

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

In the Matter of:

GABRIEL ELIAS,

Respondent.

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: HUDBCA No. 89-4474-D24
: Docket No. 89-1329-DB
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R. Carter Sanders, Esq.
Sanders & Associates
Suite 501
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

For the Respondent

Marylea W. Byrd, Esq.
Office of General Counsel
Room 10266
U.S. Department of Housing
and Urban Development
Washington, D.C. 20410

For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

November 28, 1989

Statement of the Case

By letter dated February 16, 1989, Gabriel Elias ("Respondent") was informed by the Multifamily Participation Review Committee ("MPRC"), U.S. Department of Housing and Urban Development ("HUD" or "Department" or "Government"), that the MPRC was rejecting his cash bid for the acquisition of the Tower Village Nursing Center ("Tower"), of St. Louis, Missouri, pursuant to the Standards for Disapproval set forth in the Department's regulations at 24 C.F.R. §200.230. The MPRC's decision was based upon HUD's five year debarment of Respondent, which had been imposed by HUD, in 1984, and which remained in effect at the time of the MPRC decision. Respondent requested reconsideration of the decision by the MPRC, and in the event of a negative determination, a review by a Departmental hearing officer. Subsequently, the MPRC issued a decision upholding its earlier determination. Tower then requested a review of the MPRC's final decision pursuant to 24 C.F.R. §200.241 (b). The parties elected to waive an oral hearing of this matter and have submitted briefs. This determination is based upon the entire record as submitted by the parties.

Findings of Fact

1. By letter dated January 16, 1985, Respondent was notified that the Department was proposing to debar Respondent from participation in all HUD programs for a period of five years, commencing November 6, 1984, and ending November 5, 1989. The proposed debarment was based upon Respondent's 1984 conviction in the United States District Court for the District of New Jersey, for violation of 18 U.S.C. §371. Respondent's conviction was based upon a plea of guilty to a single count which alleged that Respondent conspired to bribe a HUD official in 1982. The conspiracy in question involved an agreement to pay sums of money to a HUD employee, to induce that employee to wrongfully reduce a \$989,750 letter of credit that Respondent had tendered to HUD as partial consideration for the purchase of HUD-owned property. Respondent was sentenced by the U.S. District Court as follows: three years confinement in a "jail-type" facility, 30 months of which were suspended; 5 years probation; a \$10,000 fine was imposed; Respondent was ordered to bring all properties which he owned, managed or controlled into compliance with all applicable local, state, and federal laws; and, Respondent was ordered to perform at least 8 hours community service each week as directed by the probation office. (Govt. Exhs. 1-3; Resp. Exh. A).

2. Respondent did not request a hearing within the ten-day period specified in the notice, and a final determination was rendered by the Department on February 21, 1985, debarring Respondent from participation in the Department's programs for a period of five years as specified in the notice. (Govt. Exh. 4).

3. By letter dated February 7, 1985, United States Senator Arlen Specter contacted the HUD Office of Congressional Liaison on Respondent's behalf. The letter inquired about Respondent's opportunity to "bid for HUD properties where HUD is selling property on an all-cash basis at public auction or at sealed-bid auction." (Govt. Exh. 5; Resp. Exhs. B, C).

4. Stephen May, HUD Assistant Secretary for Legislation, responded to Senator Specter's inquiry by letter dated March 13, 1985. The letter stated that Respondent was eligible to bid on HUD single family properties where HUD is selling homes on an all-cash basis. The letter also stated that, with respect to HUD-owned multi-family properties, Respondent would also be eligible to bid on an all-cash basis, but because of his debarment by HUD, Respondent's acquisition of such multi-family properties would be conditioned upon Respondent's prior approval by HUD on a case-by-case basis. The letter concluded that no prior assurances could be given Respondent that HUD would accept a bid by Respondent for any HUD-owned multi-family property. (Resp. Exh. C).

5. On December 26, 1988, Respondent, as President of Ray Gardens, Inc., was the apparent successful bidder on Tower Village Nursing Center, a nursing home to be sold by HUD. Respondent's bid for Tower was on an all-cash basis. In accordance with the terms of the sale, a HUD Form 2530 dated January 9, 1989, was submitted to HUD by Respondent, which listed Alma Elias as beneficial owner of Ray Gardens, Inc., and which listed Respondent as her husband. After a discussion with Gene Broadnax, an employee in HUD's Washington D.C. multi-family property office, Respondent submitted another HUD Form 2530 dated January 26, 1989, which stated, inter alia, that Respondent was a five per cent shareholder of Ray Gardens, Inc., and that he was the corporation's president. (Govt. Exhs. 7, 7A, 8; Resp. Exh. D).

