



**Board of Contract Appeals**

U. S. Department of Housing and Urban Development  
Washington, D.C. 20410-0001

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In the Matter of:	:
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<b>JOHN POWELL WALKER,</b>	:
and <b>SUNBELT PROPERTIES INC.</b>	:
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Respondents	:
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HUDBCA No. 94-G-123-D2  
Docket No.

Mr. John Powell Walker  
[Redacted]

For Respondents, Pro Se

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and Urban Development  
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For the Government

DETERMINATION  
February 18, 1999  
By Administrative Judge Jean S. Cooper

Statement of the Case

By letter dated July 20, 1993, from Edwin I. Gardner, Manager of the Oklahoma Office of the U.S. Department of Housing and Urban Development (HUD), John Powell Walker, (Walker) president of Sunbelt Properties, Inc., (Sunbelt), Respondents in this case, were notified that a Limited Denial of Participation (LDP) had been imposed on them. The LDP was based on the termination for default of a Real Estate Asset Management (REAM) contract that had been awarded to Sunbelt by HUD. Failure to honor contractual obligations or to proceed in accordance with contract specifications was cause for an LDP pursuant to 24 C.F.R. §24.705(a)(4) in 1993. Walker and Sunbelt were prohibited from participating in HUD programs under the direction of the Assistant Secretary for Housing, Federal Housing Commissioner, within the jurisdiction of the HUD Oklahoma Office for a period of twelve months.

Walker and Sunbelt made a timely request for an informal conference on the LDP, which was held on September 20, 1993. The LDPs were affirmed on September 29, 1993. Walker and Sunbelt timely appealed the affirmation of the LDP, and requested a hearing before a hearing officer pursuant to 24 C.F.R. §24.713

On October 20, 1993, the HUD Board of Contract Appeals docketed Walker and Sunbelt's request for a hearing as a single case. Administrative Judge Timothy J. Greszko was assigned as the hearing officer. On January 11, 1994, Judge Greszko denied Respondents' Motion for a Directed Verdict filed in this case, in which Walker had argued that HUD lacked the authority to sanction him or Sunbelt pursuant to 24 C.F.R., Part 24 because it only applied to non-procurement programs. Judge Greszko held as a matter of law that Walker and Sunbelt were subject to an LDP pursuant to 24 C.F.R. §§110(a)(1)(ii)(C) and 110(d), and that 24 C.F.R., Part 24 applied to both procurement and non-procurement contracts and contractors.

During a prehearing conference held on January 14, 1994, it was decided that Walker's and Sunbelt's LDP case would be heard after Sunbelt's appeal of the termination of its contract for default was heard and decided. Because of the delay in the hearing on the LDP, the manager of the HUD Oklahoma Office agreed to immediately terminate the LDPs of Walker and Sunbelt, as well as an LDP imposed on Charles "Buddy" Jones, a key employee of Sunbelt. Walker, Sunbelt and Jones retained their right to contest the imposition of the LDP on each of them, and to appeal the ruling on their LDPs, including the applicability of 24 C.F.R., Part 24 to procurement contracts and contractors. By Order dated August 24, 1995, the related LDP cases were stayed indefinitely, pending a determination of the issues in Sunbelt's contract appeal.

Government counsel assigned to both this case and Sunbelt's contract appeal was killed in the explosion of the Murrah Federal Building in Oklahoma City in 1995, as were a number of the employees who would be witnesses at a hearing on this case and the contract appeal. Many documentary exhibits relevant to this case and the contract appeal were also destroyed in the explosion. This case, the contract appeal of Sunbelt, and Jones' LDP case were reassigned to Administrative Judge Jean S. Cooper after the death of Judge Greszko. Discovery was ordered to be completed on or before October 11, 1996, and all three cases would be heard together.

A consolidated hearing was held in this case, the contract appeal, and the LDP case of Jones in Oklahoma City. This determination is issued pursuant to the version of 24 C.F.R., Part 24 (May 1988), the regulations which were in effect when the LDP was imposed. It is based on the record considered as a whole. The record includes documents in the contract Appeal File (AF), which was incorporated into the evidentiary record in this case, documentary evidence presented at the hearing, testimony, and pre and post-hearing briefs filed by the parties.

