

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D. C.

In the Matter of :
 :
 ELDON WILLIAMS and ELFLO, INC.: HUDBCA No. 79-380-D30
 : (Activity No. 79-641-DB)
Appellant :

Mr. Eldon Williams
Elflo, Inc.
Route 2, Box 729
Arnold, Missouri 63010

For the Appellant, Pro Se

Joseph Bacus, Esquire
HUD Office of Area Counsel
210 North 12th Street
St. Louis, Missouri 63101

For the Government

and

Gerald S. Robinson, Esquire
Office of General Counsel
Department of Housing and
Urban Development
Washington, D.C. 20410

DETERMINATION

Statement of The Case

By letter dated March 9, 1979, Appellant Eldon Williams was notified that the Department of Housing and Urban Development intended to debar him, Elflo, Inc. and affiliates from participation in HUD programs for a period of five years. The grounds for debarment are willful violations of a regulatory agreement applicable to the Meramec Heights Apartments, HUD Project No. [REDACTED], and a lack of responsibility of such a serious nature as to warrant debarment. Specifically, Appellant is charged with retention of rent payments and wrongful use of sewage facilities belonging to the Meramec Heights Apartments. Appellant has been subject to a temporary denial of participation (TDP) in the St. Louis region since November 29, 1978 for the same reason that HUD now intends to debar him.

Appellant filed a request for a hearing on the proposed debarment but failed to appear at the hearing held in St. Louis, Missouri or give notice of the reason for his failure to appear. The Government presented its case on the record and Appellant was provided with a copy of the transcript of hearing. No response or written submission has been received from Appellant to date. This determination is therefore based on the record established at the hearing by the Government.

ISSUE PRESENTED

Whether Appellant's actions as mortgagor and general contractor for the Meramec Heights Apartments constituted willful failure to perform in accordance with the provisions of the regulatory agreement and whether this failure to perform demonstrated such a lack of responsibility as to justify debarment.

APPLICABLE REGULATION

The departmental regulation applicable to debarment, 24 C.F.R., Part 24, provides in pertinent part:

§24.4(f) "Contractors or grantees." Individuals . . . that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources including, but not limited to, borrowers, builders, mortgagees. . .; all participants or contractors with participants, in programs where HUD is the guarantor or insurer;. . .

* * *

§24.6 Causes and conditions applicable to determination of debarment.

(a) Causes.

(3) Violation of contract provisions, as set forth below, of a character regarded by the Department to be so serious as to justify debarment action:

(i) Willful failure to perform in accordance with the the specifications or within the time limit provided in the contract.

(4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.

Findings of Fact

Appellant is the president of Elflo, Inc., former owner and mortgagor of the Meramec Heights Apartments, HUD Project No. [REDACTED] (Government Exhibit #11, 19). Elflo Inc. entered into a Regulatory Agreement for Multi-Family Housing Projects with HUD-FHA on May 17, 1971 in consideration for HUD's insurance of the mortgage on Meramec Heights Apartments. (Gov't. Ex. #11).

The Regulatory Agreement provides that no distribution may be made of personal property of the project, including rents, except for surplus cash, and then only with the prior written approval of the Secretary of HUD. (Gov't. Ex. #11, Para. 6). Evidence was presented that at least five tenants of the Meramec Heights Apartments occupying units between June, 1976 and February, 1977, continued to pay rent to Appellant through Elflo, Inc. and AMICO, the project manager, after the mortgage was in default. (Gov't Ex. #3, 9, 10). An Occupancy Schedule submitted by Elflo, Inc. dated February 10, 1977, corroborates that rents were collected by Elflo after default. (Gov't Ex. #7). At the time of conveyance of the project to HUD in February, 1977, no rent receipts or tenant security deposits were conveyed to HUD (Gov't. Ex. #3, Tr. 10,11). The HUD Realty Specialist assigned to the Meramec Heights project attempted to contact Appellant on numerous occasions for an explanation of the disposition of the rents and security deposits, but Appellant failed to return her calls or answer her letters (T. 12). No funds have ever been turned over to HUD or otherwise accounted for by Appellant since February 14, 1977. (T. 10, 15). The Realty Specialist testified that, based on her knowledge and observation of the physical condition of the project, these funds were not turned over to the project for its benefit. (T. 23, 34).