6. At its February 9, 1989 meeting, the MPRC considered Respondent's proposal to purchase Tower. The committee voted unanimously to disapprove Respondent's proposal, because of Respondent's conspiracy conviction and subsequent debarment. The MPRC's determination was communicated to Respondent by letter dated February 16, 1989. The letter stated, inter alia, that the committee's disapproval of Respondent was based on his debarment status. The letter further stated that Respondent's Form 2530 did not disclose the name of his company and that Respondent had failed to disclose his debarment status, as required by the Form 2530 instructions. (Govt. Exhs. 9-10).

7. By letter dated February 28, 1989, Respondent requested the MPRC to reconsider its disapproval on the following alleged grounds:

(a) When HUD initiated the debarment proceedings against Respondent in 1984, Respondent accepted a compromise arrangement from HUD, through Senator Spector's office, in lieu of contesting the debarment. This compromise arrangement would permit Respondent to bid on HUD properties on an all-cash basis.

(b) HUD could reduce its operating losses by selling Tower to Respondent.

(c) No sensible investor would bid for HUD properties if his winning bid was rejected after he developed plans to efficiently operate the property.

(d) Failure to accept Respondent's bid, which was substantially lower than the next low bid, would discourage competitive bidding.

(e) Respondent's spouse was being unfairly penalized as a result of Respondent's debarment.

(Govt. Exh. 11).

8. On April 16, 1989, the MPRC reconsidered its previous action, and after reviewing Respondent's February 28, 1989 letter, the MPRC again voted unanimously to disapprove Respondent's proposal. Respondent subsequently requested administrative review of the action of the MPRC pursuant to 24 C.F.R. §200.243 (b). (Govt. Exhs. 12-13).

Discussion

Prior approval of the participation of "principals" in a number of HUD's housing programs, including sales of projects by the Secretary, is required under applicable HUD regulations. 24 C.F.R. §200, Subpart H; 24 CFR §200.213(e). These regulations define "principal," in pertinent part, as any corporation proposing to participate in a project as an owner, and the term principal, as it applies to corporations, includes the president of the corporation. 24 C.F.R. §200.215 (e)(2)(iii).

Respondent's status as President of Ray Garden's, Inc., renders Respondent a principal within the meaning of the applicable regulations, and under the circumstances of this case, Respondent's participation in the sale of HUD-owned property is subject to the review and approval of the MPRC. 24 C.F.R. §200.228.

In making its determination, the MPRC must consider all extenuating and mitigating factors. 24 C.F.R. §200.228 (a)(1). In each case, the decision is "within the discretion of the Review Committee" and must be "rendered in the best interest of the Government and the public." Id. The MPRC's decisions must be made by a majority vote of those members present and entitled to vote. 24 C.F.R. §200.228 (b).

The standards for disapproval are set forth at 24 CFR §200.230. The standards provide in relevant part:

The standards for disapproval shall be as follows:

(a) Suspension, debarment or other restriction of the principal under Part 24 of this Title:

* * * * *

(c) Unless the Review Committee finds mitigating or extenuating circumstances that enables it to make an intelligent risk determination for approval, any of the following occurrences attributable or legally imputable to the fault or neglect of a principal may be the basis for disapproval

whether or not the principal was actively involved in the project:

* * * * *

(7) A criminal record or other evidence that the principal's previous conduct or method of doing business has been such that his participation in the project would make it an unacceptable risk from the underwriting standpoint of an insurer, lender, or governmental agency.

Respondent asserts that his approval was improperly denied by the MPRC, because there is no "underwriting risk" subsequent to an all-cash transaction. 24 C.F.R. §200.230 (c)(7). This argument is inapposite to the facts, because Respondent was denied approval by the MPRC due to his debarment status. 24 C.F.R. §200.230 (a).¹ Moreover, while 24 C.F.R. §200.230 (c)(7) appears to require a finding of underwriting risk if the disapproval is based upon a criminal record or other misconduct, many other causes for disapproval require neither an underwriting risk finding nor a continuing post-transaction relationship between the participant and HUD. See e.g., 24 C.F.R. §§200.230 (a), (b), (c)(1), (c)(2), (c)(4), (c)(6), (f). Clearly, the existence of a suspension or debarment by HUD of a participant under Title 24 of the Code of Federal Regulations establishes a basis for disapproval by the MPRC of a participant's proposal to purchase HUD-owned property from the Secretary.