Findings of Fact

1. On February 1, 1993, HUD issued an Invitation for Bids for a firm fixed-price indefinite quantity REAM service contract for real estate asset management services for the Oklahoma City metropolitan area. The contract was designated as a small business set-aside contract. (AF Tab 2.1).

2. Sunbelt is an Oklahoma corporation with experience in performing public contracts, including contracts for HUD that were similar to the REAM contract. Walker is the president of Sunbelt. Although no representative of Sunbelt attended the pre-bid conference held on February 16, 1993, HUD prepared a transcript of the conference and provided it to all prospective bidders, including Sunbelt. At the pre-bid conference, a document with questions and answers about the contract was read aloud and was included in the transcript. One of the answers read aloud that was transcribed stated that for all services prescribed in Service Items 1 through 39, HUD would be financially responsible for Service Items 7, 10, 16, 27, 30 and 32. HUD also issued an amendment clarifying the solicitation to all prospective bidders, including Sunbelt. At the pre-bid conference, bidders were told by HUD Government Technical Representative (GTR) Larry Cook that time frames were critical to the contract and that HUD would enforce those time frames strictly. Cook specifically stated that the REAM contractor would be required to hang a lock box quickly on a property so the appraiser would have access to the property, and the REAM contractor would be required to replace keys for the lock boxes. (AF Tabs 2.2, 4.1, 4.2; Tr. 344-356.)

3. Sunbelt submitted a bid on the REAM contract. The contracting officer requested that Walker, as Sunbelt's president, verify Sunbelt's bid because it was lower than many of the 18 bids received and it was also lower than the independent Government estimate for the cost of performance of the contract. The request for verification of bid pointed out the differences between the REAM contract and prior HUD area management broker contracts with which Sunbelt and Walker were more familiar. The contracting officer requested that Sunbelt verify that it had the necessary resources to deliver the contract services, such as adequate trained staff and an equipped office reasonably located to provide convenient services to HUD and its clients. Walker provided written answers to the contracting officer. One area that the contracting officer was particularly concerned about was the statement that Sunbelt had "zero" employees. Walker responded that he and Charles "Buddy" Jones would both be "hired" if the contract were awarded to Sunbelt, and three other real estate agents were also available. Walker would organize and oversee the contract, as well as make most of the organizational decisions. Jones would be the "key" person with whom HUD would deal most of the time. Walker stated that Sunbelt intended to

hire subcontractors to perform most of the contract services. The contracting officer referred the matter to the Small Business Administration (SBA) to determine whether Sunbelt had the capacity to perform the contract, which was set aside for a small business. The SBA determined that Sunbelt qualified as a small business for the set-aside, and that it had the capacity to perform the contract. Based on that determination, the contracting officer deemed Sunbelt to be a responsible bidder, and awarded it the contract. (AF Tabs 3.1-3.6; Tr. 358-364.)

4. On May 5, 1993, the REAM contract was awarded to Sunbelt by the HUD Oklahoma Office. Work was to begin on June 1, 1993. Sunbelt was to manage and maintain the properties in the contract inventory so that they could be sold as soon as possible. At the time of award, there were about 450 HUD-owned properties in the contract inventory. Walker would manage the contract for Sunbelt. He would also pay the bills, hire personnel, schedule repairs, and do most of the tasks that could be done in the office. Jones would coordinate the contract work as the contract supervisor, deal with the GTR, inspect properties, secure them, change locks and lockboxes, do minor repairs, and assist with getting a computer program "on line." (AF Tab 2.1; Tr. 114, 925, 988, 991, 994.)

