

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

FERNANDO LABRADA,
FERNANDO LABRADA
CONSTRUCTION CORP.,
FLORIDA SERVICING &
MANAGEMENT CORP.,
LORETA FRANQUIZ and
JEAN VALEZ

Respondents.

HUDALJ 93-1955-DB(LDP)
HUDALJ 93-1956-DB(LDP)
HUDALJ 93-1957-DB(LDP)
Date Issued: July 22, 1993

Mark A. Scott, Esq.
For the Department

Carlos Lopez DeAzua, Esq.
For the Respondents

Before: WILLIAM C. CREGAR
Administrative Law Judge

INITIAL DETERMINATION AND ORDER

Statement of the Case¹

Respondents Fernando Labrada Cambra, Fernando Labrada Construction Corporation ("FLCC"), Florida Servicing & Management Corporation ("FSMC"), Loreta Franquiz, and Jean Valez, appeal the September 17, 1992, Limited Denial of Participation ("LDP") for a one-year period issued by Rosa C. Villalonga, Manager of the Caribbean Office of the U.S. Department of Housing and Urban Development ("the Department" or "HUD"). The Department's Complaint alleges that Respondents failed to disclose "identity of interest" relationships between certain owners of property and their agents; submitted and were compensated for overcharges, inadequately documented

¹The following abbreviations are used in this decision: "Tr." for Transcript; "Govt. Ex." for HUD's Exhibit; and "Stip." for oral stipulations entered into by the parties at hearing and later transcribed and attached to HUD's Post-hearing brief.

charges, and improper, unauthorized expenditures;² and failed to comply with the Department's multifamily occupancy requirements. Respondents deny the allegations. A hearing on this matter was held in San Juan, Puerto Rico, on April 20, 1993. Post hearing briefs and reply briefs were due respectively on May 10, 1993,³ and May 25, 1993. The record closed on May 26, 1993.

Reply briefs were originally due on May 25, 1993. The Department requested a one-day extension to file its Reply Brief because HUD counsel erroneously marked May 26, 1993, as the due date on his calendar. Respondents oppose the Motion. There being no apparent prejudice to Respondents by granting a one-day extension, the Motion is *granted*.

On May 26, 1993, the Department filed its Reply brief, and a Motion for Reconsideration of my decision denying its Motion to Withdraw Counts. The Motion for Reconsideration is based on my denial of the Department's earlier Motion to Amend its Complaint with an additional allegation. Department Counsel now asserts that upon denial of his motion to append this additional allegation to the original Complaint, he had hoped to preserve all of the monetary issues in this case for resolution on "another day in another forum." Government's Motion for Reconsideration, p. 2. Unfortunately, as a result of "an oversight" he did not communicate this reformulated strategy to anyone at the hearing. *Id.* The Department's Motion for Reconsideration relies only on Counsel's failure to reveal his trial strategy; it fails to address the harm to Respondents that would result if the Department's Motion to Withdraw were granted, and, therefore, it sets forth no basis for reversing my previous determination. Accordingly, the Motion for Reconsideration is *denied*.

²On April 2, 1993, the Department filed a Motion to Amend its Complaint to include yet another count charging that Respondents incurred an additional \$1,889,378 in improper costs. Pursuant to HUD's request, I deferred ruling on the Motion until the hearing, at which time I denied the Motion because the additional count was not a basis for the LDP. Tr. pp. 6-7.

³On May 10, 1993, the Department simultaneously filed its Post-hearing brief and a Motion to Withdraw Counts I, II, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XVII, XXII, XXIII, XXIV, XXV, and XXVI of the Complaint. The remaining counts deal solely with "identity of interest" issues. The Department filed its Motion to Withdraw Counts only after the parties had truncated the hearing by entering into stipulations concerning those "identity of interest" issues. Apparently, HUD's counsel decided that the stipulations were adequate evidence of the "identity of interest" allegations, and he did not offer further proof on these issues. For whatever reason, he did not offer proof on the counts that alleged violations other than those concerning the "identity of interest" issues. See Government's Motion to Withdraw Counts in its Complaint. Respondents had been prepared to litigate all of the issues alleged in every count, and went to great expense (approximately \$30,000) to retain an expert witness at the hearing for this purpose. Because, through no fault of their own, Respondents would have been faced with additional expenses were the Department allowed to withdraw the 19 counts and relitigate them in a subsequent proceeding, I determined that it would be unfair to Respondents to permit these allegations to be withdrawn, without prejudice, 20 days after the hearing. Accordingly, by Order dated May 21, 1993, I denied the Department's Motion.

Findings of Fact

1. FLCC is owned by Fernando Labrada Cambra ("Mr. Labrada") who served as its President from 1977 through 1992. Stip. I.A, Govt. Ex. 53.⁴ In 1977-78, it developed Jeannie Apartments and San Fernando Apartments, two multifamily housing projects insured by HUD under Section 221 (d)(3) of the National Housing Act. See 12 U.S.C. § 1715 (d)(3). Developers Mortgage Corporation ("Developers Mortgage") was the lender. Govt. Exs. 3, 5, 6, and 45-48.

