UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of:	:	
JACK FORTENBERRY, CHESLEY DOAK; JACK FORTENBERRY AND C&J ASSOCIATES,	:	HUDBCA No. 87-2455-D49 (Docket No. 87-1149-DB) HUDBCA No. 87-2456-D50 (Docket No. 87-1150-DB)
Respondents	:	

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DETERMINATION

Statement of the Case

By letter dated May 29, 1987, Jack Fortenberry, Chesley Doak, Jack Fortenberry Associates, and their affiliate, C&J Associates ("Respondents"), were notified by the U.S. Department of Housing and Urban Development ("HUD") that, pending resolution of the subject matter of an indictment, they were suspended from further participation in HUD programs under the provisions of 24 C.F.R. §§24.13(a)(1)(iii) and 24.13(c).

Respondents filed a timely request for an opportunity to submit documentary evidence and a brief, and also requested an evidentiary hearing. This determination is based upon written submissions of the parties, as Respondents are not entitled, under applicable HUD regulations, to an evidentiary hearing in this

matter. 24 C.F.R. §24.5(c)(2). See also, Transco Security Corp. v. Freeman, 639 F.2d318 (6th Cir. 1981); Otis Matthews and Matthews Associates, HUDBCA No. 84-904-D51 (slip opinion dated August 29, 1985).

Findings of Fact

1. Respondents Chesley J. Doak and Jack Fortenberry are owners, officers and operators of Chesley Doak and Jack Fortenberry Associates, Inc., doing business as C&J Associates, a Georgia Corporation. The primary purpose of the company is the construction and sale of single family attached townhouses and detached houses. The corporation constructed and sold single family properties upon which HUD/FHA mortgage insurance was obtained. (Govt. Exh. D; Resp. Answer.)

2. On December 10, 1985, the Department informed Respondents by letter that it was in receipt of adequate evidence of irregularities in their participation in the Single Family Mortgage Insurance Programs of the Department, and that on the basis of these irregularities, a decision had been made to issue a Temporary Denial of Participation (TDP). Respondents were denied participation in the Single Family Mortgage Insurance Program for a period of 12 months. The irregularities involved sales of property which were financed with FHA mortgage insurance to:

[redacted] Bledsoe - FHA Case No. [redacted]
[redacted] Mulchay - FHA Case No. [redacted]
[redacted] Mulchay - FHA Case No. [redacted]

These transactions involved Respondents' provision of payments to the purchasers that were not shown on the closing statements and which had the effect of reducing the purchasers' investments in the properties below the required amount, in contravention of HUD borrower requirements. 24 C.F.R. §203.119. (Govt. Exhs. E, F.)

3. In July 1986, Respondents and the Department entered into an agreement which settled the Department's December 10, 1985 TDPs. Effective July 1, 1986, the Department withdrew the TDPs upon Respondents' representations that they were "fully informed of HUD policies and regulations and have discontinued the practices cited in HUD's complaint dated December 10, 1985, and agree to refrain from any further violations as determined by HUD of HUD policies and regulations." (Govt. Exh. G.)

4. In 1987, a Federal grand jury convened for the United States District Court for the Northern District of Georgia and returned an indictment charging Respondents with violations of Sections 371, 1001 and 2 of title 18 of the United States Code. The indictment charges that Respondents, and others, between December, 1983 and September, 1985, conspired to defraud the United States by knowingly and willfully making and using false real estate contracts, false HUD/FHA applications for commitment

for insurance, and false affidavits for the purpose of obtaining insurance from the FHA on mortgages on certain residential properties. The indictment also charges that Respondents and others aided and abetted one another in making, using, and causing to be made, and used false real estate contracts and false affidavits for the purpose of obtaining HUD/FHA insurance and HUD/FHA financing for such properties. (Govt. Exh. D, Counts 1, 183-96 and 211-24.)

5. Clark W. Blight, Deputy Assistant Inspector General for Investigation of the Office of Inspector General (OIG), Department of Housing and Urban Development, declares, under oath, that, his official duties include oversight responsibility for IG field investigations and investigation reports. In August 1983, an IG field investigation file was opened on loans originated through the Equitable Mortgage Company in Atlanta, Georgia, and Respondents, along with others, were subjects of the investigation. During the course of the investigation, materials pertaining to the investigation were not released to HUD personnel (non-OIG), except for limited information related to the 1985 TDPs of several of the subjects. Blight's review of the investigation files reveals that, with the exception of the limited TDP information, the results of the investigation were not made available to officials of HUD before March 25, 1987. I find that on July 10, 1986, the date on which the HUD Deputy Regional Administrator signed the agreement in settlementof the 1985 TDPs, HUD personnel (non-OIG) were not aware of any irregularities in transactions involving the sale of properties by Respondents other than the irregularities in the three transactions which formed the basis of the 1985 TDPs. (Govt. Exh. A.)

