

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

In the Matter of: :

D.S. KENDALL :

Respondent :

HUDBCA No. 91-5790-D24
Docket No. 91-1591-DB(LDP)

For the Respondent:

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For the Government:

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

May 14, 1991

Statement of the Case

By letter dated July 31, 1990, Robert E. Lunsford, Manager of the Birmingham, Alabama, Regional Office of the U.S. Department of Housing and Urban Development ("Department", "Government," or "HUD"), notified D.S. Kendall ("Respondent" or "Kendall"), that the Department had imposed a one year Limited Denial of Participation ("LDP") on him on the grounds that Respondent failed to provide a complete annual financial report within sixty days of the end of Respondent's fiscal year, as required by the Regulatory Agreement executed between HUD and Respondent.

On September 7, 1990, Lunsford affirmed his initial decision to continue the LDP. Thereafter, Respondent timely filed an appeal with this Board and requested a hearing on the LDP. The parties elected to waive an oral hearing and to have the case submitted for determination on the written record. This determination is based upon a consideration of the entire record in this matter.

Findings of Fact

1. Respondent is the trustee of the Kendall Family Trust, which has owned and managed the Woodward Estates Mobile Home Park in Bessemer, Alabama for the past six years. (Respondent's Evidentiary Affidavit, p. 1 and Exh. A).

2. On November 1, 1984, Respondent and HUD entered into a "Regulatory Agreement for Multi-Family Housing Projects" in which HUD provided an endorsement for insurance on a mortgage on the Woodward Estates Mobile Home Park in exchange for Respondent's agreement to manage and operate the property as a housing project in accordance with HUD regulations. The Regulatory Agreement provides, in relevant part, that:

Within sixty (60) days following the end of each fiscal year the Secretary shall be furnished with a complete annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, certified to by an officer or responsible Owner and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary. (Regulatory Agreement, Paragraph 9(e) at p. 3).

Respondent's 1989 financial report should have been furnished to HUD by March 1, 1990 because Respondent's books are maintained on a calendar year basis. (Respondent's Evidentiary Affidavit, Exhs. A and B).

3. In each of the past five years, Respondent has submitted an annual financial report to the HUD Birmingham office after the March 1 deadline. The preparation of Respondent's annual reports requires the coordination of a tax accountant and certified public accountant. This coordinated effort generally is not completed until two to three months after the Internal Revenue Service's income tax deadline of April 15. During the past five years, HUD has condoned Respondent's late delivery of the annual report by not demanding prompt delivery in accordance with the Regulatory and by not imposing any administrative sanctions. (Respondent's Evidentiary Affidavit, p. 2).

4. By letter dated January 8, 1990, W.R. Martin, Chief of the Loan Management Branch of the Birmingham office of HUD, informed Respondent that HUD required delivery of the annual report by March 1, 1990. Respondent failed to deliver the annual report by that date, consequently, Martin sent a letter dated March 16, 1990 informing Respondent that he was in violation of the Regulatory Agreement. By letter dated March 28, 1990, Respondent requested a sixty-day extension of time in which to file the annual report. The request for an extension was denied by Martin on April 6, 1990. (Govt. Response to Order dated January 29, 1991, attachments).

5. Respondent delivered the annual financial report for the year ending December 31, 1989 to HUD on October 24, 1990. At that time, Respondent requested that the LDP be rescinded. Lunsford denied this request on November 2, 1990 because the "late submission of the 1989 Annual Financial Statement provides no assurance that subsequent Financial Statements will be provided in a timely manner." (Govt. Response to Order dated January 29, 1991, attachments).

6. On or about January 4, 1991, Respondent sought, from the Birmingham HUD office, a waiver or permanent extension of the Regulatory Agreement's sixty-day filing requirement to allow Respondent to make late delivery of annual financial reports. By letter dated January 31, 1991, Gerald Beard, Deputy Chief of the HUD Loan Management Branch in Birmingham, advised Respondent that the Birmingham office had no authority to waive the filing requirement stated in paragraph 9(e) of the Regulatory Agreement nor to grant a permanent extension of time in which to submit the annual financial report. The letter also informed Respondent that the Birmingham office could approve a change in Respondent's fiscal year end date. (Respondent's Evidentiary Affidavit, Exh. D).

7. In his affidavit dated January 31, 1991, Lunsford attests that the Birmingham office has no authority to grant a waiver of the Regulatory Agreement requirement for delivery of the annual financial report under HUD Handbook No. 4370.2, Financial Operation and Accounting Procedures, Chapter 3, paragraph 13(a) and HUD Administration Notice 90-005 dated August 3, 1990 and that such waivers may only be granted by the Secretary of HUD. Additionally, Lunsford states that he would not recommend to the Secretary of HUD that a waiver be granted because Respondent, not the Government, benefits financially from late delivery of the report since he can hire a less expensive Certified Public Accountant to prepare the report. Lunsford also avers that Respondent could change the project's accounting year to avoid late delivery, but has not elected to make this change. (Affidavit of Robert E. Lunsford, Exhs. 1 and 2).

