

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

Washington, D. C.

In the Matter of:

ROBERT C. DELMARCO and  
DELMARCO PLUMBING AND HEATING

HUDBCA No. 83-777-D19

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For the Government

DETERMINATION

Statement of the Case

By letter dated August 27, 1982, Edmund R. Davis, Area Manager, HUD's New York Area Office, advised Robert C. Delmarco, Delmarco Plumbing, ("Delmarco" or "Appellant") that he was subject to a Temporary Denial of Participation ("TDP") for one year ending August 26, 1983. The TDP extended to HUD's Single Family Property Disposition programs under the National Housing Act, 12 U.S.C. §1701 et seq., as amended, within the jurisdiction of the New York Area Office.

Delmarco requested a hearing by a letter to Davis dated September 9, 1982. Subsequent to an informal hearing with Delmarco conducted by HUD officials on October 21, 1982, Davis issued a letter dated November 18, 1982, affirming the TDP pursuant to 24 C.F.R. §24.18. From that notice, the Appellant by letter of counsel dated December 3, 1982, made a timely request for a hearing in accordance with 24 C.F.R. §§24.18(a)(5)(iv). The hearing, at which Delmarco was represented by counsel, was conducted in New York City on March 17, 1983. This determination is based upon the record of that proceeding and the briefs submitted by the parties.

The Appellant's Motion at the close of the Government's case in chief is treated as a Motion to Dismiss on the grounds that Government did not prove a prima facie case or, in the alternative, for summary judgment, and is hereby denied. The Government's Motion for leave to file its brief out of time, being unopposed, is hereby granted. The Government's Motion to supplement the record after the hearing, being opposed by Appellant, and there having been no reservation or sufficient showing of cause, is hereby denied.

### Findings of Fact

1. Robert C. Delmarco, as lowest bidder, was awarded contract Number [REDACTED] ("the repair contract") for repair of [REDACTED] Van Buren Street, Freeport, New York ("the premises") on December 29, 1981, by Contracting Officer Leonard Duany, of HUD's New York Area Office. The contract was for the general rehabilitation, alterations, and repairs, including heating, plumbing, and electrical systems, of a one-to-four family dwelling unit for a total lump sum bid price of \$8,444.00. (Exh. G-17.) Delmarco's performance under that contract is not material to this determination, except insofar as the repair contract should be construed to provide for the "activation" of the property in connection with its sale by HUD. Delmarco was ordered to "activate" the premises on June 30, 1982 (Exh. G-5). Subsequent to the activation, Delmarco submitted invoices for the activation in the amount of \$365.00 for a stove and \$510.50 for other labor and materials connected with the activation (Exh. G-12, G-13).

2. In its original notice of the TDP addressed to Delmarco, dated August 27, 1982, the Area Manager, Edmund R. Davis, advised him that "The specific reason for the imposition of this sanction by the New York Area Office is: the submission of questionable invoices for purchases of a range, mailbox, house number, 2 lock sets, 1 exterior lock, 4 splash blocks, and a dump fee for the HUD property located at [REDACTED] Van Buren Street, Freeport, N. Y." The date of expiration of the TDP, as corrected, was August 26, 1983. (Exh. G-1.)

3. The November 18, 1982, letter affirming the TDP after the informal hearing conducted at Appellant's request on October 21, 1982, gave notice of the following grounds for the Government's action:

(1) Mr. Delmarco attempted to activate the property without permission from either HUD or the property owner.

(2) Mr. Delmarco submitted two invoices to HUD totalling \$876. His cost as reflected in the bills presented at the hearing was \$430. Mr. Delmarco's profit was 100%, although according to a July 5, 1982 invoice from Delmarco Plumbing, the profit and overhead were listed at 35%.

