Board of Contract Appeals
U. S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:	HUDBCA Nos.	Docket Nos.
LEON SLOAN, SR.,	96-C-106-D3	96-0001-DB
J & L RENOVATION COMPANY	96-C-107-D4	96-0002-DB
JIMMIE L. FURBY,	96-C-108-D5	96-0005-DB
Respondents		

Joseph L. Luciana, III, Esq. — For the Respondents
John E. Beard, III, Esq.
Kirkpatrick & Lockhart, LLP
1500 Oliver Building
Pittsburgh, PA 15222-2312

Dane M. Narode, Esq. — For the Government
Christy Maldonado, Esq.
Office of General counsel
Department of Housing and
Urban Development
Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

August 30, 1996

Statement of the Case

By letters dated August 18, 1995, Joseph Shuldiner, Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development (HUD), notified J&L Renovation Company (J&L), Leon Sloan, Sr., and Jimmy L. Furby, all Respondents in this case, that HUD was considering their debarment for a period of five years, based on irregularities in their performance of demolition work at the Burns Heights public housing project. The letter also advised Respondents that they were immediately suspended from participating in primary and lower-tier covered transactions, pending determination of debarment, because HUD had determined that immediate action was necessary to protect the public interest.

J&L, Sloan, and Furby were charged by HUD with three types of irregularities as grounds for their suspension and proposed debarment: (1) improper cleanup of waste from the lead-based paint abatement process, (2) improper disposal of construction debris

from the demolition work, and (3) failure to adhere to contract requirements or HUD Guidelines with respect to allowing hazardous waste to be tracked outside of containment and allowing workers to perform abatement work without proper protection. HUD cites 24 C.F.R. §§ 24.305(b), (d), and(f) as causes for their debarment as either a participant or principal in primary and lower-tier covered transactions at HUD and throughout the Executive Branch of the Federal government, and from participating in procurement contracts with HUD for five years from the date of the letters from Shuldiner.

Respondents filed a timely request for a hearing on their suspension and proposed debarment. A consolidated hearing was held on April 9-13, 1996, in Pittsburgh, Pennsylvania. At the end of the hearing, based on the evidence presented, the Government withdrew the charge that Respondents had failed to adhere to contract requirements or the HUD Guidelines with respect to hazardous waste as a ground for their debarment.

This Determination is based on the hearing record, considered as a whole, the prehearing briefs, and closing arguments of counsel. The regulations that apply to these cases are 24 C.F.R., Part 24 (1988).

FINDINGS OF FACT

THE PRIME CONTRACT

1) In fiscal year 1989, the Allegheny County Housing Authority (ACHA) was awarded $237,00 in Comprehensive Improvement Assistance Program (CIAP) funds by the Pittsburgh Office of HUD to test 58 dwelling units for the presence of hazardous levels of lead-based paint at the Burns Heights project, and to remove hazardous paint, as needed. Burns Heights is a 182-unit project that is owned and operated by ACHA as public housing. ACHA had applied for $5,000,000 in CIAP funds to begin work on an overall rehabilitation of Burns Heights. Because of the age of the project, testing for lead-based paint was required by HUD as part of the rehabilitation evaluation. (Exhs. G7(b), R243 (A) and (B); Tr. 97.)

2) ACHA had tested for lead-based paint at Burns Heights in 1988, before it had applied for the CIAP funds. In 1988, testing for lead-based paint was to be done in accordance with general departmental regulations and manufacturer's directions for the testing instruments used. ACHA had the Allegheny County Health Department test only ten dwelling units at Burns Heights for lead-based paint. The tests were made with an XRF analyzer. Only one reading was taken by the testers on each surface, and no substrate corrections were made on this raw test data. These tests were not done in accordance with the manufacturer's directions for use of the XRF analyzer because three readings were not taken on each surface tested and there were no substrate corrections made on the

raw test data. The highest level of lead recorded, with a single unadjusted reading, was 2.5. Such a reading is inconclusive for hazardous levels of lead, and would require further testing of actual paint samples. No paint samples were tested. There is no indication that ACHA was aware that the limited testing done by the Health Department was scientifically flawed. (Exhs. JE2 Addendum 3, JE1 at page A-4, R233, R234-tab B; Tr. 923, 929, 1227-1229, 1231-1232, 1235-1243, 1266-1266.)