8. On February 11, 1991, Richard W. Bell, Chief Financial Officer of the Kendall Family Trust, executed an "Evidentiary Affidavit" in which he avers that HUD and the project tenants benefit from the late delivery of the financial report because it reduces project expenditures and makes the project more financially sound. The affidavit also states:

It is our hope that the Birmingham Office will make a recommendation to the Secretary to waive this one requirement of the Regulatory Agreement. However, if this cannot be accomplished, it is our goal to continue pursuing cost reductions by using all reasonable means, including the submission of the Financial Statement in the middle of each year rather than March 1st. We openly and honestly believe

it to be the right thing to do. If the cost of sanctions outweigh [sic] the benefit of saving \$2,000.00 per year, we would then comply with this part of the Regulatory Agreement. However, it is difficult to ascertain the full cost at this time, so a decision cannot be made as to how we will respond at a future date. (Respondent's Evidentiary Affidavit, p. 3).

Discussion

It is uncontested that Respondent is a participant in a covered transaction under HUD's nonprocurement programs and that Respondent is a principal as defined in 24 C.F.R. §§ 24.105(m) and (p). Under HUD regulation 24 C.F.R. § 24.705(a)(4) an LDP may be imposed for:

[f]ailure to honor contractual obligations or to proceed in accordance with the contract specifications or HUD regulations;

The burden is on the Government to prove by a preponderance of the evidence that cause for a limited denial of participation exists. 24 C.F.R. §§ 24.313(b)(3), (4).

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," as used in the context of an LDP, suspension, or debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. 48 Comp. Gen. 769 (1969). The test for whether a sanction 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.C. D.C. 1980). In deciding whether to impose a sanction, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. See 24 C.F.R. §§ 24.314(a), 24.320(a).

The imposition of the LDP at issue is based on Respondent's failure to provide an annual report within the time specified by the Regulatory Agreement. The Government contends that Respondent's untimely delivery and continued insistence that timely delivery is not important is sufficient evidence that Respondent is not presently responsible. See Schlesinger v. Gates, supra. Respondent asserts, however, that the continuation of the LDP sanction is not warranted because he has delivered the 1989 annual report and because the Government is not harmed by late delivery of annual reports.

Respondent's reasoning in this context is faulty. The language of the Regulatory Agreement requires delivery of the financial report within sixty days of the end of Respondent's accounting year. HUD's Birmingham office sent a number of notices to Respondent reaffirming that the financial report was to be delivered by March 1, 1990. Nevertheless, Respondent did not deliver the report until October 24, 1990 which is nearly eight months after the required delivery date. Respondent asserts that HUD's failure to enforce the filing deadline for the previous five years indicates that late delivery of the annual report is not a violation which merits the imposition of a sanction. I do not find this contention persuasive in light of the express notice given to Respondent that strict compliance with the requirement for timely submission of the 1989 annual report was expected, notwithstanding HUD's prior practice of accepting late filings without objection. Consequently, I find that Respondent's failure to timely provide the financial report violates the Regulatory Agreement and constitutes an adequate basis for imposing an LDP under 24 C.F.R. § 24.705(a)(4).

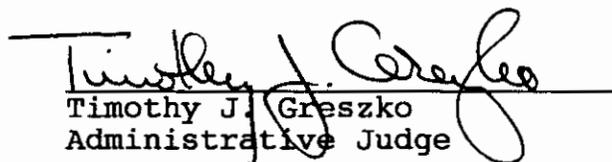
In mitigation, Respondent maintains that late delivery of financial reports benefits the Government because the money saved in accountant fees reduces losses on the housing project thus making the housing project more financially sound. Assuming that this argument is true, I do not find it persuasive because it is premised upon a lack of appreciation for the importance of complying with the express language of a binding agreement and explicit directives of the Government. See Ted Dalton, HUDBCA No. 90-5246-D23, at 6 (Jan. 14, 1991); Cf. Chesley J. Doak, HUDBCA No. 89-4364-D12, at 7 (May 24, 1989); Bruce Haltom, HUDBCA No. 87-264-D62, at 3 (June 13, 1988). Moreover, Respondent has not demonstrated that he intends to comply with the provisions of the Regulatory Agreement relating to the submission of financial data by making timely delivery of financial reports in the future. Conversely, the evidence suggests that Respondent would be inclined to continue the late delivery of financial reports despite the requirements of the Regulatory Agreement.

In redressing this violation, Respondent should change the project's accounting year as suggested by the HUD Birmingham office. Respondent might also seek a waiver of the filing requirement in question from the HUD Secretary, as his request for a waiver appears to be on a reasonable footing.

Nevertheless, based on the record before me, I find that Respondent is not presently responsible and that the conduct in question warrants the imposition of an LDP.

Conclusion

For the foregoing reasons, I find that the Limited Denial of Participation imposed on D.S. Kendall on July 31, 1990 is warranted under the circumstances of this case and should not be rescinded.


Timothy J. Greszko
Administrative Judge