly reminded that they were responsible for the accuracy of invoices sent to HUD, she did not accept the responsibility for the accuracy of EDR's invoices. (Tr. 685, 696-700; 704, 722-723, 734-735, 745-747, 750-755.)

6) Starting in 1996, the GTR assigned to EDR was Elmer Butler. Butler made no corrections on EDR's invoices, and apparently did little or nothing to check them for accuracy before approving them for payment. Dunn was annoyed that Butler was not correcting EDR's invoices, because, to her, that meant he was not doing his job. During the period when Butler was the GTR assigned to monitor EDR's performance on the REAM contracts, the compensation schedule for both contracts changed from the 30%/70% compensation schedule to the monthly schedule. The modified contracts provided that EDR would be entitled to receive compensation for each month in which it performed contract services on a property until that property was sold, and the sale closed. EDR had to keep track of when a property closed so that it would know when to stop performing contract services on that property. Under the 30%/70% compensation schedule, EDR could invoice for 70% of its management fee as of closing, and its receipt of timely payment of this fee was dependent on EDR knowing when a property closed. When the contracts were amended in 1996 to provide for monthly compensation, EDR still had a contractual duty to know when a property sale closed, so that it no longer performed or invoiced for monthly contract services that it was to cease performing as of closing. (AF Tabs, 2.1, 2.27; Admission 37; Tr. 698.)

7) In early to mid October, 1996, Dunn called Lydia Faircloth, a GTR who had been assigned to monitor EDR at various times and who had become a personal friend of hers, to find out why EDR's invoice for September, 1996, had not yet been approved. Faircloth found the invoice on Butler's desk. In late October, Faircloth brought EDR's September invoice to Debbie Bonelli, a supervisory real estate owned (REO) specialist at HUD, to process it for payment. Bonelli was very familiar with EDR's property inventory, and she thought the list of properties receiving contract services on EDR's September invoice looked "weird" because too many properties were listed on it. Bonelli input the case numbers for the properties listed on EDR's September invoice into her computer to see if and when those properties had been sold. The computer program provided the date of sale closing for any property that had closed. Bonelli concluded from the information in the computer that EDR was invoicing HUD for contract services months after properties had been sold and closed. (Tr. 246-250, 613.)

8) Bonelli was very concerned with the pattern of overcharges that she saw on EDR's September invoice. She went to HUD's Contracting Division to report what she had found. Bonelli wanted advice as to the procedure to pursue on EDR's invoice. On November 4, 1996, EDR submitted its invoice for October services to HUD. Bonelli again analyzed the charges on EDR's invoice by using the computer data base, and found that the pattern of billing for services after properties had closed was repeated on the October invoice. Both invoices had been prepared and certified by Dunn. (Af Tab 1.1, Tr. 57, 60, 81-83.)

9) Anita Wender, a HUD contract specialist, considered these documents to be evidence of serious and deliberate overbilling by EDR on the two contracts.

She did not consider sending out a "deficiency notice" to EDR on what she had found because it was so serious that a "deficiency notice" would be inappropriate. Furthermore, neither the contracts nor the Federal Acquisition Regulation (FAR) require that a "deficiency notice" be sent before a cure notice. Wender believed that a cure notice was the only appropriate response to the apparently false invoices. (Tr. 231-232.)

10) Based upon the information developed by Bonelli and further analyzed by Wender, contracting officer Michael Swan issued a cure notice to EDR, dated November 6, 1996, for erroneously billing HTJD on both REAM contracts. The cure notice states that EDR's invoice for October services overbilled HUD \$6,094, its invoice dated October 30, 1996 for lock charges and systems check overbilled HUD "at least \$1,902.03," and its invoice for September services overbilled HUD \$6,094. No specific information as to the overbilling was given with the cure notice. All three invoices were returned to EDR for correction and resubmission. The cure notice further stated that HUD was also investigating prior invoices submitted by EDR for January through August, 1996. The cure notice informed EDR that the overbillings were false claims, and both contracts could be terminated for default. EDR was given ten days to provide an acceptable explanation for what had occurred, and to provide a plan for preventing any further reoccurrence. (AF Tab 3.12; Tr. 535, 538.)