3) ACHA intended to use the 1989 CIAP funds to do an overall investigation of the cost of rehabilitating Burns Heights, including identification and abatement of lead-based paint. Although ACHA's 1989 CIAP budget included $11,600 for lead-based paint testing, no further testing was done by it. ACHA's current Director, David McLean, was not aware whether HUD knew that ACHA had done no further tests for lead-based paint, although it was included in the 1989 CIAP budget. After discussions with HUD, ACHA decided to do rehabilitation by interior demolition, which meant all unit interiors would be gutted. This made any abatement that would be needed simpler. ACHA applied for additional CIAP funds to do the rehabilitation. In fiscal year 1991, HUD approved a second CIAP budget for ACHA that included $341,000 to cover interior demolition of 124 units. Included within the budget line item for demolition was "removal and disposal of all hazardous materials, i.e. asbestos and lead-based paint." HUD allowed $2,750 per unit for all demolition, including removal of lead-based paint and asbestos, as needed. (Exh. G7(a) and (b); Tr. 1307-1309, 1311-1312, 1351.)

4) ACHA had the demolition contract specifications prepared by an architectural firm, but it used in-house staff to write the lead-based paint removal specifications. In-house staff relied on the 1988 Health Department test data exclusively. No further testing was done by ACHA for lead-based paint before it implemented the rehabilitation plan. ACHA's safety concern was for worker protection during demolition, rather than tenant protection, because the units would be vacant. It decided to shift the contractual risk to the demolition contractors for worker protection. The only data ACHA provided to the demolition contract bidders were the 1988 XRF readings. The general specification for lead-based paint abatement stated as follows:

> ACHA has had building surfaces and components randomly tested for the presence of lead based paint. The test results indicate that lead based paint exists within the community. Consequently, the ACHA requires the Demolition Contractor to consider all existing paint surfaces as containing lead based paint.

The specifications for lead-based paint abatement incorporated the 1990 HUD Interim Guidelines for Lead-Based Paint Hazard Identification and Abatement (HUD Guidelines) by reference. Lead-

based paint abatement was to be done, if needed, in accordance with the HUD Guidelines. Abatement is only required under the Guidelines if lead levels are found to be hazardous. (Exhs. JE1, JE2, Section 02060-1; Tr.1313-1316.)

5) Despite the apparently unequivocal language of the general specification for lead-based paint abatement, ACHA intended that the contractors bidding on the demolition work would determine the locations and severity of both lead-based paint and asbestos. In the event that hazardous levels of lead-based paint were present in a unit, ACHA would be owed strict compliance with both the HUD Guidelines and the contract for safe removal of any hazardous substances. Conversely, if tests performed by the contractors showed an absence of hazardous lead levels, the contractor could take the risk that the demolition work would not have to be done in accordance with the HUD Guidelines or the lead-based paint abatement specifications. Demolition debris would not have to be disposed of as hazardous materials if no lead-based paint was present at hazardous levels. The CIAP funds allotted per unit for demolition would not have covered even a fraction of the cost of lead-based paint abatement if all units were actually treated as having hazardous levels of lead-based paint. (Tr. 1104-1110, 1315-1316, 1344-1348.)

6) Mistick P.B.T., a Pennsylvania business trust, bid on the demolition contract for Burns Heights. Mistick understood the general specification for lead-based paint abatement to be a disclaimer by ACHA that there was a probability of lead and asbestos on site, but it was up to the contractor to find it, and to determine whether the levels were hazardous. If the levels were hazardous, ACHA would hold the contractor responsible for required containment protocols. Mistick's understanding of the contract and ACHA's understanding were the same. (Tr. 818-819, 1125-1127, 1315-1316, 1336-1337.)

7) The contract was advertised for bids twice, and Mistick bid both times. In between the two bid periods, Mistick performed paint inspections and rudimentary tests at Burns Heights to determine the real lead-based paint hazard risk. Based on those inspections and tests, it concluded that the level of lead in the paint on the plaster walls was not hazardous. This allowed Mistick to substantially lower its bid during the second bidding period. Mistick did not notify ACHA of the reasons for its lower bid during the second bid period. On December 1, 1992, Mistick was awarded the contract. (Exhs. JE2, R218A; Tr. 818, 855, 954. 958.)

