

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

In the Matter of

ED GUILFOYLE, JR.
and ED GUILFOYLE
REALTY, INC.

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: HUDBCA Docket No. 80-524-D55
: (Activity No. 80-713-DB)
:
:

Ed C. Guilfoyle, Jr.
President,
Ed Guilfoyle Realty, Inc.
9410 Kenwood Road
Cincinnati, Ohio 45242

For the Appellants, pro se

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Washington, D. C. 20410

For the Government

DETERMINATION

Statement of the Case

By letter dated April 2, 1980, Ed Guilfoyle, Jr. and Ed Guilfoyle Realty, Inc., "Appellants" herein, were notified by the Area Manager of the HUD Ohio Area Office that they were being temporarily denied participation in HUD programs for a period of one year pursuant to 24 CFR §24.18 for alleged business irregularities in the Department's §203(b) mortgage insurance program. Specifically, the temporary denial of participation (TDP) was based on allegations that Appellants submitted 1) a false certification to HUD reflecting that gutters and downspouts had been replaced on a property for which HUD was considering mortgage insurance, and 2) gave false information to HUD concerning the income and employment of applicants for mortgage insurance.

By letter dated April 7, 1980, Appellants requested a hearing on the TDP. After an informal hearing, the Area Manager reduced Appellants' temporary denial of participation to six months. Appellants requested a hearing pursuant to 24 C.F.R. §24.7 on the decision of the Area Manager. A hearing was held in Cincinnati, Ohio on July 14, 1980 to determine whether the six-month temporary denial of participation of Appellants should be upheld.

APPLICABLE REGULATION

The departmental regulation applicable to a temporary denial of participation, 24 C.F.R. §24.18, provides in pertinent part, as follows:

§24.18 Temporary denial of participation; conditional denial

(a) Causes and conditions under which a temporary denial of participation may be invoked.

(1) An Area Director, Insuring Office Director or Regional Administrator may issue an order which denies the participation in Department programs of a contractor or grantee.

(2) Causes for denial of participation shall include:

(i) Adequate evidence that approval of an applicant for insurance would be an unsatisfactory risk;

(ii) Adequate evidence of irregularities in contractor's or grantee's past performance in a Department program; and

(iii) Failure of a contractor or grantee to maintain prerequisites of eligibility to participate in a Department program.

(iv) Causes under §24.13(a).

(3) Period and scope of temporary denial of participation.

(i) A denial of participation is limited to the program under which the offense occurred.

(ii) Denial of participation shall be for a temporary period pending correction or dismissal of the grounds for the denial, demonstration by the contractor or grantee that it is in the best interest of the Government to resume business with such contractor or grantee, or completion of an investigation and such legal proceedings as may ensue.

The regulation provides that the causes for suspension pursuant to §24.13(a) may also be causes for imposition of a TDP. 24 C.F.R. §24.13(a) provides as follows:

§24.13 Causes and conditions under which contractors or grantees may be suspended.

(a) The Assistant Secretaries may, in the interest of the Government suspend a contractor or grantee:

* * *

(2) For other causes of such serious and compelling nature, affecting responsibility as may be determined in writing by the appropriate Assistant Secretary to warrant suspension. Among such causes are cases where the contractor or grantee is suspected, upon adequate evidence of--

(i) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance or guarantee or to the performance of obligations incurred pursuant to a grant of financial assistance or conditional or financial commitment to insure or guarantee.

(ii) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.

The definition of "Contractors or grantees" at 24 C.F.R. §24.4(f) provides as follows:

(f) "Contractors or grantees." Individuals, state and local governments and public or private organizations 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, real estate agents and brokers, area management brokers, management and marketing agents, or those in a business relationship with such recipients including, but not limited to, consultants, architects, engineers and attorneys; all participants, or contractors with participants, in programs where HUD is the guarantor or insurer; and Federally assisted construction contractors.

