

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

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In the Matter of:

LESLIE WARE and  
BORO MANAGEMENT CORP.,

Respondents

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HUDBCA No. 83-797-D27

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For the Government

DETERMINATION

Statement of the Case

By letter dated March 8, 1983, Leslie Ware ("Ware"), President of Boro Management Corporation ("Boro"), was notified by the U. S. Department of Housing and Urban Development that it intended to debar Ware and Boro from participation in departmental programs for three years, based on serious irregularities in Boro's management of two HUD projects, Magnolia Plaza and Leggett Houses. Specifically, the Government charged in regard to Magnolia Plaza that Boro and Ware had failed to satisfactorily maintain the project, had failed to maintain adequate financial records, had failed to provide project books and records for inspection by HUD representatives, and had made disbursements from project funds without adequate supporting documentation. The Government further charged that Boro and Ware had failed to remit \$15,251.23 to HUD from excess rent collections for Leggett Houses for March, July and August, 1981.

The Government cited the alleged deficiencies and failures of Boro and Ware as causes for debarment pursuant to 24 C.F.R. §24.6(a)(3),(4) and (5). Ware and Boro were temporarily suspended from participation in departmental programs pending determination of debarment.

Ware and Boro, Respondents in this case, made a timely request for a hearing on their proposed debarment. At the hearing, the Government abandoned the charge against Ware and Boro concerning Leggett Houses. The charge concerning disbursement of project funds at Magnolia Plaza was dismissed at the hearing for failure to produce any evidence in support of the charge.

### Findings of Fact

1. Boro is engaged in the business of real estate management, real estate appraisals, and mortgage lending. It was incorporated in 1975, with Leslie Ware as its president and chief executive officer. Ware had been engaged in the real estate business for forty years. During his career, he had managed more than 17 HUD projects, including Magnolia Plaza. (Tr. 488-489.)

2. Magnolia Plaza is a HUD-held and insured two-building apartment complex located in the Bedford-Stuyvesant area of Brooklyn, New York. In July, 1977, Ware was asked by the HUD New York Area Office to manage Magnolia Plaza. At that time, there was a rent strike and tension at the project among the tenants. Boro was accepted by the tenants as the project manager. (Tr. 491, 493; Joint Exh. 1.)

3. Boro entered into a Housing Management Agreement ("HMA") for Magnolia Plaza that set out the policies and procedures to be followed in the management of Magnolia Plaza. Paragraph 13 of the HMA, entitled "Maintenance and Repair", required Boro to maintain and repair the project in a condition "at all times acceptable to the Owner and the Secretary" of HUD. Maintenance included "cleaning, painting, decorating, plumbing, carpentry, grounds care, and such other maintenance and repair work as may be necessary ...." Boro was also to "systematically and promptly receive and investigate all service requests from tenants, take such action as may be justified and ... keep records of the same." Emergency requests were to be "received and serviced on a twenty-four (24) hour basis." (Joint Exh. 1.)

4. In April, 1982, the HUD New York Office assigned a "team" of HUD employees to conduct a comprehensive management review of Magnolia Plaza. The team included Henry Allen, a loan specialist who had been assigned to Magnolia Plaza since 1981; Alphonso Fudge and Terry Foppiano, financial analysts; Robert Mille, a construction analyst and building inspector; Ronald

Blair, a loan specialist, and Seymour Maslow, the "team captain", who was a supervisory loan specialist. None of the members of the team who testified at the hearing knew why the review had been ordered. The team captain, Maslow, decided which HUD projects would be reviewed. (Tr. 25, 145, 147, 233, 236-237.)

5. In mid-April, 1982, Henry Allen arranged with Ware to conduct a physical inspection and an inspection of the project books and records. A snowstorm prevented the HUD team from conducting the scheduled inspections. In early May, 1982 <sup>\*</sup>/, Allen called Boro's office to announce that the inspections would take place that same day. Ware was not present. The HUD team was accompanied by the Resident Manager for Boro at Magnolia Plaza during the physical inspection and was assisted by Ardell Lucy, Boro's bookkeeper, during the inspection of the books and records. (Tr. 43-44, 60, 148, 515-517.)

6. The physical inspection was conducted by Robert Mille. Allen and Fudge accompanied Mille but were not responsible for any of the findings in the physical inspection report. Allen summarized the report findings in the Management Review Report and determined the degree of deficiency of the physical problems noted by Mille. Allen did not characterize any of the problems noted as requiring immediate action. All were characterized by him in the Management Review Report as needing corrective action within one year. However, Allen gave Magnolia Plaza an unacceptable rating overall. (Tr. 47-48; Govt. Exh. 1.)