6. Excerpts from a report of the Department Inspector General, which appears to have been prepared in August/September 1985 indicate, among other things, that Respondent Doak "questioned [the] financing procedure" that underlies the indictment "because he had been in real estate for 22 years and it did not seem right to him." The report also indicates that Respondent Doak stated that "Wilson, an attorney and developer, told him it was perfectly legal to finance properties insured by HUD and have a rent shortfall as long as it was disclosed to the lender and appraiser." (Resp. Exh. C, p. 2.)

Discussion

Under applicable HUD regulations, an outstanding indictment of a "contractor or grantee" is deemed to be "adequate evidence" of suspected criminal conduct and may be the basis for the suspension of a "contractor or grantee" in the public interest. 24 C.F.R. §24.13(c). The sufficiency of an indictment as the basis per se for a suspension has long been upheld. Alexander v. Alexander Ltd., HUDBCA No. 82-727-D46, 83-1 BCA ¶16,228 and cases cited therein.

Respondents' participation as owners, officers and operators of a construction corporation which constructed and sold single family properties upon which HUD/FHA mortgage insurance was obtained renders Respondents "contractors or grantees" within the meaning of 24 C.F.R. §24.4(f). As such, Respondents are subject to the sanction of suspension if application of the sanction is determined to be in the public interest and is otherwise effected in conformity with the law. Id. at ¶16,229.

Underlying the Government's authority not to do business with a company is the requirement that agencies only do business with "responsible" contractors or grantees." 24 C.F.R. §24.0. The term "responsible" as used in the context of suspension and debarment is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the contractor as well. 48 Comp. Gen. 769 (1969). The test for whether suspension is warranted is present responsibility. It is well established that a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D. D.C. 1980). Thus, the absence of proof in the record of subsequent misconduct by Respondents is not dispositive in Respondents' favor. Alexander & Alexander Ltd., HUDBCA No. 82-727-D46, 83-1 BCA ¶16,229.

An indictment for making false statements to HUD in connection with Federally-insured mortgage loans clearly provides an ample basis for suspension under the causes listed in 24 C.F.R. §13(a).

The basis issue before me is whether Respondents' indictment is adequate evidence of lack of present responsibility, when considered in conjunction with the settlement of the 1985 TDPs involving similar facts, and Respondents' assertions that the acts in question were performed upon advice of counsel that such acts were not improper.

The evidence reveals that the indictment is based on numerous acts that were not alleged in the 1985 TDPs--the indictment alleges fourteen acts of misconduct, while the 1985 TDPs are based on three alleged acts of misconduct. There is no showing that the HUD Assistant Secretary, General Counsel, or any other HUD non-IG personnel were aware of any specific additional allegations of misconduct, above and beyond those listed in the 1985 TDPs at the time the 1985 TDPs were settled, and the Department's Office of Inspector General denies that it divulged any information relative to the additional allegations to HUD personnel outside of the Office of the Inspector General. Based on this evidence, which is uncontroverted, I conclude that the settlement of the 1985 TDPs does not bar these suspension proceedings, as the indictment alleges numerous matters in addition to the matters alleged in the 1985 TDPs.

Although a finding of lack of present responsibility may be based on past acts, all mitigating circumstances must be taken into consideration in deciding that a sanction is necessary. Gonzalez v. Freeman, 344 F. 2d 570 (D.C. Cir. 1964). Respondents argue in mitigation that, at the time of the commission of these acts, they had been advised by their attorney that such acts were legal, and Respondents further allege that they are now suing their attorney for malpractice. While evidence of this nature may be deemed mitigating, I am not persuaded under the facts and circumstances of this matter that such evidence mitigates the acts in question. If the false statements were made as alleged in the indictment, such statements were so patently false that I am not convinced that persons with substantial business experience may claim justification in making such statements, even if it was proven that such statements were made upon advice of an attorney. Respondents have significant business experience. Respondent Doak has been involved in real estate sales for 22 years (Resp. Exh. C, p. 2). It appears that prior to their indictment, Respondents were aware, in a general sense, of the questionable nature of their financing transactions.

Accordingly, I find that Respondents have not provided such evidence as would overcome the adequate evidence of lack of present responsibility that derives from the indictment for serious offenses, or that would otherwise require the suspension imposed in the public interest to be lifted before the related criminal review has been completed. See Horne Brothers, Inc. v. Laird, 463 F. 2d 1268 (D.C. Cir. 1972).

Conclusion

Based upon my review of the record, it is my determination that the suspension of Respondents was based upon adequate evidence, so that it should be, and hereby is, sustained and should remain in full force and effect.

Timothy J. Greszko

TIMOTHY J. GRESZKO
Administrative Judge

April 14, 1988