Findings of Fact

Appellant Ed Guilfoyle, Jr. is a licensed real estate broker and agent in Cincinnati, Ohio (Tr. 64). He is president of Ed Guilfoyle Realty, Inc. (EGR) (Tr. 65). EGR owned properties located at [REDACTED] Wasson Road (Tr. 65), [REDACTED] St. Lawrence (Tr. 78), and [REDACTED] Dixmont (G-6), all in Cincinnati, Ohio. The property located at Wasson Road was purchased by [REDACTED] Ward and [REDACTED] Nikolychek with a mortgage insured by HUD-FHA (Tr. 83). [REDACTED] Gemmer attempted to purchase the St. Lawrence property with a mortgage insured by FHA but their application was rejected twice (G-22, 24). [REDACTED] Perry attempted to purchase the property located at Dixmont with a mortgage insured by FHA but his application for mortgage insurance was rejected (G-11, 12). In each of the three transactions, the Government has charged Ed Guilfoyle, Jr. and EGR with making false statements to induce FHA to either approve an application for mortgage insurance (St. Lawrence and Dixmont) or to go to closing on a property for which it had made a firm commitment predicated on the completion of certain repairs (Wasson Rd.).

1) [REDACTED] Wasson Road

The property located at [REDACTED] Wasson Road was purchased by EGR on September 23, 1976 (G-26). Thereafter, on January 1, 1977, EGR entered into a purchase agreement to sell the Wasson Road property to [REDACTED] Ward and [REDACTED] Nikolychek (G-27). A second purchase agreement was entered into by the same parties on February 24, 1977 (G-30). Both Ward and Nikolychek applied for a mortgage insured by HUD-FHA (G-32, 33) and FHA issued a firm commitment for mortgage insurance on April 11, 1977 (G-34). Attached to the firm commitment as an addendum was a requirement that the seller, EGR, submit with the closing documents a certification signed by the seller stating it paid at least \$10,000.00 in repairs on the property (G-35). A list of required repairs was attached (A-8).

On March 3, 1977, a roofing inspector had inspected the property on behalf of HUD (Tr. 67). He found certain deficiencies on the property requiring correction (G-31). Attached to the inspection report was a list of repairs that the seller was required to make. The list provided as follows:

1. Remove all present roof covering from main roof and rear porch roofs and side roofs. Install new 240# shingles over all areas. Complete with all new flashing.

2. Replace all rusted downspouts and elbows.
3. Replace all gutters on house.
4. Paint all new metal.

The report also contained a handwritten directive signed by "Boyle" to "comply with the above-listed repairs and submit a certification from the contractor performing the required work". Boyle was not the inspector and no evidence was offered as to his identity (G-31).

The list of repairs on the addendum to the firm commitment (A-8) varied somewhat from the list of repairs on the inspection report. The addendum repair list provided, in pertinent part, as follows:

1. Replace all damaged or deteriorated sections of gutters and downspouts.
2. At closing, submit standard roofing certificate signed by contractor performing work required above. Certify to condition of roof, gutter and downspouts.

Ed Guilfoyle, Jr. hired Steven Gemmer, of S & T Odd Job, to perform the repairs on the property (Tr. 67). Guilfoyle told Gemmer to see that the work was done in compliance with the FHA repair list (Tr. 67). Gemmer prepared a roofing certificate signed by him, certifying that he had completed all of the roofing work (G-36). A second page with typing was attached to the certification, stating that all rusted downspouts and elbows had been replaced, all gutters had been replaced, and all new metal was painted (G-36). On April 25, 1977, Appellants paid Gemmer \$1,045.00 for the new roof, gutters and downspouts (A-1). Guilfoyle gave Gemmer's certification to EGR's attorney to present at the closing (Tr. 70-71).

Guilfoyle admitted that he did not verify the repairs certified to by Gemmer at the time when Gemmer presented the certification to him (Tr. 84, 93). Ordinarily, EGR had an employee whose duty it was to verify repairs before payment, but in this instance Guilfoyle was not sure that it was done (Tr. 91). He relied on Gemmer's certification because in the past Gemmer's work had been satisfactory (Tr. 220).

