

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

In the Matter of:

GLENN E. MINIER,

Respondent

:
:
:
: HUDBCA No. 88-3341-D16
: Docket No. 87-1200-DB(TDP)
:
:

Michael J. Duhig, Esq.
Coldwell Banker
1211-25 W. 22nd Street
Oak Brook, Illinois 60521

For the Respondent

Geoffrey T. Roupas, Esq.
Office of Regional Counsel
Department of Housing and
Urban Development
300 South Wacker Drive
Chicago, Illinois 60606

For the Government

DETERMINATION

Statement of the Case

By letter dated July 23, 1987, Gertrude W. Jordan, Regional Administrator of Region V of the U.S. Department of Housing and Urban Development ("HUD"), notified Glenn E. Minier, Respondent in this case, that a temporary denial of participation ("TDP") had been imposed on him. The TDP denied Minier participation in sales of HUD-acquired properties within the jurisdiction of HUD's Chicago Regional Office for a period of one year from July 23, 1987.

The grounds for the TDP concerned alleged irregularities related to an earnest money deposit made by an offeror for purchase of a HUD-acquired property, who subsequently reneged on his offer and stopped payment of a personal check that Minier had accepted as an earnest money deposit, in violation of HUD requirements. By letter dated October 20, 1987, counsel for Coldwell Banker Residential Real Estate Services, Inc., Minier's employer, requested reconsideration of the decision to impose the TDP on Minier and the demand of payment of the earnest money to HUD. This request was denied, and Minier filed a request for a

hearing pursuant to 24 C.F.R. §§24.7 and 24.18(a)(5)(iv). At a prehearing conference, it was agreed that there were no material issues of fact in dispute between the parties, and that a determination made on a written record would be acceptable to both Respondent and the Government.

Findings of Fact

1. Glenn Minier is employed as a real estate broker by Coldwell Banker Real Estate, Inc., ("Coldwell") in Streamwood, Illinois (Stipulation).

2. On March 17, 1987, Minier, on behalf of Coldwell as selling broker, executed a bid package, including a Sales Contract and Conditions of Sale, for the purchase of a HUD-acquired single family property by Melvin L. Horton. HUD required that the selling broker hold an earnest money deposit from the bidder-purchaser. The broker was also required by HUD to certify that the earnest money was being held in an escrow account. (Stipulation, Exhibit D.)

3. The Sales Contract and Conditions of Sale provided for an earnest money deposit of \$2,000, a deadline for closing the sale of 45 days from HUD's acceptance of the offer, and forfeiture of the earnest money deposit to HUD as liquidated damages for purchaser's failure to close the sale in a timely manner. Minier accepted a personal check payable to Coldwell drawn on the account of █████ Horton in the amount of \$2,000.00 as an earnest money deposit. (Stipulation, Exhs. C, D.)

4. The Earnest Money Certification prepared and signed by Minier for the bid package stated:

I hereby certify that I have collected from the above purchaser(s), in connection with their offer to purchase the above property, an earnest money deposit in the amount of \$2,000.00. This amount has been deposited and is being held in my escrow account.

I have fully explained HUD's earnest money forfeiture policy to the purchaser(s) and I agree to immediately comply with HUD's instructions for the ultimate disposition of this earnest money deposit. (Stipulation, Exh. E.)

5. On March 17 or 18, 1987, Minier submitted to HUD Horton's bid to purchase the HUD-acquired property. The bid package included the Sales Contract and the Earnest Money Certification. (Stipulation).

6. After the bid opening on March 20, 1987, HUD accepted the bid submitted by Minier on behalf of Horton, and executed the Sales Contract on March 23, 1987 (Exhs. D and F).

7. On March 25 or 26, 1987, the personal check, which Horton had given to Minier as the earnest money deposit, was returned because of insufficient funds (Exh. C).

8. A few days after the check was returned, Minier informed HUD by telephone of the return of the earnest money check, at which time HUD personnel reminded Minier that he was responsible for collecting the earnest money deposit. Subsequently, on April 27, 1987, after again attempting unsuccessfully to contact Horton and to get the check paid, Minier informed HUD that the problem with the earnest money check had not been solved, that he had been unable to reach Horton by telephone, and that he believed the sale would not close. (Stipulation, Exh. G.)

9. HUD's closing agent was unable to contact Horton to arrange a sales closing, which was required to be held on or before May 6, 1987 (Stipulation, Exh. H).