Respondent argues that he should be permitted to acquire Tower in accordance with the terms of the "settlement" of his debarment by Senator Spector's office. Respondent's characterization of the exchange of correspondence between

¹ The cause specified in 24 C.F.R. §200.230 (c)(7), i.e., a criminal record or other evidence that the principal's previous conduct has been such that his participation in the project would make it an unacceptable risk from the underwriting standpoint, was cited in the Government's complaint as cause for Respondent's disapproval by the MPRC. The Government later alleged on July 13, 1989, in reply to a Board Order, that Respondent's disapproval by the MPRC was also based on his debarment status. 24 C.F.R. §200.230 (a). There is no persuasive evidence in this record outside of the complaint that the MPRC relied on 24 C.F.R. §200.230 (c)(7) in reaching its determination to disapprove Respondent's participation in the acquisition of Tower.

Senator Spector and HUD as a settlement seems disingenuous on its face, because the Department's reply to the Senator's letter was made several weeks after the imposition of the debarment sanction, and because the Senator's letter simply requested HUD's findings and views on the scope of the debarment. Even assuming arguendo that a settlement was reached, Respondent's ability to bid on an all-cash basis in sales could not have exceeded the terms stated in Assistant Secretary May's March 13, 1985 letter. I find no breach of the scope of Respondent's permissible activity as defined in Assistant Secretary May's letter.

Respondent next asserts that the decision of the MPRC to disapprove Respondent's participation in the acquisition of Tower was arbitrary, capricious and discriminatory. Respondent bases his assertion on the fact that the Government permitted Respondent to bid on the project, and then rejected his low bid. Respondent argues that his debarment has effectively precluded him from participating in any all-cash sale of HUD property. I disagree.

Firstly, Respondent was not prohibited, under the terms of Assistant Secretary May's letter, from participating in cash purchases of HUD-owned or HUD-acquired single family properties. Secondly, the MPRC reached its decision to disapprove Respondent's participation in the acquisition of Tower, not solely on Respondent's debarment, but on the basis of all of the evidence before it, including the reasons set forth in Respondent's request for reconsideration dated February 28, 1989. There was nothing arbitrary and capricious with respect to the MPRC's determination, and the evidence indicates that the MPRC gave Respondent all due consideration under the applicable regulations.² Thirdly, there was a conspicuous absence of extenuating and mitigating evidence before the MPRC, and Respondent did not attempt to convince the MPRC that he had become a responsible businessman in the years subsequent to his


² The words "arbitrary and capricious" are a technical legal phrase. They are not used in their popular sense and in this connection have no opprobrious connotation. In the eyes of the law, an administrative action not supported by evidence or lacking a rational basis, is deemed arbitrary and capricious. O'Beirne v. Overholser, 193 F. Supp. 652, 656 (D.D.C. 1961).

conviction.³ While Respondent's request for reconsideration went to considerable length in describing his business prowess and the "inequities" of the situation, it lacked evidence upon which the MPRC might have inferred that Respondent would conduct the business affairs of Tower in responsible fashion. Considering the seriousness of the offense for which Respondent was convicted, the critical omissions in Respondent's Form 2530 with respect to his interest in Ray Garden's, Inc., the dearth of extenuating and mitigating evidence before the MPRC, and the nature of Tower's business, I find the MPRC's disapproval of Respondent's participation an appropriate exercise of its discretion. Cf., Darwin Construction Co. v. United States, 811 F2d 593 (Fed. Cir. 1987).

Respondent also asserts that the actions of the MPRC were violative of his Fifth Amendment due process rights. While this Board does not have jurisdiction to adjudicate constitutional issues, Victor G. McClendon, Jr., HUDRCA No. 87-2376-D13, 1988 HUD BCA LEXIS 17, (July 25, 1988), it appears on this record that Respondent was afforded all process due under the applicable regulations of the Department.

Conclusion

The Government's complaint is dismissed to the extent it relies upon 24 C.F.R. §200.230 (c)(7). However, it is my determination that the disapproval by the MPRC of Respondent's participation in the acquisition of Tower is warranted under 24 C.F.R. §200.230 (a). The denial by the MPRC of Respondent's eligibility to participate in the acquisition of Tower is sustained.


 Timothy J. Greszko
 Administrative Judge
 HUD Board of Contract Appeals

³ Underlying the Government's authority not to do business with a company is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. §200.210. The term "responsible," as used in the context of these regulations, is a term of art which includes not only a person's ability to perform satisfactorily, but the honesty and integrity of that person as well. Cf., John P. Moscony, HUDBCA No. 89-4444-D17, citing 48 Comp. Gen. 769. (1969).