11) When Dunn received the cure notice for EDR, which was sent by FAX, she requested a meeting. Swan did not meet with her, but on November 8, 1996, Bonelli and Wender met with Dunn, who wanted to find out how to correct the invoices and "make things right." Dunn told Bonelli and Wender that EDR was not receiving notices of closings from closing attorneys, and that she did not know when property sales closed. She also told them that HUD GTRs always corrected EDR's invoices in the past, and that she could not understand why that had not been done with the invoices at issue. Dunn also was not waiting to deliver initial inspection reports to HUD before billing for services on newly assigned properties, and Bonelli and Wender characterized those charges as overbillings. Dunn did not correct or resubmit the EDR invoices that were the subject of the cure notice. (Tr. 87, 90, 250-250, 675-678.)

12) By letter dated November 15, 1996, attorneys for EDR responded to the cure notice. They stated that EDR had not been sent any prior notification of problems with its billings, problem areas were not identified in the cure notice, HUD had always corrected EDR's invoices in the past, and EDR was not getting notices of closings. The November 15, 1996, response letter proposed no changes in the way that EDR would prepare invoices in the future to avoid the problems on the rejected invoices. (AF Tab 3.15.)

13) HUD staff investigated Dunn's statement that EDR was not receiving notices of closings and, thus, did not know when to stop providing contract services for properties. Closing attorneys who represent HUD at the closing of the sale of HUD-owned properties are required by their contracts with HUD to provide the REAM contractor with notice of closing within 24 hours after closing. That notice can be given by FAX, telephone, or otherwise delivered in writing. The files for the HUD closing attorneys checked by HUD staff contained the required notices from the closing attorneys. There was no record of any complaints from EDR in 1996 that closing notices were not being sent to it. Also, some of the properties for which EDR billed HUD after closing had been sold by EDR, and it had direct knowledge of the closing dates for those properties. Based upon this investigation, Bonelli, Wender, and Swan all concluded that EDR was not experiencing a problem with closing notices that

would excuse or mitigate EDR's practice of invoicing HUD for contract services months after closing. (AF Tab 4.21; Tr. 39, 83-84, 102-103, 255, 539.)

14) The contracting officer also did not consider EDR's reliance on HUD GTRs to correct its invoices to be an excuse for submitting invoices replete with overbillings because the contractor is required to submit certified, accurate invoices on which HUD can rely. Swan did not consider either Dunn's oral explanations to Bonelli and Wender or the written response to the cure notice from EDR's attorneys to be acceptable. The problems described in the cure notice were not cured, EDR did not correct and resubmit the rejected invoices, and it failed to develop a plan to avoid future overbillings. Swan concluded that a termination for default of EDR's REAM contracts was the next step to be taken, under the circumstances. (Tr. 539-542.)

15) On November 25, 1996, EDR's two REAM contracts were terminated for default, effective immediately. That same day, Bonelli went to EDR's office to collect all of the contract files, so that the files on active property listings could be delivered to the temporary contractors who would be taking over EDR's duties. (AF Tab 1.1; Tr. 94-95, 255-256, 259.)

16) After receiving a request on behalf of EDR from a Member of Congress, the contracting officer agreed to reconsider the termination for default. Wender held a meeting with Dunn at which further explanations were given. Also, EDR was given an opportunity to present evidence that it had performed the inspections for which it billed HUD, and to provide an explanation, supported by documentation, as to why EDR billed HUD as it had. At the same time, Swan directed Bonelli and Wender to conduct a more in-depth analysis of the documentation in the EDR files to verify how often EDR had billed HUD for property services after a property had closed, whether EDR knew or had reason to know a property had closed, whether there was documentation of the services billed, and whether new properties were being billed to HUD prematurely. (AF 4.15; Tr. 99-110.)

17) Bonelli had the temporary contractors make copies of everything in the active listing files so that she could analyze EDR's billings for January through October, 1996, by comparing them to the contents of EDR's files. Bonelli prepared a separate sheet for each property for which EDR had billed HUD for contract services, and then listed and analyzed the contents of EDR's file for each property. She also cross-referenced that information to the computerized data base for each property. Twelve files were missing altogether for properties that had been invoiced by EDR. (AF Tab 1.3; Tr. 256-261.)