8) On January 26, 1993, after contract award, Mistick conducted an air cassette monitoring pilot project on one building, which indicated that hazardous waste removal protocols would not be necessary because of the absence of hazardous levels of lead. ACHA was aware of the tests done by Mistick and the results. According to McLean and Robert Potts, the ACHA inspector, the test results

meant to both ACHA and Mistick that they would be proceeding with demolition without hazardous lead-based paint protocols because the units were "not hot," meaning they did not have hazardous levels of lead. If subsequent tests indicated a hazard, the protocols would be required. Mistick did not ask ACHA for permission to perform the demolition without hazardous lead-based paint protocols, but it was discussed with Robert Pacacha of ACHA, and ACHA acquiesced to this contract change without any objection. ACHA did not want to amend the written contract with Mistick because McLean was concerned that ACHA would somehow be giving up some of its contractual protection if it had to negotiate a formal change order, and Mistick never asked for a contract amendment. The contract documents were never amended to reflect the constructive changes to which both ACHA and Mistick agreed. (Tr. 601, 869-875, 975-978, 1164, 1190, 1193-1195, 1319-1321, 1333, 1335-1336, 1352-1354.)

9) Mistick took baseline blood tests of its workers who would be involved in demolition to determine whether lead levels were elevated during demolition. Mistick continued the blood tests on a regular basis during contract performance. None of the tests indicated to Mistick that it needed to follow protocols for hazardous levels of lead exposure during demolition. As each unit was completed, a "wipe test" would indicate whether the unit had any residual lead dust in it before it was reoccupied. None of the test results caused ACHA to require Mistick to change its performance from simple demolition to demolition with hazardous substance protocols. (Exh. R234; Tr. 978-980, 982-983, 985-986, 1116-1122.)

10) [redacted] Connor, a lead-based paint testing expert, concluded from the XRF test results taken by the Allegheny County Health Department, and also from a second set of XRF tests taken at four other units by another tester, PSI, in 1993, that there were no lead-based paint test results that conclusively indicated the presence of hazardous levels of lead-based paint at Burns Heights. The 1988 test results were either negative or inconclusive for the presence of lead-based paint. None were conclusive. The 1993 tests, taken in accordance with the HUD Guidelines and manufacturer's directions, showed conclusively that there was no lead-based paint at hazardous levels on the plaster walls of the units tested. Connor concluded from the 1993 data that there was no documented hazardous lead-based paint on the plaster walls at Burns Heights, because the project was believed to have a homogeneous paint history. Connor also evaluated other test data from Burns Heights taken before, during and after interior demolition at the project in 1992-1994, which included the air cassette sampling for lead, lead wipe tests for occupancy, and the blood tests. In Connor's expert opinion, all of these tests were

consistent with his opinion that there was no lead-based paint hazard at Burns Heights. He agreed with Mistick that all test results warranted simple demolition, rather than demolition with hazardous materials protocols. (Exhs. R233, R234; Tr. 1227-1229, 1231-1232, 1243-1250, 1269, 1288-1289.)

THE SUBCONTRACT FOR DEMOLITION

11) Once Mistick assured itself that interior demolition at Burns Heights would not require lead-based paint removal, it entered into a subcontract, dated March 1, 1993, with J&L Renovation Company (J&L) to do the basic interior demolition work. HUD was not a party to the subcontract. The subcontract required J&L to remove all plaster, lathe, insulation, nails, electrical wiring and devices, and remove all debris resulting from demolition from units, to be disposed of properly. Despite Mistick's belief that it would not encounter hazardous levels of lead during demolition, Schedule A of the subcontract also stated that "lead classes, blood testing and protective uniforms [were] to be provided by Mistick." (Exh JE3, JE4; Tr. 995, 998-1001.)