(3) Mr. Delmarco was outspoken about his unwillingness to comply with the HUD requirements that activation of properties, equipment and labor be itemized in invoices and that flat fees were not acceptable. The requirements were spelled out in the August 11, 1982 letter from the Contracting Officer to all contractors:

"It has come to the attention of the contracting officer that some contractors have paid nominal amounts to homeowners to purchase and install new ranges and have then submitted bills for the standard allowed price.

"This practice is unacceptable. When discovered, the invoice will be reduced to the amount paid to the homeowner and the case will be turned over to inspector general for appropriate action.

"Should the homeowner supply the range and the contractor connect it, the amount to be paid will be the sum paid to the homeowner and a reasonable charge for the installation."

Delmarco was asked to resubmit his bills to Edwin Steffek, the Contracting Officer, for the work done at the premises to reflect actual expenditures. (Exh. G-2; Tr. 124-25.)

4. Delmarco is an experienced contractor doing rehabilitation and repairs on HUD-acquired properties. A very substantial portion of Delmarco's business, perhaps seventy-five percent or more, has consisted of repair contracts of this type (Tr. 169). There is no record of prior misconduct by Delmarco.

5. The standard fixed price repair contract which governed Delmarco's work on the premises contained standard printed Special Conditions for Rehabilitation of One-to-four Family HUD Owned Properties - New York, New York, Revised June 1, 1978 and 6/1/79, including:

#### 26. INSTRUCTIONS FOR ACTIVATION

The Contractor will be required to activate the premises upon closing by HUD. At the time of closing the Contractor will perform the following functions at no additional charge to the Government unless provisions for additional payment are listed below.

Prior to activation the Contractor shall contact the HUD office to obtain a small purchase order number and permission to install the necessary appliances.

The Contractor shall activate all plumbing and heating lines for proper operation of same and will be responsible for completing all necessary repairs to the plumbing and heating system.

Locking door hardware, when scheduled to be installed new, shall be installed at activation. The Contractor, at the time of installation, shall provide the owner with 2 keys to each new door lock.

All missing or broken glass shall be replaced after removal of perma-seal panels, paint touch-up shall be done as necessary and any existing storm doors and windows shall be reinstalled.

Splash blocks, downspouts, mail box, hot water heater and exterior light fixtures, when scheduled to be installed new, shall be placed in their proper position (location) at the time of activation. (Exh. G-17; Tr. 103.)

6. By the fall of 1981, responsible HUD officials had discovered that original contractors who had performed the repairs under certain contracts were often unavailable to complete activations when those contractors were notified to activate the repaired properties, often months later. Since the cost of such activations had been included in the original bid price, HUD was required to pay additional compensation to the contractors who actually performed the activations, even though it had already paid the original repair contractors for the activations. (Tr. 109-12.)

7. Approximately two months before the repair contract was awarded to Appellant, Contracting Officer Leonard Duany issued a memorandum to "All Contractors" dated November 2, 1981, concerning "Activation, Winterization and Securing" (the "November Memorandum"), which provided in relevant part:

"Effective immediately, the following directives will apply to all DHUD repaired properties:

\* \* \*

D. On new contracts, effective December 1, 1981, activation will not be included in your contract and will be a separate item at the time of closing. Your bid should reflect same.

E. If original contractor is notified by DHUD office to activate, the contractor must respond within three to five (3 to 5) working days. If no response, repairs will be completed at the original contractors's expense.

You are required to sign this memorandum and return to Dolores Jefferson so that it may be entered into your contractor's file." (Exh. G-9.)

8. Delmarco was aware of this November Memorandum and his conduct reflected his reliance upon paragraph "D" which excluded

activation of the premises, as well as an explanation to that effect by Duany, its author (Tr. 141, 157-59, 167).