2. As a condition of HUD insuring the mortgage, FLCC entered into Regulatory Agreements with HUD. These agreements state that FLCC will provide an "annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the [Secretary of HUD], certified to by an officer or responsible Owner." Govt. Exs. 5, ¶ 12(e) and 45, ¶ 9(e).

3. On or about June 1979, FLCC transferred its ownership of Jeannie Apartments to Jeannie Housing Associates ("JHA"). Mr. Labrada was the General Partner of JHA from 1977-1992. Stip. I.A., Govt. Ex. 7.

4. On July 15, 1982, FLCC entered into a management agreement with FSMC to act as the management agent for San Fernando Apartments. Govt. Ex. 52. On May 15, 1984, JHA entered into a management agreement with FSMC to act as the management agent for Jeannie Apartments. Govt. Ex. 11. On or about January 1, 1985, JHA executed 11 service contracts with FSMC for various services at Jeannie Apartments. Complaint, ¶ 14; Answer, ¶ 13. On or about July 2, 1985, FLCC executed 11 service contracts with FSMC for various services at San Fernando Apartments. Complaint, ¶ 16; Answer, ¶ 15.⁵

5. Respondent Loreta Franquiz served as President of FSMC as of July 15, 1982, the date of FSMC's management agreement with FLCC, and as of May 15, 1984, the date of FSMC's management agreement with JHA. Govt. Exs. 52 and 11. For some period prior to June 1977 she was a 20% owner of FLCC. Govt. Ex. 4.

⁴At some point between 1977 and June 1983 his ownership share increased from 80% to 100%. Govt. Exs. 4 and 53.

⁵The Department's Complaint alleges that FLCC "executed 11 service contracts with FSMC for various services," at each apartment complex. Complaint, ¶¶ 14 and 16. Respondents' admissions in their Answer are ambiguous, admitting only that "11 service contracts were executed with [FSMC] to provide for various services" at each complex. Answer, ¶¶ 13 and 15. Because FLCC and JHA were the owners of San Fernando and Jeannie Apartments, respectively, at the time of the FSMC contracts, they were the only entities authorized to enter into these contracts. Therefore, I conclude that FLCC contracted with FSMC for services at the San Fernando complex and that JHA contracted with FSMC for services for the Jeannie Apartments.

6. Mr. Labrada occasionally signed checks for FSMC. Stip. VII.
7. Respondent Jean Valez witnessed the signing of the May 15, 1984, management agreement between JHA and FSMC. Govt. Ex. 11.
8. From 1977-1992 Luis Fernandez served as comptroller for FLCC, FSMC, and JHA, and as an officer of Developers Mortgage. Stip. I.B. The record also reflects that he was the Vice President of FLCC in June of 1983. Govt. Ex. 53.
9. At times during 1991-92, Miguel Santiago also served as comptroller of FSMC. Stip. II; Tr. p. 135. In addition, Mr. Santiago was the comptroller for ABC Building & Maintenance Corp. ("ABC") during 1991-92. Stip. II. On or about September 18, 1990, ABC executed contracts with FLCC and JHA to provide services for the San Fernando and Jeannie Apartments, respectively. Complaint, ¶ 18; Answer, ¶ 17.⁶
10. From at least 1980, HUD possessed documents submitted to it by Respondents from which it could ascertain Mr. Labrada's positions with FLCC and JHA; Mr. Fernandez's positions at FLCC, JHA, FSMC, and Developers Mortgage; and Mr. Santiago's positions at FSMC and ABC. Stip. III.
11. In accordance with HUD requirements implementing ¶¶ 12(e) and 9(e) of the Regulatory Agreements, FSMC filed "identity of interest" certificates with HUD on April 17, 1984, February 20, 1985, and March 24, 1987. These certify that "no identity of interest exists nor any association nor any connection in any transaction whatsoever between Jeannie Housing Associates, Florida Servicing and Management Corporation, and the suppliers of services or materials." Govt. Exs. 13, 15, and 19; Tr. pp. 85, 104, and 125.
12. I take official notice that the following HUD Handbooks contain the following requirements and information.⁷ HUD Handbook 4370.1 requires HUD loan servicers to obtain supplemental data, including a schedule of "identity of interest" firms.

⁶Although Count III of the Department's Complaint alleges that FLCC failed to disclose an "identity of interest" with ABC, other than these facts, the record contains no other information concerning ABC.