12) J&L, which ceased to exist in 1994, was a small, minority-owned and operated company that specialized in interior selective demolition. The President of J&L was Jimmie L. Furby; the Vice-President was Leon Sloan, Sr. Both Sloan and Furby have worked very hard to make a success of themselves, to give work opportunities to men who would find it difficult to get hired, and to give service to their community. Currently, Sloan owns and operates LS Renovations, and Furby works for him as an estimator. Furby negotiated the subcontract with Mistick and signed it on behalf of J&L. The subcontract incorporated by reference the general conditions of the prime contract "as applicable," and Addendums 1-5 of the prime contract. Furby assumed that there was no lead hazard when J&L subcontracted with Mistick to perform interior demolition without lead-based paint protocols, so he did not worry about the reference to lead classes and protective clothing in Schedule A of the subcontract. (Exh. JE3; Tr. 659, 751-755, 764, 772, 778-779, 1440-1444, 1464.)

13) Furby, Leon Sloan, and [redacted], the wife of Leon Sloan, discussed with Robert Mistick, Chief Operating Officer of Mistick, what J&L would and would not do under the subcontract before Furby received the written subcontract for signature. Furby admitted that the written subcontract required J&L to do certain tasks that it had notified Mistick that it would not do, but Furby assumed that the pre-contract discussions with Mistick would limit the effect of the written contract. J&L had given Mistick a written statement of company policy that outlined what general work items J&L would not do as a subcontractor, and considered that document to be part of the contract, despite lack of any formal incorporation of it into the subcontract. Mistick agrees that the parties to the subcontract intended that certain of the

specifications and requirements in the subcontract would have no effect, and that J&L's written statement of company policy was treated as part of the contract. (Exh. R33; Tr. 679, 764-765, 1002-1003, 1009, 1171-1173.)

14) Paragraph 3 of the General Conditions of the prime contract between ACHA and Mistick set out the obligations and limitations of subcontractors. HUD was not a party to the contract. The prime contract held Mistick "fully responsible" for the acts and omissions of its subcontractors. Paragraph 3(d) stated that "[n]othing contained in this contract shall create any contractual relation between any subcontractor and the PHA or HUD." The prime contract also required Mistick to insert appropriate provisions in all subcontracts "to bind subcontractors to the terms of the Contract Documents . . . and to required the subcontractor to assume toward the Contractor all the obligations and responsibilities which the Contractor . . . assumes toward the owner." (JE 2.)

15) The demolition specifications in the prime contract required the use of water sprinkling and temporary enclosures to limit the amount of dust and dirt rising and scattering in the air, and the removal of dust, dirt, and debris caused by demolition operations. The demolition specifications did not specifically require that debris removal be done at the end of each day, but the HUD Guidelines for abatement of lead-based paint, incorporated into the prime contract by reference, do require full daily site cleanup. The lead abatement specifications in the prime contract required that proper protective clothing and respiratory protection be used, that lead-based paint be removed in ways that would minimize the spread of lead particles and dust, and that containment barriers and proper work practices be followed to contain and control hazardous lead dust. (JE 1, JE 2.)

16) J&L rarely used barricades, water, or temporary enclosures to limit the amount of dust and dirt rising in the air during demolition, and Mistick did not insist that it do so, despite the contract and subcontract requirements. J&L employees generally did not wear protective clothing or respiratory protection. Demolition debris was left for days, and sometimes weeks, before it was removed. Despite the terms of the written subcontract between Mistick and J&L, Mistick agreed to do the required general cleanup each night. Mistick did not clean the worksite and secure buildings each night, as required by the contract with ACHA, nor did J&L. Demolition debris would sit in doorways and stairwells, so that doors could not be fully closed. The debris usually sat in units for at least a week while the asbestos subcontractor removed asbestos. The debris would have been a safety hazard to anyone who attempted to enter the buildings after working hours. (Exhs. G-73, G-82; Tr. 1327, 1361, 1363-1364, 1377.)