Ed Guilfoyle, Jr. had previously certified on January 28, 1977 that all damaged or deteriorated sections of gutters and downspouts had been replaced at a cost to Appellants of \$625.00 (G-28). This certification pre-dated the conditional commitment of February 17, 1977 (G-29). There is a conflict in the evidence as to when the repairs were made and how much they cost. However, there is no assertion by Appellants that the repairs were made prior to February 17, 1977. [REDACTED] Ward testified that the repairs had not been completed as of the date of closing. Ed Guilfoyle, Jr. testified that approximately two days before the closing (Tr. 213) he accompanied a HUD inspector named Horatio Pickett (Tr. 206) at a final inspection before closing (Tr. 213). Pickett required that storm windows and doors be provided (Tr. 207). Guilfoyle did not recall that the inspector had made any mention that the roof, gutters, or downspouts had not been repaired (Tr. 214). Appellant and Pickett both looked at the outside of the house but did not climb on the roof to inspect the box gutters (Tr. 93, 215-217). Downspouts were visible and Guilfoyle did not see any split downspouts or ones with makeshift repairs (Tr. 219-220).

On April 22, 1977, the sale of the property was closed (Tr. 66, G-37, 38). Guilfoyle testified that many months later he was called by Len Hampshire, the head appraiser for FHA (Tr. 73, 102). Hampshire was calling about a complaint from George Ward that gutters and downspouts had not been replaced (Tr. 73, 74). Guilfoyle told Hampshire that Ward had transferred the mortgage from FHA to conventional financing and Hampshire and Guilfoyle agreed "not to worry about it". According to Guilfoyle, this was the first notice he had that the gutters and downspout might not have been repaired or replaced. (Tr. 74). He denied that [REDACTED] Ward had notified him of this previous to Hampshire's call (Tr. 73). Ward testified that he remembers discussing the gutter and downspout problem with Ed Guilfoyle by telephone about two months after closing (Tr. 117, 118). He testified that Guilfoyle told him that work had been contracted out to S & T Odd Jobs, and Ward should get satisfaction directly from the contractor (Tr. 118).

Guilfoyle testified that there is a year's warranty on any repairs performed and if Ward had called him within a year, he would have made Gemmer correct the repairs (Tr. 108). Guilfoyle did not attempt to get Gemmer to correct the repairs (Tr. 103). He testified that he did nothing to back up his warranty because Hampshire of the FHA was "not concerned" (Tr. 103). An investigator from the Office of the Inspector General interviewed Guilfoyle on February 13, 1980 (Tr. 166). The inspector testified that Guilfoyle told him that Ward had talked to him (Guilfoyle) about the gutters and downspouts but Guilfoyle had informed him that the repairs were Gemmer's responsibility (Tr. 167). This statement corroborates the testimony of [REDACTED] Ward that Ward did discuss the matter with Guilfoyle and Guilfoyle stated the responsibility was Gemmer's.

I find that Guilfoyle was notified by [REDACTED] Ward approximately two months after closing that the gutters and downspouts had not been repaired, as certified. Even if Guilfoyle had been reasonable in relying on the certification prior to notification of problems, when Ward called him he had a responsibility to make sure that the repairs were made pursuant to his warranty and certification. This notice predated Guilfoyle's conversation with Mr. Hampshire of FHA by many months. Appellants had a duty to either make sure that Gemmer corrected his work or to hire another contractor. Appellants did neither of these things.

The record supports a finding that Ed Guilfoyle, Jr. and EGR falsely certified repairs to FHA in February, 1977 to induce it to make a conditional commitment. However, the record is less clear that final commitment or closing were likewise affected. Guilfoyle clearly relied on Gemmer's certification because he paid him for the work. While Guilfoyle should have been more careful in verifying Gemmer's certification, he was only required to obtain a certification from the contractor that the work had been done (G-31). However, as the seller, EGR had an obligation to the purchasers and FHA to correct and repair deficiencies when it knew or should have known the repairs were not done as certified. Guilfoyle testified that in the future he would verify all repairs before certification to avoid a repeat of the problems with the Wasson Road property (Tr. 212).

2). ██████████ 4 St. Lawrence Avenue

EGR purchased the property located at ██████████ St. Lawrence on November 21, 1978 (G-14). On December 26, 1978, Ed Guilfoyle, on behalf of EGR, entered into a purchase agreement with ██████████ Gemmer to sell the property (G-15). Guilfoyle was the broker in the sale (Tr. 80).