In the absence of a clear showing that such monies were used for the project, particularly those monies collected after default on the mortgage, I find that the property of the project was wrongfully distributed in contravention of the Agreement. Therefore, I find that Appellant violated Paragraph 6 of the Regulatory Agreement.

Appellant is also charged with wrongful use of the sewage facilities of Meramec Heights Apartments. Appellant was given a construction permit to build sewage facilities for the

exclusive use of the project (Gov't Ex. #15). The sewage facility is covered by the HUD insured mortgage (Gov't Ex. 13). Appellant thereafter executed an easement on April 22, 1971, granting the Eldon Williams Construction Company use of the project's sewage facilities for an adjoining dental office not related to the project. (Gov't. Ex. #16). The easement was not recorded until April 7, 1977 when HUD had acquired title to the project (Gov't Ex. #17). The Title Insurance Policy did not reflect the easement for the sewer line when the property was transferred to HUD (Gov't. Ex. #8) and HUD was unaware of the easement until it tried to sell the project (T. 29).

The easement was further concealed by false certifications on a series of documents executed between 1971 and 1975. After the easement was executed in April, 1971, Appellant executed a deed of trust covenanting that Elflo, Inc. had good title to the project free of any encumbrances (Gov't Ex. #18). On May 24, 1975 he executed a Mortgagor's Certification certifying that the premises were free and clear of all liens (Gov't. Ex #19). Likewise, he executed a Request for Final Endorsement which also certified the property was free of all liens. This certification was executed on February 6, 1973 (Gov't. Ex. #20).

It is clear that the sewage treatment facility was part of the mortgaged property insured by HUD. The easement which operated without formal recordation for six years was clearly an encumbrance on the property. Recordation revealed the encumbrance to HUD when it became the owner some six years after the encumbrance was secretly created. I find that Appellant has violated Paragraph 6(a) of the Regulatory Agreement, which provides that the owners shall not "convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of such property" without the prior written approval of the Secretary of HUD (Gov't Ex. #11).

DISCUSSION

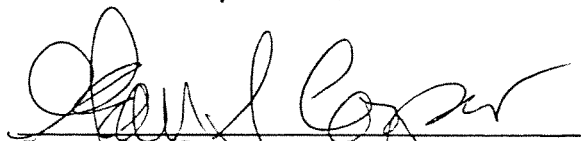
Debarment is not a penalty but a sanction to protect the Government and the public from doing business with contractors and grantees who are not responsible. 24 C.F.R. §24.0. Appellant, as president of Elflo, Inc., is clearly a "contractor or grantee" within the meaning of the regulation applicable to debarment because he is a borrower receiving HUD funds indirectly through the mortgage insurance program and is a participant in a program in which HUD is the guarantor. Appellant perpetrated blatant violations of the Regulatory Agreement.

Even if Appellant was not aware that as a legal matter the easement constituted an "encumbrance" on the property, which would explain his numerous certifications as to clear title, his recordation of it after title passed to HUD shows that he knew he had to record it to preserve its status upon the passing of title. Appellant breached the Regulatory Agreement by granting the easement without revealing it to HUD or getting prior permission.

Therefore, I find that Appellant's violations of the Regulatory Agreement over a period of time constitute a lack of responsibility of a sufficiently serious nature to warrant debarment. The fact that funds remain unaccounted for and the property was encumbered are more than trivial acts. However, because of lack of a clear showing of fraud and willful intent, the facts of this case do not support a five year period of debarment. Appellant has already been temporarily denied participation in HUD programs for one year. Consequently, debarment from this date up to and including December 1, 1982 is sufficient to protect HUD and the public.

CONCLUSION

For the foregoing reasons and based on the record in this case, Appellant and Elflo, Inc. shall be debarred from this date up to and including December 1, 1982.



Jean S. Cooper
Administrative Judge
HUD Board of Contract Appeals

Issued at Washington, D.C.
on December 28, 1979