17) ACHA objected both orally and in writing to the lack of dust containment and poor cleanup during demolition. David J. McLean was first the Director of Planning and Development of ACHA, and then the Executive Director of ACHA, during the rehabilitation of Burns Heights. By letter dated March 7, 1994 to Mistick, McLean reminded Mistick that maintaining a clean and safe worksite was not a recommendation, but "an absolute contract requirement." McLean called attention to the contract requirements for dust control and cleanup. He further stated that site cleanup was an issue that "goes to public safety and to the dignity of public housing tenants and employees." As early as March, 1993, Robert Pacacha and Robert Potts, ACHA Construction Manager and Inspector, respectively, both wrote to Mistick to object to the failure to remove debris and secure buildings in a timely manner. Potts discussed the need for cleanup and dust protection with Sloan and Furby, as well as with Mistick employees. Potts considered the site to be very dangerous during demolition because there were doors left open at the end of the work day, and units had holes in the floors. Potts had directed Mistick in writing to remove debris on a timely, meaning daily, basis, and to secure units so that they were weather-tight at all times. Mistick was also repeately directed by Potts, orally and in writing, to have J&L water down plaster dust during transfer of demolition debris to refuse containers. Potts' memos to Mistick referred to the dust problem under the general heading of lead abatement, but it is clear from his testimony and the memos that he was concerned about dust as a general noxious condition of demolition, and not as a lead-based paint hazard. Potts copied none of these memos to J&L. (Exhs. G13, G16, G19, 34, 40, 45, 51, 53, 56, 69, 70; Tr. 570, 582-583, 588-589, 604, 609, 631-632, 1362.)

18) At no time, orally or in writing, did ACHA notify Mistick that it was not performing the demolition contract in accordance with the HUD Guidelines for Lead-Based Paint Abatement, and that it would have to do so. Despite problems with debris removal, demolition dust, and securing of buildings, ACHA treated the demolition contract as being acceptably performed. Likewise, Mistick treated the subcontract with J&L as being acceptably performed. (Tr. 612-613, 852-853, 1095-1097.)

DUMPING OF PLASTER CONSTRUCTION DEBRIS

19) On a number of occassions between September and November, 1994, Leon Sloan dumped plaster that had been removed from the demolished units at Burns Heights in a lot that was not an approved landfill. Under Pennsylvania law, only demolition debris that meets the definition of "clean fill" could be dumped at the site that Sloan used. As of 1988, plaster has not been defined by Pennsylvania environmental regulations as clean fill, but both Furby and Sloan believed that it met the definition of clean fill. J&L would not have dumped the plaster debris in an unapproved landfill if they had been aware of the change in state regulations.

Mistick compensated J&L for hauling the plaster debris and dumping it, but there is no indication the Mistick knew that the debris was being dumped in an unapproved site. The dumping stopped after Sloan was followed to the site and photographed. (Exh. G35, G39, G42, G47, G73, G83; Tr. 556-558, 710-712, 1015, 1161, 1402, 1406, 1445.)

20) In August, 1995, HUD accused Mistick and J&L of dumping hazardous construction debris in an unapproved landfill. When Robert Mistick received notice of HUD's accusation, he contacted Sloan to find out what he had dumped and where he had dumped it. Robert Mistick also contacted Kenneth Miller, Vice-President of Civil & Engineering Consultants, Inc., to verify what was permissible under Pennsylvania regulations. Miller informed Mistick that plaster was not considered clean fill in Pennsylvania, and Mistick already had been told by Sloan that he had been dumping plaster. Mistick engaged Miller to analyze the site where the plaster had been dumped, and to discuss the matter with the Pennsylvania Department of Environmental Protection (PDEP). (Tr. 1014-1019.)

21) Miller analyzed the site where Sloan had dumped the plaster. He also contacted Anthony Orlando, Manager of the Southwest Regional Office of PDEP, who informed Miller that the plaster should have been dumped in a permitted landfill. Miller described the dumpsite as covering an area 50 feet long about 70 feet from the road and about 300 feet from the Monongahela River, with the plaster covered with about 60 feet of soil and rock fill, and no seepage from the toe of the fill. Miller did not mention to Orlando that HUD suspected that the plaster debris contained lead-based paint. Based upon what Miller told Orlando, Orlando indicated to Miller that PDEP would not require that any action be taken by Mistick in regard to the plaster. Orlando did not have anyone from PDEP inspect the site until February or March, 1996, when he was visited by an agent from the HUD Office of Inspector General (OIG). Orlando did not visit the site himself, and he did not have core borings taken to determine whether the plaster dumped by Sloan contained lead-based paint. (Exh. G72; Tr. 551-555, 558-560.)