9. When he succeeded Duany as Contracting Officer in mid-March, 1982, Steffek had been "sent in to clean up a rather sticky mess" that existed in the HUD Area office. He was precluded by higher HUD authority from talking to Duany regarding past practices at the time he undertook his new responsibilities in order to avoid his being influenced by past mistakes. (Tr. 85-86.) Steffek did not become aware of the existence of this November Memorandum until well after the activation and Delmarco's submission of the invoices in question (G-9; Tr. 31-32, 53, 79, 89, 167). Steffek conceded, and I find, that in view of the November Memorandum, at the time Delmarco executed the repair contract, it was HUD's position that the repair contract did not include an activation requirement (Tr. 74, 103). Steffek rescinded the November Memorandum immediately upon his belated discovery of its existence two weeks before the hearing (Tr. 79-80).

10. Without regard to the November Memorandum, Steffek viewed the repair contractor's obligation to activate as a convenient sole source procurement effected pursuant to the changes clauses of the repair contract which would be compensated on a labor and materials basis to be determined after performance. The basis for any such obligation was not well understood by other HUD officials. (Tr. 100-01, 103, 109-12, 121, 125, 130-31, 136-37.)

11. Before Steffek became Contracting Officer, and apparently pursuant to the November Memorandum, the New York Area Office had followed an informal practice of paying contractors a minimum fee of \$500, exclusive of furnishing and installing a stove, to activate a repaired property in connection with its sale (Tr. 32-33, 52-53, 81-82, 88, 108, 157). Such a request for a minimum fee payment for activation was generally accompanied by a breakdown of costs prepared by the contractor to total at least \$500 which might or might not have accurately reflected the actual costs of labor and materials incurred by the contractor to activate a given property (Tr. 165). I find that Appellant relied upon that informal practice in submitting his invoices in support of his claim for payment for activating the premises and that he did not intend to deceive or mislead HUD as to his actual labor and materials costs.

12. Steffek testified, and I find, that it was then HUD's practice to pay a contractor \$365 for furnishing and installing a stove, regardless of what the contractor had paid for the stove or what arrangement the contractor might have made with the homeowner (Tr. 82-85, 88, 103-09). I also find that the policy as refined in Steffek's August 11, 1982, letter quoted in the affirmation of the TDP, which concerned the procurement of stoves, was not in effect at the time Delmarco activated the premises

(See Finding of Fact 3; Exh. G-8). Rather it was promulgated to remedy what Steffek later perceived to be an abuse. Steffek conceded that Delmarco was entitled to compensation for the activation he undertook, but only for the work he actually performed and not on a minimum fee basis. (Tr. 54-56, 100-01).

13. On March 30, 1982, Ralph Permahos, Acting Chief Property Officer, had addressed a memorandum that was co-signed by Steffek to "All Contractors doing business with HUD - Single Family Property Disposition" specifying the proper "Procedures for submitting payment vouchers (Forms 1034 & 2542)." It provided with respect to any and all work done on a labor and materials basis that "all payment vouchers submitted must be accompanied by a fully documented bill. The bill shall include kinds and quantities of material, kinds and quantities of labor, special equipment, and overhead and profit." It specified 25% for overhead and profit. (Exh. G-7, G-20; Tr. 56, 57, 81.) Since Delmarco contended that he was not obligated to perform the activation and therefore disputed that he was obligated to accept compensation on a labor and materials basis, he did not concede the applicability of the memorandum to the activation in dispute.

14. Steffek testified that he conducted a meeting on May 21, 1982, with HUD contractors to clarify certain HUD policies. At this meeting, he testified, he announced that the practice of paying a minimum \$500 fee to contractors for activating repaired houses was terminated and that compensation for activations would thereafter be on a labor and materials basis (Tr. 34-38, 55-56). Steffek recalled that Delmarco was present at the meeting, but Delmarco claimed to have no specific recollection of it (Tr. 33-36, 164). A follow-up memorandum dated May 24, 1982, prepared by Dolores Jefferson, Realty Specialist, and addressed to the "Formal Contractors" regarding "Key Points from Contractor's Meeting on May 21, 1982," made no mention of the practice of paying a flat \$500 fee or its termination, or of compensation for activation on a labor and materials basis (Tr. 38; Exh. G-6). Paragraph 6 of this memorandum contained the only provision which related to activation, and that promulgated a new policy to apply prospectively for payment affecting contracts awarded after May 24, 1982 (Tr. 36-40, 80-81).