The Gemmers applied to FHA for mortgage insurance (Tr. 81, 82). Steven Gemmer listed his employment on the application as "foreman, S & J Enterprises" (G-20). On December 28, 1978, the mortgagee requested a verification of employment of Steven Gemmer from S & T Enterprises, 314 9th Street, Dayton, Kentucky. The request for verification was signed by Steven Gemmer. Steven Gemmer listed his home address as the same address given for S & T Enterprises. The verification was filled out and signed by "John Williams, Owner" on January 3, 1978 (G-17). The Credit Bureau was not able to verify Gemmer's employment with S & T Enterprises because it could find no listing for the company (G-18). On February 21, 1979, HUD prepared a Report on Application stating that Gemmer did not have sufficient income from a "reliable source" to support the mortgage (G-22). By letter dated February 27, 1979, Gemmer wrote that he was an independent remodeling and repair contractor who did most of his work for Appellant and that he had enough work from Appellant and other individuals "to keep us busy for the next year" (G-23). Gemmer had also submitted financial statements for S & T Enterprises for 1975-1978 (G-25). On March 5, 1979, HUD-FHA again decided not to insure the mortgage (G-24).

At the time of Gemmer's application for mortgage insurance, he was on the payroll of EGR (Tr. 82). Gemmer was employed by EGR from May 26, 1978 through April 9, 1979 (Tr. 83). However, he did other jobs in addition to his employment with EGR (Tr. 82). Gemmer had failed to list EGR as his employer on the application for mortgage insurance (G-20). EGR was never asked to verify Gemmer's employment because Gemmer did not list EGR as his employer (Tr. 90, 100). Guilfoyle testified that he had no idea why Gemmer filled out his application in the manner he did (Tr. 86). However, Guilfoyle testified that, to his knowledge, S & T was Gemmer's business (Tr. 87). He also testified that to his knowledge, S & T Odd Jobs and S & T Enterprises were the same entity (Tr. 87, 179). He did not remember calling John Nienabor at HUD on or about March 5, 1979, stating that he could verify the existence of S & T Enterprises (Tr. 82). However, he admitted that it was possible (Tr. 82). This would have occurred about the time that HUD rejected Gemmer's application for the second time. Guilfoyle apparently did not volunteer the information that Gemmer was on the EGR payroll.

The evidence in the record does not support a finding that Ed Guilfoyle made a false statement to HUD concerning the employment of [REDACTED] Gemmer. In Guilfoyle's mind, S & T Enterprises was the same as S & T Odd Jobs, a company to which he had written many checks (A-1, Tr. 85). Furthermore, the letter written by Gemmer and the financial statement for S & T Enterprises submitted by Gemmer in response to FHA's questions bear out Guilfoyle's belief that S & T Enterprises existed. I find that the Government has failed to produce evidence that Ed Guilfoyle or EGR made a false statement to HUD-FHA to influence its decision to approve Gemmer's application. Any false or misleading information was generated by Gemmer himself on the application for mortgage insurance.

3. [REDACTED] Dixmont

EGR purchased the property at [REDACTED] Dixmont on September 8, 1977 (G-1). On November 11, 1978, EGR entered into an agreement to sell the property to [REDACTED] Perry (G-5). [REDACTED] Perry applied for FHA financing and on the application for FHA mortgage insurance, [REDACTED] Perry listed his employer as "S & T Enterprises" (G-9). [REDACTED] Gemmer signed the verification of Perry's employment at S & T Enterprises on November 15, 1978 (G-8). Gemmer verified that Perry was a Supervisor-Foreman and signed the verification as "owner" (G-8). S & T Enterprises had withheld taxes and Social Security from Perry in 1977 and 1978, and submitted the information on Perry's W-2 forms for those years (G-10). The HUD Report on Application reflects that one of the reasons Perry's application was not approved was because S & T Enterprises was not listed in the telephone book (G-11).

[REDACTED] Perry had been hired by EGR as an independent contractor to clean up four yards (Tr. 88, 99). EGR never received a request for verification of employment for Perry (Tr. 99). [REDACTED] Gemmer had told Ed Guilfoyle that Perry worked for him at S & T (Tr. 87). Guilfoyle had only met Perry three times in his life (Tr. 99).