7. The physical inspection took between two and three hours to perform. Mille considered major repairs were needed to the roof, the concrete coping, and the west parapet wall of one of the buildings. All of those repairs resulted from improper construction techniques and were not caused by Boro's failure to maintain them. Those repairs were made in 1982 and 1983. (Tr. 285, 288, 477-479, 481-482, 484-485, 518-521, 523, 526-528.)

8. Mille found a significant amount of physical and maintenance deficiencies during the inspection. The elevator machine doors needed to be replaced and secured, loose balcony railings needed repair, as did broken glass and window frames. Security was threatened by broken front door locks and an inoperative intercom. Fire doors and trash chute doors were "sprung" so that they did not close automatically. Mille found that an unusually high degree of damage was due to vandalism. (Tr. 275-277, 285, 319, 322; Govt. Exh. 2.)

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<sup>\*</sup>/ The inspection report indicated that the inspection took place on May 2, 1982, a Sunday. The inspection did not take place on a Sunday, but none of the witnesses were able to provide the correct date of the inspection.

9. HUD did not reinspect Magnolia Plaza or otherwise verify whether the maintenance and repair problems found by Mille had been corrected (Tr. 305, 316).

10. Boro ordinarily arranged for repairs at the project promptly. If window glass was broken or removed, it was replaced within a day. The loose balconies were repaired promptly, according to the testimony of tenants. The broken intercom and door locks took longer to repair because of the expense and custom nature of the replacement parts, but those repairs were also made. The "sprung" chute and fire doors were not repaired to close automatically because they did not present a safety or security hazard. (Tr. 386-387, 389, 390-397, 404-405, 417-418, 420, 422, 450-451, 453-454, 461-462, 532-537.)

11. Vandalism was a constant problem because of the neighborhood in which Magnolia Plaza was located. The degree of vandalism at the project had been greatly reduced by the presence of a security guard at night, a team of tenants acting as vandalism deterrent guards, and more effective security measures taken by Boro to secure closets, doors and the elevators. Damage due to vandalism was repaired promptly. (Tr. 403-404, 419, 444-446, 529-530, 539, 542.)

12. Boro did not fail to satisfactorily maintain Magnolia Plaza.

13. Paragraph 18 of the Management Housing Agreement required Boro to establish and maintain a "comprehensive system of records, books and accounts in a manner conforming to the directives of the Secretary [of HUD], and otherwise satisfactory to the Owner and the Consenting Parties." The Agreement further required Boro to obtain an annual financial report prepared by a Certified Public Accountant ("CPA") or "other person acceptable to the Owner and Secretary", certified by the preparer and Boro, and submitted to the owner within 60 days after the end of the fiscal year. The owner had the obligation to submit the certified financial report to the Secretary of HUD and the mortgagee. (Joint Exh. 1.)

14. Boro did not obtain a certified annual financial report prepared by a CPA for Magnolia Plaza until 1982. It did obtain uncertified annual financial reports prepared by a CPA for 1979, 1980 and 1981, but the reports for 1979 and 1980 were not submitted until January 6, 1981. The submission of uncertified reports had been allowed by Maslow for 1979 and 1980 and by another HUD official for the 1981 report. (App. Exh. 2; Tr. 335-336, 365, 508-509.)

15. The reasons why the 1979, 1980 and 1981 annual financial reports could not be certified by the preparer was because the preparer could not verify the assets and accounts of the project based on the documents given him to prepare the

reports. Certification by the preparer would have required verification of Boro's records of assets, liabilities, and project operations. Boro's books and records were not sufficiently well organized to permit that verification. (Tr. 336-339.) In May, 1982, Boro hired a CPA who reorganized its books and was able to verify the information in the books and records. That CPA was able to certify the 1982 financial report and stated that he will be able to certify future financial reports in accordance with Paragraph 18 of the Management Housing Agreement. (Tr. 343, 359, 365.)

16. Boro keeps a cash disbursement book, bank statements and cancelled checks, and computerized rents receivable accounts containing relevant information for each tenant. A computer system for cash receipts was established in July, 1982. Boro did not keep a "general ledger", which is a separate book summarizing all financial ledgers and journals for the project. However, the CPA prepared a written summary of all accounts and disbursements, which he testified served the same purpose as a general ledger. In May, 1982, Boro's CPA organized the project books in accordance with what he understood to be "generally accepted accounting principles." Boro instituted financial controls recommended by the CPA. Those controls have been in effect since July, 1982. (Tr. 346-351, 388.)

17. Alphonso Fudge, the HUD financial analyst who examined the books and records for the project available at Boro's office on the day of the inspection, was not a CPA. He had a bachelor's degree in accounting. Fudge testified that maintenance of a general ledger was "mandatory" in order to permit comparison and verification of disbursements and receipts. He rejected the possibility of an acceptable substitute for a general ledger. I do not find his testimony in that regard to be persuasive. Fudge did not review all of the financial books and records kept by Boro because much of the material was in the possession of Boro's CPA on the date of the inspection. Fudge did not schedule a meeting with the CPA to examine those books and records or make other arrangements for their examination. Because he did not see all of Boro's financial books and records, he admitted that he was unable to draw any conclusions about the type of books and records kept by Boro. (Tr. 145-146, 148-149, 201, 202-204.)