18) Bonelli concluded from her comparison of EDR's invoices, its files, and the computer data base that EDR had billed HUD 86 times for monthly contracts services after properties had closed. Bonelli's data analysis is reliable, and we find that EDR improperly billed HUD 86 times for monthly contract services after sales of properties had closed. Bonelli also concluded that EDR had billed HUD a monthly fee for contract services on 40 properties before an initial inspection report had been received by HUD for those properties, which she classified as an overbilling under the terms of the two contracts. (AF Tab 1.3; Tic. 262-2632)

19) Bonelli and Wender analyzed the contents of EDR's files for 1996 for evidence of notices of closings from closing attorneys, and also for other notices and communications to EDR that would indicate that a closing was scheduled. For most of the properties for which EDR continued to invoice HUD for monthly services after closing, EDR's own files contained closing notices from

closing attorneys or other indicia that a property was scheduled for closing within days, such as a termite inspection report or a notation that keys had been sent by EDR to the closing attorney to be given to the new owner at closing. Furthermore, for five properties that had closed and for which EDR continued to invoice HUD after closing, EDR was the selling agent and received a commission when the sale closed. For all but two of the properties for which EDR invoiced HUD for services after closing, there is no evidence that EDR performed any inspections after closing. (AF Tabs 1.3, 4.29; Tr. 102, 105-107, 112-120, 265, 283-285.)

20) The contracting officer affirmed the terminations for default in a written decision dated December 10, 1996. He cited the evidence found and analyzed by Bonelli and Wender after the original termination for default as further support for the terminations, and he rejected each of EDR's excuses for the overbillings as either not supported by the evidence before him, or not in accordance with EDR's contract. (AF Tab 1.2.)

Discussion

Default termination is a drastic action which should only be taken for good cause on the basis of solid evidence; ABC Group, HUDBCA No. 88-3384-C3, 88-3 BCA ¶20, 990; but the Government is entitled to strict compliance in contract performance. Ibid. When a contract is terminated for default after expiration of a cure notice period, the Government has the burden of proving either a failure by the contractor to cure the deficiencies cited in the cure notice or new defaults after issuance of the cure notice. All South Properties, Inc., HUDBCA Nos. 92-G-7604-C12 and 93-G-C5, 97-2 BCA ¶29,329. The two REAM contracts at issue were indefinite quantity fixed-price service contracts. A service contract has a new delivery date every time performance of the services is required. Emancar, Inc., HUDBCA No. 80-534-C12, 82-1 BCA ¶15,531. Termination of a service contract for default will be sustained if the performance failure is more than de minimis and reasonably substantial. Edward E. Davis Contracting, Inc., ASBCA No. 22646, 80-1 BCA ¶14,422.

After the payment terms of both contracts were changed to a monthly fee payment schedule, submission of accurate monthly certified invoices was a specific contract requirement. EDR's submission of certified invoices charging HUD for inspection services on properties that had been sold and closed was in violation of the letter and spirit of the REAM contracts. Under the contracts as amended, EDR's performance with respect to a particular property ceased as of closing. EDR knew or had reason to know when a property closed. The property files had notices to that effect from the closing attorneys, as well as other documents that were required to be filed within days of a closing. It is noteworthy that EDR was apparently able to determine with little problem or error the date on which properties closed when the original contracts provided that EDR would be paid 70% of the management fee for a property when that property closed. Once the financial incentive to promptly determine closing dates ceased after the change in the contract payment requirements, EDR failed to determine closing dates with any reliability.

EDR prepared and certified its monthly invoices without even checking the relevant files. The method it used to prepare its invoices was both unprofessional and irresponsible. EDR had no contractual or equitable right to consider its monthly certified invoices as "scratch" copies that EDR knew were unreliable and untruthful. The language of the certification signed on each

invoice by Dunn made clear that there would be severe consequences for filing false invoices. Dunn was told at every HUD training meeting she attended that invoices had to be prepared with care because HUD would be relying on their accuracy. While Dunn was annoyed that Butler, the last GTR assigned to EDR, was not making any changes on the invoices, Dunn continued to prepare and certify EDR invoices without a heightened degree of care, professionalism, or sense of responsibility in order to assure their accuracy.