15. By a form letter dated June 30, 1982, Permahos notified Delmarco Plumbing and Heating of a closing on the premises on that same date. Delmarco was initially notified of the closing and need for an expedited activation by a telephone call from the selling broker, at about the time that the written notice was dispatched. Normally such a notice would have been sent out prior to the date of closing. In addition to the old FHA Case Number 374-010143-203 assigned to the repair contract, the notice identified a "New Case Number: 347-106633-203." (Exh. G-5; Tr. 142.)

16. The notice of closing sent to Delmarco stated, "It is your responsibility to coordinate activation with the purchaser for the same time he/she takes possession of the property. You must contact the purchaser within three (3) days of the receipt of this letter." In this case, the notice identified the purchasers, the selling broker, and the Area Management Broker, and supplied telephone numbers for the selling broker and the Area Management Broker, but not the purchaser.

17. Delmarco testified that the new owner of the premises was a plumbing salesman and was very difficult to contact. Thus, normal coordination was not practicable. (Tr. 145-46.) Despite his protests, Delmarco responded without first contacting the owner by immediately sending a subcontractor with a crew to the premises (Tr. 143-45).

18. The new owner had taken possession immediately, before Delmarco could accomplish the activation (Tr. 142-43). The owner had not been informed that HUD would provide for activation. As a result, the new owner removed the perma seals over the windows and retained them for later personal use. He acquired and installed his own electric stove, and bought and installed the necessary house numbers and mailbox instead of waiting for HUD's contractor to perform these services. The owner also activated the plumbing and electricity before Delmarco's subcontractor arrived. (Tr. 142, 146-48.)

19. When he received notice to activate the premises, Delmarco advised Steffek that he was not willing to perform the activation on a labor and materials basis; that, under the terms of the November Memorandum, he was not obligated to perform the activation; that his bid did not reflect an activation cost; and that he was only willing to perform the activation under the \$500 minimum fee arrangement which had previously existed. (Tr. 119-20, 123, 126, 132-33, 141-44, 156-59, 161-63, 167-68, 172). Delmarco said that this was the first activation that he had performed where the pre-existing arrangement which compensated contractor with a \$500 fee had not applied or where the activation had not been included in his bid. (Tr. 159, 170-71). Delmarco responded to the notice for activation under pressure from Steffek, who insisted that Delmarco perform the activation and backed his insistence with a threat of suspending Delmarco or holding him in default and deducting the cost of activating the premises from money the Government owed him if he did not perform (Tr. 52-53, 143, 159-60). Steffek did not agree to compensate Delmarco for the activation under a minimum fee arrangement.

20. The subcontractor's invoice in the amount of \$195.00 to Delmarco Plumbing was dated July 3, 1982, and specified "Activation of house - remove perma seals, install windows & doors - clean up debris & dump" and was marked "paid in full cash." Delmarco paid the bill, which represented a standard minimum fee he was obliged to pay to send a subcontractor's crew

to the premises regardless of what tasks they actually performed (Exh. G-13, G-14, G-16; Tr. 151-52, 165-66).

21. Delmarco subsequently gave the purchaser of the premises a check for \$235.00, obtaining a receipt dated July 9, 1982, which recited as follows:

I, Dennis Kropp, am hereby accepting a check for \$235.00 in full settlement for the stove, mailbox & house numbers for [REDACTED] Van Buren St., Freeport which I will put towards a better model. (Exh. G-15; Tr. 146-48.)