The Government has presented no evidence that Guilfoyle or anyone else at EGR made any statement, let alone a false one, to HUD-FHA concerning Paul Perry's employment. Therefore, the Government's charge in regard to this transaction is not supported.

DISCUSSION

The purpose of a temporary denial of participation is essentially the same as the purpose of the sanctions of suspension and debarment, namely, to assure the Government that "... contracts awarded by the Department and by those entities with whom it does business be made only to those contractors and grantees which can demonstrate that Government funds will be properly utilized." 24 C.F.R. §24.0. To further that policy, the Government must ascertain " ... that awards be made only to responsible contractors and grantees." Ibid.

"Responsible contractor" and "responsibility" are terms of art in Government contract law. "Responsibility" has been defined as more than the mere ability to perform a contract. It includes the honesty, integrity, and reliability of the contractor. 34 Comp. Gen. 86 (1954); 49 Comp. Gen. 132 (1969).

There is no doubt that Appellants Ed Guilfoyle, Jr. and Ed Guilfoyle Realty, Inc. are "contractors or grantees" within the meaning of the regulation applicable to a temporary denial of participation because the regulation applies to "real estate agents and brokers." Furthermore, Appellants were participants in a program where HUD was the guarantor or insurer and received HUD funds indirectly from the sale of properties financed with FHA mortgage insurance. 24 C.F.R. §24.4(f).

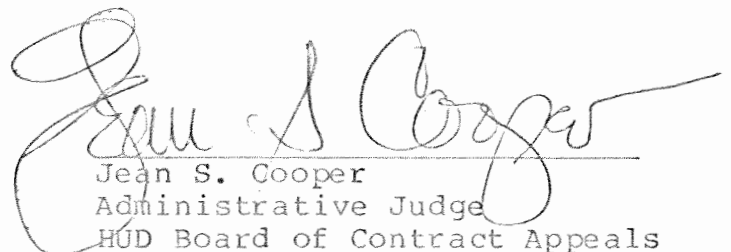
The issue presented is whether Appellants acted in a responsible manner in certifying to repairs and if they were liable for repairs to which they had certified. I find that Appellants did not act with responsibility in certifying that gutters and downspouts had been repaired in February, 1979. HUD clearly relied on that certification in making a conditional commitment for mortgage insurance. Furthermore, if Appellants were liable for the repairs and did not correct the repairs when they found the repairs were not performed properly, this failure to repair and failure to correct is a ground for a TDP because it was an obligation incurred as an incident of mortgage insurance. 24 C.F.R. §24.18(a)(I)(iv) and 24 C.F.R. §24.13(a)(2)(i). I find that Appellants had an obligation to the buyers and FHA to verify the repairs as best they could because FHA's decision to allow the sale to go to closing with mortgage insurance was predicated on the repairs being completed.

Ed Guilfoyle testified that the seller warrants the repairs for one year. Even if Appellants submitted Gemmer's repair certification for gutters and downspouts in good faith, when notice was given that the repairs were not acceptable, Appellants had an obligation to correct the repairs. This was not done. Ed Guilfoyle admitted that he should have verified the repairs when they were completed. This would have been the most responsible course of conduct. However, Appellants compounded the problem by doing nothing to correct the repairs or otherwise stand by their warranty when they knew or should have known that the repairs were not performed as certified. This double failure, in addition to the false repair certification submitted prior to the conditional commitment, shows a lack of business responsibility justifying a temporary denial of participation.

The Government's allegations concerning the transactions with the Gemmers and Mr. Perry were not supported by evidence in the record and were not considered in the decision to uphold the TDP.

CONCLUSION

Based on the evidence in the record considered as a whole, I find that the temporary denial of participation of Ed Guilfoyle, Jr. and Ed Guilfoyle Realty, Inc. for a period of six months is in the best interest of the Government and is in accordance with law.


Jean S. Cooper
Administrative Judge
HUD Board of Contract Appeals

Issued at Washington, D. C.
September 25, 1980.