⁷The Department neither pleaded nor introduced these Handbook provisions into evidence. However, HUD regulations permit me to take official notice of facts not subject to reasonable dispute which include facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." 24 C.F.R. § 26.2 (c)(8); Fed. R. Evid. 201(b)(2). Moreover, both parties included the quoted portion of HUD Handbook 4381.5 Rev-1 in their Post-hearing briefs. *See* Respondents' Post-hearing Brief, p. 17 n.2; Gov't. Post-hearing Brief, pp. 5-6. Finally, FSMC's filing of identity of interest certificates with HUD establishes its familiarity with a HUD requirement to provide a schedule of "identity of interest" firms. Accordingly, I conclude that inclusion in the record of these Handbook provisions does not prejudice Respondents.

HUD Handbook 4370.1 Rev-1, ¶ 2-2b (2) and App. 1 (Feb. 24, 1981). Not until 1986 did a HUD Handbook define this phrase. HUD Handbook 4381.5 Rev-1 provides the following definition:

D. Identity-of-interest management agent. An individual or company that provides management services to the project and whose relationship with the project owner is such that the selection process and management fee will not be determined through arms-length negotiation.

1) An identity-of-interest relationship is considered to exist:

<u>WHEN</u>	<u>IS ALSO</u>
the owner entity or a general partner of the owner entity	an owner, general partner, officer or director of the management company or subcontractor
OR	
any officer or director of the owner entity	OR
OR	
any person who directly or indirectly control 10 percent or more of the voting rights or who owns 10 percent or more of the owner entity	a person who directly or indirectly controls 10 percent or more of the management company's or subcontractor's voting rights or owns 10 percent or more of the management company or subcontractor.

HUD Handbook 4381.5 Rev-1, ¶ 2-3.D. (June 1986).

Discussion

A Limited Denial of Participation must be based upon "adequate evidence" that cause exists for its imposition. 24 C.F.R. § 24.313 (b) (3). These causes include 1) irregularities in a participant's or contractor's past performance in a HUD program; and, 2) failure to honor contractual obligations or proceed in accordance with contract specifications. 24 C.F.R. §§ 24.705 (a) (2), (4). For the reasons set forth below, the Department failed to prove its allegations by adequate evidence.

Identity of Interest Allegations

The Department contends that the simultaneous service of Luis Fernandez as comptroller of both owners, FLCC and JHA, as well as the management corporation,

FSMC, establishes that these entities shared a common officer. Relying upon the definition of "identity of interest" set forth in HUD Handbook 4381.5 Rev-1, it asserts that its case has been proved by this fact alone. Govt. Post-hearing Brief, p. 7. I disagree. The "comptroller" may indeed be a corporate officer in one or more of these three corporations. However, these positions could also be held by an employee or even an independent contractor. The record is devoid of evidence of the nature of the position and function of the "comptroller" of these corporations.⁸

The record is insufficient to establish whether Loreta Franquiz was simultaneously a 20% owner of FLCC and the President of FSMC. While the facts indicate that she was a part owner of FLCC for sometime prior to June of 1977, the record does not reflect that she owned, controlled, or held a position at FSMC at that time. Furthermore, it was not until sometime in 1982 that FLCC contracted with FSMC.

HUD's Complaint also alleges that FLCC failed to reveal an identity of interest between FLCC and ABC. The Department was unable to prove the existence of such a relationship, let alone the failure to disclose it, if it did, in fact, exist.

Overcharges, Inadequately Documented Charges, Improper Expenditures,
and Failures to Comply with HUD Multi-family Occupancy Requirements

The record evidence in support of these allegations ranges from little to none. Indeed, as discussed above, after truncating the hearing by entering into stipulations, the Department offered no further evidence relating to these allegations. A review of what little evidence there is in the record reveals insufficient evidence to support a prima facie case with regard to any of these claims.

⁸I note that Mr. Fernandez was the Vice President (presumably an officer) of FLCC on or about June 30, 1983. Govt. Ex. 53. No evidence establishes that he served as an officer of more than one of these corporations at the same time.

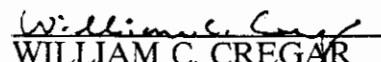
Stipulation VII reflects that Mr. Labrada "on occasion" signed checks for FSMC. However, the mere fact that he occasionally signed checks for FSMC does not address the issue of whether there was an identity of interest between FLCC and FSMC. HUD did not attempt to prove that he was an owner, officer, director, or partner, or that he controlled 10% or more of FSMC. Nor is there any evidence that he signed his own name or someone else's, or whether he signed at the direction or under the control of anyone else. Moreover, the Department failed to offer any evidence indicating that he had signatory authority at FSMC *at the same time* that he held positions at FLCC or JHA.

CONCLUSION AND ORDER

The Government's Motion for Enlargement of Time to file its Reply Brief is hereby *granted*.

The Government's Motion For Reconsideration of the denial of its Motion to Withdraw Counts is hereby *denied*.

The allegations of the Complaint are not supported by adequate evidence. Accordingly, the Limited Denial of Participation is hereby *rescinded*.


WILLIAM C. CREGAR
Administrative Law Judge

Dated: July 22, 1993