22. Delmarco made this settlement with the purchaser in accordance with HUD's established practice whereby contractors were permitted to negotiate with the homeowners for the installation of the stove of their choice and to submit a standard claim to HUD for \$365.00 for furnishing and installing the stove, regardless of the actual cost to the contractor. Delmarco testified that because of HUD's obligation to provide a stove, Delmarco had ordered a stove, but eventually canceled the order as a result of his negotiations with the owner of the premises. (Exh. G-10, G-11; Tr. 82-85, 146-48, 154.) The Government has abandoned the claim of impropriety related to Delmarco's procurement of the stove as a basis for the TDP (Govt. Brief at 14, n.2).

23. With the exception of a splash block, the necessary activation tasks had been performed by the time the premises were inspected by HUD on July 21, 1982 (Tr. 16-17, 24-27, 65-66; Exh. G-3, G-4, G-11, G-13). The perma seals were piled up, but had not been carted away, and there was no other debris on the site and no record other than the subcontractor's invoice of what, if any, debris had been actually removed (Exh. G-16; Tr. 17, 22-23, 145). Delmarco did perform various standard activation tasks, including providing the splashblocks, the outside light, and certain other items. He checked the plumbing system and the premises generally, and committed himself if needed to insuring that the heating system was operational. (Tr. 148.) The parties stipulated that the homeowner had "performed the following tasks on his property: purchase and installation of stove, mailbox and house numbers and connection of plumbing, heating and electrical systems." (Tr. 4, 27.)

24. With respect to the activation, Delmarco submitted to Steffek a typed invoice dated July 20, 1982, for labor and materials, including charges for services and materials that the owner himself had provided, as follows:

Request is hereby being made for \$510.50 for activation of above job; the following items were installed:

1 mailbox	\$ 22.50
housenumbers	7.50



2 exterior lock sets	32.00
1 exterior light	12.50
4 splash blocks	34.00
dump fee	30.00
Material	\$138.50
8 hours, mechanic	240.00
	\$378.50
35% Profit/O/hd , cont.	132.00
TOTAL AMT. DUE	\$510.50

Remove permaseals and cart away, check fit free 14 windows, 2 exterior doors & 9 interior doors. Activate plumbing sys, pressure test all systems. (Exh. G-13; Tr. 66-69.)

25. As an alternative justification of his claim, Delmarco had prepared a handwritten invoice dated July 5, 1982, which appears to be a parallel accounting of costs incurred by Delmarco in relation to the activation reflected on the invoice dated July 20, 1982 (Exh. G-12; Tr. 66-68). This invoice, resulting in the same total amount reflected different items as follows:

Activation	\$195.
Exterior lite	12.50
Mailbox	22.50
House numbers	7.50
4 splash blocks	34.00
	273.50
My time 3 1/2 hr.	105.00
	378.50

Profit & overhead	
35%	132.00
	\$510.50

26. In a handwritten "Rapid Reply Letter" dated July 23, 1982, Steffek requested Delmarco to make an appointment with the Contracting Officer to discuss payment for the activation vouchers. (Exh. G-19; Tr. 70). Delmarco, however, did not attend the meeting scheduled for July 27, 1982, and so Steffek referred the matter to the Area Manager for appropriate action (Tr. 70-72, 123).

#### Discussion

Reduced to its fundamentals, this case involves a contract dispute between Delmarco, the repair contractor, and Steffek, the recently installed Contracting Officer charged with reforming the New York Area Office's contracting practices, over the extent to which Delmarco was subject to certain requirements that Steffek sought to impose upon him. Whether the TDP imposed by the New York Area Office is necessary to protect the public interest from an allegedly irresponsible contractor should be distinguished from the contract dispute over Delmarco's entitlement to compensation under the applicable contract. The latter question

is not before me. I find, however, that, under the peculiar circumstances of this case, the TDP is not justified and should be terminated immediately.