10. On May 7, 1987, HUD wrote Minier, directing him to cancel the Sales Contract and requesting remittance to HUD of the \$2,000 earnest money deposit (Exh. I).

11. On June 3, 1987, HUD reiterated its request in writing to Minier that the earnest money deposit be sent to HUD, and stated that a denial of participation would be imposed against Minier for failure to make the payment (Exh. J).

12. Payment of the \$2,000 earnest money deposit was not made to HUD. On July 23, 1987, the HUD Chicago Regional Office sent a letter to Minier, advising him that a temporary denial of participation had been imposed on him as of that date. There is no evidence that the payment of \$2,000 has been made since that date. (Exh. K.)

13. Previously, on October 2, 1986, the HUD Chicago Regional Office had imposed a TDP on the Coldwell Office in Streamwood, based upon its failure to submit an earnest money deposit to HUD after a sales contract was cancelled. In that case, the prospective purchaser, who did not close the sale in a timely manner because he was unable to secure financing, refused to consent to the payment of the earnest money deposit to HUD. Coldwell, in turn, refused to forward the earnest money deposit to HUD, based upon its policy of making no disposition of earnest money deposits without the consent of the purchaser. (Stipulation, Exh. L.)

14. On February 3, 1987, the TDP was withdrawn against Coldwell after the purchaser withdrew his objection to the payment of the earnest money to HUD. The notice of withdrawal of the TDP stated:

All future bid submissions by your firm will be closely monitored by the Property Disposition section. If in the future the Property Disposition section experiences any further difficulties in receiving prompt submission of earnest money deposits from you, we will consider this as evidence of a continuing pattern of non-compliance with our policies and regulations. In the event we again find it necessary to impose administrative sanctions for similar acts of non-compliance with our requirements, correction of the cited deficiency will not be considered adequate for withdrawal of the sanction. [Stipulation, Exh. M.]

15. Since the imposition of the TDP against Minier on July 23, 1987, Coldwell has adopted a corporate policy that in sales of HUD-acquired, single-family properties for which it acts as the broker, only a cashier's or certified check will be accepted for the earnest money deposit. (Stipulation.)

16. HUD policies and procedures for the disposition of HUD-acquired, single-family properties are contained in HUD Handbook 4310.5 REV 1, entitled "Property Disposition Handbook, One to Four Family Properties."

Paragraph 6-3H of the Handbook provides in pertinent part as follows:

The earnest money submitted with the accepted offer [to purchase] must be deposited upon execution by HUD of the [Sales Contract], or as an option, selling brokers are permitted to hold earnest money deposits in their escrow accounts until closing. Where brokers are holding the earnest money, offers must include certification from the broker that the earnest money has been deposited in their escrow account and HUD's instructions will be followed regarding its disposition. This may include forfeiture, in which case, earnest money will be submitted to HUD.

Paragraph 6-4A. states that,

Earnest money deposits must be in the form of a cashier's check or money order, payable to HUD.

Paragraph 6-4 F. provides, in effect, that the entire earnest money deposit is forfeited to HUD for failure to close an uninsured offering, such as the one involved in this case, where the purchaser either is an investor or fails to provide documentation of an acceptable cause for failure to close. (Stipulation, Exh. N.)

17. An information booklet was prepared by HUD to be provided to real estate brokers in connection with the offering for sale of the HUD-acquired properties. It contained complete instructions for submission and acceptance of offers to purchase single-family homes from HUD. The information booklet was mailed to Minier in late January or early February, 1987, and it had been received at his office before he submitted Horton's bid to HUD. Included in Section 4 of the information booklet are the following instructions:

Accepting and Depositing Funds

Brokers shall obtain the appropriate amount in the form of a cashier's check or money order at the time of obtaining a signed bid on the property. Earnest money deposit checks should be made payable to the selling broker.

Discussion

A TDP is a sanction that allows HUD to assure itself that it only does business with responsible contractors and grantees. 24 C.F.R. §24.0. Like debarment and suspension, a TDP may not be used for punitive purposes, but only to protect the public interest. 24 C.F.R. §24.5(a). There is no dispute that Minier is a "contractor or grantee" within the meaning of the regulation because he was a direct recipient of HUD funds in the form of broker commissions. 24 C.F.R. §24.4(f).