HUD'S DECISION TO SANCTION MISTICK AND J&L

22) Mistick and J&L came to the attention of HUD as a result of testimony at a hearing involving another contractor, Pan Building. HUD OIG auditor Mark Chandler and HUD attorney Dane Narode met with Andrew Maletta, a Pan Building official, to investigate Maletta's testimony that other contractors were doing demolition in violation of the HUD Guidelines applicable to abatement of lead-based paint, and that other contractors were dumping construction debris in unapproved landfills. Maletta named Mistick as one of these contractors, and produced photographs that he had taken at Burns Heights to document his charges. Chandler and Narode went to look

at the site where Sloan had dumped the plaster debris. Chandler observed paint chips scattered all over the site that looked like the paint chips that he had just seen on the ground at Burns Heights. Chandler and Narode were chased from the site by [redacted] Perrone, who was not the owner of the site, but held himself out as the owner. Perrone threatened to shoot off the heads of Narode and Chandler if they did not leave the property. Narode and Chandler obtained the contract documents for Burns Heights from ACHA, and visited the project. They took photographs and a videotape to document the physical conditions at the project during demolition, removal of demolition debris from the units with no containment of dust or paint chips, and Sloan taking construction debris to the dumpsite run by Perrone. Chandler also spoke with Furby by telephone to ask him whether J&L was dumping demolition debris in an unapproved site, and Furby denied it. (Exh. G73, G81A, G82; Tr. 100, 107-112, 115-122, 133, 153-158, 268-269, 511, 528.)

23) Chandler and Narode met with McLean at ACHA, but asked McLean only general questions because OIG agents had warned them that there might be a problem with ACHA and McLean. When Chandler asked McLean if lead-based paint abatement was part of the CIAP renovation project at Burns Heights, McLean told him yes. Chandler and Narode believed that McLean had confirmed that the demolition work had to be done under abatement protocols for lead-based paint. McLean does not deny that he told Chandler that the Burns Heights project involved lead-based paint abatement. He offered Chandler no explanation of his answer, despite the fact that he knew at the time when he talked to him that the demolition was not being done under lead-based paint abatement protocols because subsequent tests showed that there was not a lead-based paint hazard at the project. (Tr. 112-113, 264-265, 1333-1334.)

24) Based on the information collected by Chandler and Narode, OIG began an audit of ACHA. Much information was collected during the audit to confirm the information collected initially by Narode and Chandler. Before completion of the audit of ACHA, HUD made a determination that there had been serious irregularities in Mistick's and J&L's performance of the demolition contract. HUD believed that it had a legitimate interest in immediately suspending Mistick, J&L, Sloan and Furby, and proposing their debarments, based on the information it had, because it appeared to HUD personnel that there was ongoing dangerous exposure to lead-based paint debris at the project and at the dumpsite. This determination was based on the contract documents provided to HUD by ACHA, information from McLean, other ACHA staff, and Maletta; the photographs and videotape taken at Burns Heights and the dumpsite, the observations of Chandler and Narode, and the bizarre conduct of Perrone. By letters dated August 18, 1995, HUD suspended Mistick, Sloan, Furby, and J&L, and proposed their debarment for five years. (Exhs. R204, R205, R206, R214, R240; Tr. 111, 194-195, 202-203, 209-214, 219, 223, 234, 241-242.)

25) In late 1995, Mistick negotiated a settlement with HUD that resulted in its suspension being terminated. Under the terms of the settlement, Mistick would not be debarred, but it would indemnify HUD and ACHA with respect to any civil judgment arising out of the demolition activities at Burns Heights. In addition, the agreement provided that Mistick would pay ACHA $40,000 for landscaping and fencing at Burns Heights, and that Mistick would not "modify the terms of any future contract for lead-based paint abatement, funded by HUD, without the written approval of the party with whom Mistick has contracted." (Exh. R240.)