The dispute stems from Steffek's commendable efforts to eliminate lax practices and to implement standard Government procurement procedures upon the repair and activation programs administered by the New York Area Office. However, I find that, as a result of these efforts, the Area Office's effective standards for contract administration were in such flux that Delmarco's position as to his obligation to activate the premises, which was the basis of his dispute with Steffek, might or might not have been correct as a matter of contract interpretation. To the extent that Delmarco might have been incorrect, I find that there are sufficient mitigating circumstances to preclude a finding that he lacks responsibility as a result of that contract dispute.

Important mitigating considerations are the facts that Steffek was not aware of the existence of the November Memorandum until long after the operative events and that, upon learning of its existence, he immediately rescinded it. He testified that he understood the November Memorandum to eliminate the activation requirement. That was obviously how Delmarco construed it. Delmarco also testified that his understanding was based on Duany's explanation to the same effect.

Another mitigating circumstance is the fact that the Government based its initial TDP action in significant part upon what it contended was Delmarco's improper claim for the allowance for the stove under a policy memorandum that was issued in August 1982. That memorandum was issued well after the activation services had been performed and the contested invoices had been submitted. The policy promulgated in that memorandum was not so clearly established that Delmarco should be held to have had notice of it or to have acted in deliberate disregard of it when he made his claim. In addition, the fact that the Government has abandoned that basis for the TDP eliminates what was identified as a substantial basis for imposition of the sanction against Delmarco and tends to show that the requirements sought to be imposed upon Delmarco were not well defined.

In addition, the May 24 memorandum purported to recapitulate the important points made at Steffek's May 21 conference with the active repair contractors. The conspicuous absence of any mention whatever of the abolition of the informal practice of paying repair contractors a standard minimum fee of \$500 for activating properties and the substitution of the sole source


procurement of these services on a standard labor and materials basis raises a substantial question as to how clearly the policy change was defined. These considerations persuade me that HUD's requirements relating to activation and related compensation were not so clearly established that Delmarco should be branded irresponsible and be subject to sanction.

The Government contends that Delmarco was obligated to activate the premises on a labor and materials basis and to support his claim for compensation with invoices which accurately detailed the costs he incurred for work he actually performed plus a prescribed percentage for overhead and profit. While I do not condone any inaccurate representations on the invoices that Delmarco submitted for payment, I find that any such technical misrepresentations do not constitute willful false statements, nor do they reflect a fraudulent intent to mislead on the part of the contractor that would justify imposition of the TDP. While I understand the indignation of a conscientious Contracting Officer at being billed for work the contractor did not actually perform or cause to be performed at the contractor's expense, I find that there is no such impropriety as would justify the imposition of the TDP under the peculiar circumstances of this case and in light of the lax practices that were apparently condoned in connection with the use of the minimum fee. I also find that the expedited and contentious basis on which the activation was undertaken mitigates any technical deficiency in Delmarco's coordination with the new owner.

The Government's contention that Delmarco refused to adhere to HUD's requirements relating to the activation of properties has not been shown to extend beyond this dispute over Delmarco's contractual obligation to activate the particular premises under the repair contract and how he was to be compensated for that activation. For that reason, I conclude that any demonstrable refusal by Delmarco to adhere to HUD requirements is related to this dispute only. The Government has not shown that such refusal would be likely to continue beyond the resolution of this particular dispute. The contractor is now clearly on notice as to what is to be required. Since I have found that the Appellant's position is reasonable, at least in relation to the imposition of this sanction, as distinguished from the contract dispute, I find that the Government has not established adequate basis for imposition of a sanction to protect the public interest from dealing with this contractor who has not been shown to have had any other adverse history of contract performance.

Conclusion

The Temporary Denial of Participation by Robert C. Delmarco, Delmarco Plumbing and Heating, in Single Family Property Disposition programs under the National Housing Act within the jurisdiction of the New York Area Office has not been justified, and the sanction should be terminated immediately.

  
Edward Terhune Miller  
Administrative Judge  
Board of Contract Appeals

Date: May 26, 1983