A TDP may be imposed against a HUD contractor or grantee by a HUD Regional Administrator for causes that include "[a]dequate evidence of irregularities in contractor's or grantee's past performance in a Department program." 24 C.F.R. §24.18(a)(2)(ii). The Government has cited both that section of the regulation and 24 C.F.R. §24.13(a)(2)(i) as grounds for the TDP in this case. Inasmuch as the transaction in question did not involve an insured or guaranteed sale, or a grant of financial assistance, 24 C.F.R. §24.13(a)(2)(i) would be inapplicable to this case. However, 24 C.F.R. §24.18(a)(2)(ii) is applicable, upon proof of adequate evidence to support it.

Minier violated two HUD-mandated procedures that brokers must follow if they wish to participate in the sale of HUD-acquired single-family properties. First, Minier accepted as earnest money a personal check from Horton, rather than a cashier's check or money order. To compound the risk of accepting a personal check that could be stopped or returned for insufficient funds, Minier accepted a check not even drawn upon Horton's own checking account. HUD requirements for acceptance of only a cashier's check or money order are unequivocal. Not only does the applicable Handbook clearly state this requirement, the information booklet provided

to Minier to guide him in preparing purchaser bid packages also states that these are the only forms of earnest money payment acceptable to HUD. Minier's irresponsible business decision to accept an earnest money deposit in any form other than those mandated by HUD constitutes an irregularity in his past performance in a HUD program.

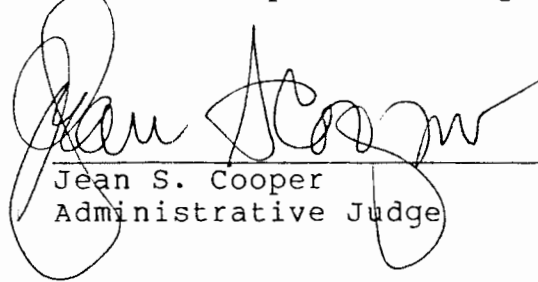
The second irregularity, the refusal to remit to HUD \$2,000 as damages for the loss of the sale, is the more serious of the two. Again, HUD policy in this regard is unequivocal. It was certainly no secret to anyone at Coldwell's Streamwood office that HUD would enforce its right to payment of forfeit earnest money deposits. The Streamwood office had already been subjected to a TDP for refusal to remit earnest money to HUD in another case. Even if Minier accepted deviations from HUD's prescribed forms of earnest money payment, he could have mitigated this irregularity by remitting the damages to HUD upon demand. He has steadfastly refused to do so. Coldwell's belated policy change in reference to the forms of earnest money payment it will accept in the future for HUD-acquired properties in no way corrects or mitigates the two-fold flouting of HUD procedures in this case.

HUD's requirement dictating the acceptable forms of earnest money protect both HUD and the brokers who participate in the sale of HUD-acquired properties. The broker has the responsibility for collecting the earnest money, promptly depositing it in an escrow account, and remitting a check for it to HUD upon acceptance of a purchaser's bid. So long as the money is received in a form that cannot be reduced or cancelled, both the broker and HUD have complete financial protection. Minier put himself, his company and HUD in an exposed position from the moment he accepted a personal check from Horton. Had Minier required the proper form of earnest money payment from Horton, he would not have been obligated to reach into his own, or his firm's, pocket to pay this debt. Ultimately, it is the financial obligation of the buyer and broker to recompense HUD for damages suffered from a lost sale. That is the purpose of earnest money, whether the seller is a private person or the Federal Government.

There is no evidence that either Minier or Coldwell's Streamwood office has any real appreciation of the obligations that accompany the privilege of being a HUD contractor or grantee. The Chicago Regional Office did what was necessary to protect itself from a contractor who refused to conduct business according to HUD requirements. The imposition of the TDP was appropriate. It was supported by not just adequate, but compelling, evidence of irregularities. The term "irregularities," contrary to arguments of counsel, is not a concept of quantity, but quality. Even one example of an irregularity of such insensitivity, stubbornness and irresponsibility as occurred in this case is more than sufficient to support a TDP. The only mystery in this record is why only Minier, and not the repeatedly recalcitrant Coldwell, was subjected to a much needed sanction.

Conclusion

For the foregoing reasons, the temporary denial of participation imposed against Glenn E. Minier in Region VI of the U.S. Department of Housing and Urban Development on July 23, 1987 is sustained.



Jean S. Cooper
Administrative Judge

Date: June 13, 1988