Discussion

Underlying the Government's authority not to do business with a person or entity is the requirement that the Government only do business with responsible persons and entities. 24 C.F.R. § 24.115. The term "responsible" as used in this context, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participants, as well. 48 Comp. Gen. 769 (1969). The test for whether debarment is warranted is present responsibility, but a finding of present lack of responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 11 (D.C. Cir. 1957); Stanko Packing Co. v. Berglund, 489 F. Supp. 947, 949 (D.D.C. 1980). The test for suspension is whether there was adequate evidence that cause for suspension existed when it was imposed and that immediate action was necessary to protect the public interest. 24 C.F.R. § 24.400(b). Debarment and suspension shall be used only to protect the public interest, and not for purposes of punishment. 24 C.F.R. § 24.115(b).

The Government bears the burden of proof that cause for debarment and suspension exists. 24 C.F.R. § 24.313(b). However, existence of a cause for debarment or suspension does not automatically require imposition of a sanction. All pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§ 24.115(d), 24.314(a), and 24.400(c). Respondents bear the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.313(b)(4).

J&L, Sloan, and Furby were participants and principals in a lower-tier covered transaction when they performed the demolition subcontract at Burns Heights because the rehabilitation of Burns Heights was financed with HUD CIAP funds. 24 C.F.R. §§ 24.105(m) and (p)(14). Thus, HUD may sanction them if there is cause and a public need to do so.

HUD withdrew one of the cited grounds for the debarment of Respondents because the hearing record made clear that the written contract documents on which HUD had relied in imposing the suspensions and proposing the debarments did not reflect the real

contractual agreements of the parties. HUD did not receive proof of the irrelevancy of many provisions of the written contracts, which had been alleged by Respondents, until the hearing, when it was confirmed by the ACHA witnesses.

The parties to the contracts had constructively changed the terms of the contract and subcontract because they all believed that it would not be necessary to do the demolition work under hazardous lead protocols unless further test results indicated a hazard. They based this common understanding on test results that indicated the absence of hazardous levels of lead-based paint. The test results in evidence, some taken repeatedly throughout contract performance, and the testimony of Patrick Connor, the expert witness presented by Respondents, convinced me that there was not a lead hazard present at Burns Heights that would have made lead-based paint abatement protocols necessary.

The Government has failed to prove the charge that Respondents performed improper cleanup of waste from the lead-based paint abatement process . There was no lead-based paint abatement process, and the cleanup element of the charge cannot be separated from the Government's assumption that what was to be cleaned up was hazardous lead-based paint waste. The cleanup done by J&L and Mistick may have been inadequate day-to-day, and it may even have posed a hazardous condition when it was not cleaned up promptly, but it was not hazardous because of high levels of lead, which is the basis of the Government's first cause for debarment.

The second charge is that Respondents improperly disposed of construction debris from the demolition work. The Government has carried its burden of proof that this occurred on more than one occassion over a three-month period in 1994. Respondents admit that Sloan, acting on behalf of J&L and with the full knowledge of Furby, transported plaster demolition debris from Burns Heights to an unapproved dumpsite, where he dumped it. Under the applicable Pennsylvania regulations, the plaster had to be dumped in an approved landfill. It was not defined as clean fill that could be dumped anywhere. Sloan and Furby believed that plaster was still considered clean fill in Pennsylvania in 1994, but the state had redefined clean fill to exclude plaster in 1988. I am persuaded by the record of this proceeding that Respondents would not have dumped plaster at the unapproved site if they had known of the change in the law.

I also cannot find that the plaster posed an environmental hazard. The Pennsylvania Department of Environmental Protection did not consider the plaster a hazard requiring remedial action, nor did it even consider core borings to determine the nature of the debris to be necessary. The location where the plaster was dumped was 300 feet from the nearest free-running water, in this case the Monongahela River, and it was covered with 60 feet of rock and soil by September, 1995. The Government charge does not

characterize the construction debris as hazardous, only that it was dumped improperly. However, implicit in the charge is a concern that the plaster debris was contaminated with lead-based paint.

If the plaster debris were covered with hazardous levels of lead-based paint, this would be a serious charge meriting debarment. However, in light of the lack of an environmental hazard and the unintentional violation of a state regulation which the state did not pursue, I cannot find that this cause for debarment, though proven, warrants debarment. If there had been evidence that Respondents had continued to dump plaster debris at unapproved dumpsites after they learned that it was not considered clean fill, I would be concerned with their present responsibility. However, on the basis of this record, I find no reason to draw a finding of lack of present responsibility from this past error.