Appellant contends that HUD should be estopped from terminating its contracts for default because HUD GTR's had corrected EDR's invoices in the past, EDR had relied on that practice, and that HUD waived the requirement to file accurate invoices by its course of conduct with EDR.

We find no evidence that HUD waived its right to receive accurate invoices under the terms of the contracts or to take appropriate action when EDR's invoices appeared to be fraudulent. Dunn herself admitted that HUD no longer corrected EDR's invoices when Butler became the GTR. The nature and extent of the changes that HUD GTRs made in the past on EDR's invoices were in no way comparable to the startlingly false invoices that were filed by EDR after the contract billing process was changed. False claims for payment for work on properties that had long since been removed from EDR's inventory, and for which there is no proof that the invoiced work was even performed, permeate the invoices that were the basis for both the original termination for default and the affirmation of the default termination after reconsideration.

We find as a matter of fact and law that HUD did not waive its right to terminate EDR's contracts for default because of HUD's past practice of correcting errors on EDR's invoices because that practice ceased, EDR was aware that it had ceased, and any reliance upon HUD's past practice relative to invoice correction was unwarranted. See Sentinel Standard, ASECA No. 26199, 83-1 BCA ¶16,517 (1983)

There is no evidence in the record of this proceeding that HUD terminated EDR's contracts in retaliation for EDR's filing of a protest concerning small business set-asides on REAM contracts. We find the default terminations to be well justified and supported by overwhelming documentary evidence. We further conclude that EDR's failures were not otherwise excused under the termination clause of the contracts. There was no contractual or programmatic requirement that a notice of deficiency be sent to EDR prior to sending out a cure notice. Notices of deficiency were an in-house mechanism for dealing with minor problems that a contractor could easily correct. They were not to be used for serious performance failures, such as when it appeared that fraud was taking place through false invoicing.

HUD has also cited EDR's "early" submission of invoices after the two contracts had been changed to provide for monthly compensation as evidence of false billing. It relies upon the wording of the last amendment to each of the contracts, in which the entire compensation system for the contracts was changed from the 30%/70% schedule to monthly fees. The amendments state that "all other terms and conditions remain unchanged." Prior to the change, the "first" invoice for the 30% payment was not to be submitted until after a significant amount of work had been done by EDR, and HUD received and approved the initial inspection report. HUD contends that EDR still could not submit a first (monthly) invoice for a property until after HUD had received the initial inspection report, even after the compensation formula and schedule was changed.

We find that Appellant did not overbill HUD for "early" invoices after the two contracts had been changed to provide for monthly compensation, because the contract requirement that no invoice be sent to BUD until the initial inspection report had been received by BUD was intrinsic to the 30%/70% compensation schedule, and had no relevance to monthly compensation. If Appellant was still required to wait until the initial inspection report was received before invoicing, there could be months in which Appellant performed substantial contract services before the delivery of the initial inspection report for which Appellant would receive no compensation. The change to a monthly compensation schedule changed all of the contract provisions that were integrally related to the 30%/70% compensation schedule. The provision in the last amendments, that all other contract provisions remained unchanged, did not retain the time schedule for the submission of invoices related uniquely to the 30%/70% compensation schedule. There is no basis to find that Appellant overbilled BUD with "early" billings in 1996.

CONCLUSION

We find that HUD has shown by a preponderance of the evidence that the default terminations of its contracts with EDR were justified as a matter of fact and law. Based upon these findings of fact and conclusions of law, EDR's appeal of the termination for default of its two REAM contracts is DENIED.

Jean S. Cooper
Administrative Judge

CONCUR:

David T. Anderson
Chief Administrative Judge

(Administrative Judge Lynn J. Bush participated in this decision
but was unavailable to enter her concurrence)

November 12, 1998