18. Boro did not maintain adequate financial records kept in accordance with generally accepted accounting principles until July, 1982, when its CPA reorganized its books and records, instituted financial controls, and prepared the certified annual financial reports required by the Housing Management Agreement.

19. Boro did not withhold its books and records from HUD representatives. Ardell Lucy made available to Fudge all of the financial records on the premises of Boro's office on the day he appeared at the office for examination of the books and records. Neither Henry Allen nor Fudge had notified Boro in advance of the

date of the inspection to allow for retrieval of the records in the custody of the CPA. The remaining books and records were available for inspection at the office of Boro's CPA. No one at HUD attempted to schedule an inspection of those books and records in the temporary custody of the CPA. (Tr. 44, 202, 345, 431-432, 437.)

20. The final HUD Management Review Report was not the independent product of the preparers. Seymour Maslow, the HUD supervisory loan specialist who was the "team captain", dictated evaluations to be inserted in the report, although he had not been present during the inspection. Some of those evaluations were false and damaging to Boro. I find the Management Review Report, other than the attached physical inspection report prepared by Mille, to be unreliable and in some portions patently false. (Govt. Exh. 1; Tr. 73, 77, 79, 159, 243-244, 249, 254, 256, 258-259, 410, 411, 498, 545.)

### Discussion

The purpose of debarment is to assure the Government that it only does business with responsible contractors and grantees. 24 C.F.R. §24.0. It is not to be used for punitive purposes. 24 C.F.R. §24.5(a). Both Leslie Ware and Boro Management Corporation are "contractors or grantees" within the scope of the HUD regulation applicable to debarment because they are management agents receiving HUD funds indirectly through non-Federal sources and are contractors with a participant in a program where HUD is the guarantor or insurer. 24 C.F.R. §24.4(f).

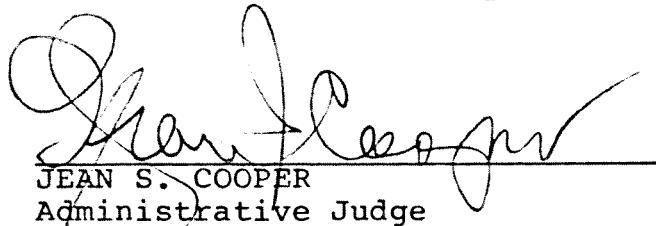
The Government failed to prove by a preponderance of reliable evidence the grounds on which it proposed the debarment of Ware and Boro. One ground, alleging misuse of project funds at Leggett Houses, was dropped by the Government at the hearing without any evidentiary presentation. The charge concerning disbursement of project funds at Magnolia Plaza was dismissed because the Government did not offer any evidence to support it. While Boro's financial recordkeeping and reporting was not fully satisfactory at the time of the Management Review, Boro had corrected those deficiencies long before its debarment was proposed. Furthermore, the evidence that HUD officials had accepted unaudited financial reports for 1979, 1980 and 1981 was not challenged by the Government. HUD relied upon one physical inspection with no follow-up, an incomplete inspection of books and records, and a thoroughly discredited and biased Management Review Report to take the extraordinary action of a proposed debarment.

HUD also temporarily suspended Boro and Ware pending determination of debarment. The regulation applicable to suspension sets forth clear criteria and specific grounds for

that sanction. 24 C.F.R. §§24.12, 24.13. However, none of those criteria or grounds comport with the enumerated causes for the proposed debarment, except possibly the charges concerning the project funds. The suspension regulation states that a suspension may be imposed when it is "suspected, upon adequate evidence" that cause for suspension exists. 24 C.F.R. §§24.12, 24.13(a). It is not possible to find that there was adequate evidence concerning the project funds charges because none was presented at the hearing. The charges concerning maintenance, financial recordkeeping, a cooperation with HUD officials, are all based on clauses of the Housing Management Agreement contract. Alleged failure to perform a contract satisfactorily is not a ground for suspension. The contractual procedures that were alleged to have been violated do not pertain to a grant of financial assistance or a conditional or final commitment to insure or guarantee. Likewise, they bear no relationship to any other cause for suspension enumerated in the regulation.

#### Conclusion

The Government has failed to prove cause for either the temporary suspension or the proposed debarment of Ware and Boro. Based on the evidence presented, debarment is not warranted to protect the interests of either the Government or the public. The temporary suspension shall be terminated immediately.

  
JEAN S. COOPER  
Administrative Judge

Dated: February 2, 1984.