The third charge, that Respondents had failed to adhere to contract requirements or HUD Guidelines with respect to allowing hazardous waste to be tracked outside of containment and allowing workers to perform abatement work without proper protection, was withdrawn by the Government at the end of the hearing. In many ways, this was the most serious charge, because it addressed both an environmental hazard allegedly created by Respondents and a deliberate violation of contractual and program requirements. This charge, if proven, would have warranted a substantial period of debarment. However, I agree with the Government that withdrawal of the charge was appropriate, based on the hearing record, and Government counsel acted professionally and responsibly in withdrawing the charge. While I am concerned that Respondents, Mistick and ACHA all acted outside the requirements of their written contractual agreements, and did not include those changes in the contract and subcontract documents, it is also clear that they were all in agreement on those unwritten constructive changes. This was why the Government withdrew the third charge. Nonetheless, this is an unprofessional, careless way to document contractual obligations funded with public monies, and it created the key misunderstanding that led to HUD's IOG audit of ACHA and the sanctions at issue in these cases.

Based on the causes for debarment cited by the Government and the hearing record, I find that debarment is not warranted as to any of the Respondents. There is no public purpose to be served in debarring them for the plaster dumping; it would be punitive only, which is not permitted by the regulations. 24 C.F.R. § 24.115(b). The need for any public protection from Respondents has been sufficiently met by their suspension. They are now aware of the change in the state dumping regulations, and will be more attentive in the future to changes in laws and regulations that apply to them.

Respondents argue that their suspensions should be voided ab initio because HUD knew or should have known that there was not adequate evidence of one or more causes for suspension, and even if there were, there was no need for immediate action because the public was in no way imperiled by Respondents. I disagree. HUD took action based on its understanding of the contractual requirements that governed the performance of Respondents, observations of HUD employees, and information provided to it that was confirmed upon investigation. ACHA had indicated to HUD that the rehabilitation of Burns Heights involved abatement of hazardous levels of lead-based paint. When McLean was asked by Chandler if there was lead-based paint abatement going on at Burns Heights, he gave a grossly misleading answer that set the wheels of the OIG audit rolling. HUD personnel saw a demolition job being done with no regard for containment of debris, which they believed to be hazardous, based on McLean's statement and the contract documents. Steve Perrone's violent threats to Narode and Chandler understandably raised HUD's concerns about the dumping to very serious levels, and HUD employees observed and photographed the dumping by Sloan. The contract documents made frequent reference to the need for lead-based paint abatement protocols. This was true of both the prime contract and the subcontract. The Government's suspension action was based on the information available to it when it imposed the sanction. That information overwhelmingly supported the need for immediate action, because it appeared as if Respondents had acted in deliberate disregard of their contractual obligations and HUD program requirements, and that there were health hazards implicit in those actions.

The fact that this information, as reliable as it appeared, was revealed at the hearing to be fatally flawed as to the real, though unwritten, contractual agreements, does not invalidate the suspension of Respondents. Even if there were not hazardous levels of lead present at Burns Heights, the written contract documents required that Mistick treat the job as though there were, and neither Mistick nor J&L would have had the right to unilaterally change contract performance requirements if ACHA had not agreed, or at least acquiesced, to those changes. ACHA's agreement was key. Without it, Respondents' conduct would have been seriously lacking in responsibility. Based on the information provided to HUD up to the fourth day of the hearing, when McLean's testimony clearly took the Government by surprise and changed the case, HUD had adequate evidence that not only was there cause for suspension, but that immediate action to protect the public interest was a prudent reaction to that evidence. The suspension was properly imposed against Respondents.

Conclusion

For the foregoing reasons, it is my determination that debarment of Respondents Leon Sloan, Sr., Jimmy L. Furby, and J&L Renovation Company is not warranted or necessary, based on the causes cited, to protect the public interest, and their suspensions shall be terminated as of this date.

Jean S. Cooper
Administrative Judge