5. Prior to commencement of the contract, HUD held an orientation meeting on May 7, 1993, with Sunbelt represented by Walker and Jones. The required contract services were reviewed, including the time frames for performing the services, and the authority of the various HUD contracting officials. Sunbelt's representatives asked few questions about the contract requirements. They did request a print-out of the contract inventory as of May 7, 1993, so that Sunbelt could set up a computer program that it intended to use in its performance of the contract. The computer program, designed by Mark Estes, was to make Sunbelt "work smart" with almost no employees. Sunbelt spent most of its time prior to the start date of the contract inputting property data into the computer program, and did not even do a spot check of some of the properties to determine their condition. Had Sunbelt used the May printout to check property conditions, it would have been aware that some of the properties were very overgrown and would require different lawn services than Sunbelt planned on using. (AF Tab 3.7; Tr. 366-368, 909-910.)

6. Walker sent a letter dated May 25, 1993, to the contracting officer, which stated that he had directed Jones to "limit his discussion concerning the properties," to the GTR. Walker also stated in the May 25 letter that Sunbelt would accept only 15-20 lock boxes as spares for replacement. (AF Tab 3.8.)

7. On June 1, 1993, Sunbelt was given a delivery order in the form of a SAMS inventory status report containing a list of

all properties that HUD believed were in the contract inventory on the date of contract commencement. On July 15, 1993, HUD gave Sunbelt a second delivery order which correlated to the SAMS inventory status report dated July 1, 1993, to confirm all of the properties assigned to Sunbelt in June, 1993. HUD gave Sunbelt a third delivery order to confirm all of the properties assigned to it between July 1 and July 12, 1993, with a SAMS report accompanying it. (AF Tabs 2.5, 2.6, 2.7; Tr. 272-380.)

8. Service Item 1 of the contract required Sunbelt to inspect all properties on the initial listing of properties assigned to it under the contract on June 1, 1993, within 15 days of contract commencement. The contracting officer directed Sunbelt to document those initial inspections on a HUD Form 9516A, which required a detailed inspection. The authority for directing that the Form 9516A be used was at service Item 36. The purpose of requiring Sunbelt to perform a detailed initial inspection on all properties in the contract inventory was two-fold: 1) to familiarize Sunbelt with the contract inventory, and 2) to let HUD know the condition of all of the properties at the start of the contract. (AF Tab 2.1; Tr. 115-116.)

9. As of June 22, 1993, HUD had not received any initial inspection reports from Sunbelt on the properties that were in the contract inventory on June 1, 1993. Trish Nix, the GTR assigned to administer the contract on a day-to-day basis, sent Sunbelt a Rapid Reply letter dated June 22, 1993, advising Sunbelt that it was required to perform an initial inspection on each of those properties. Walker decided, despite this communication, that Sunbelt would not do a detailed initial inspection or fill out a Form 9516A, used to document an initial inspection, for each property assigned to it. At no time during performance of the contract did Sunbelt ever perform or document initial inspections on the properties in the initial listing of the contract inventory on June 1, 1993. The only inspections performed on those properties were walkthroughs by Jones, who made sketchy notes on a legal pad about the properties. (AF Tab 4.23; Exhibit G-2; Tr. 120, 849, 919-922.)

10. Service Item 3 of the contract required Sunbelt to initially inspect a newly assigned property, to post HUD warning signs, and to provide access to the property for the appraiser within 48 hours of assignment. Initial inspection Form 9516A was to be turned into HUD within 5 working days of assignment of a new property. The warning sign was to be posted in a conspicuous location, and contain the name, address and telephone number of Sunbelt, so that Sunbelt could be promptly reached in an emergency. (AF Tab 2.1; Tr. 129, 134-135.)

11. Sunbelt did not post HUD warning signs on at least 14 properties, based on HUD's inspections of properties in the contract inventory, in violation of Service Item 3 of the

contract. Some properties had out-of-date warning signs lacking any information about how to contact Sunbelt. Properties with out-of-date warning signs had been in the initial listing of properties assigned to Sunbelt on June 1, 1993, and had been previously managed by a company named Property Watch, whose name and telephone number still appeared on the posted warning signs. Property Watch received numerous calls, based on the outdated signs, and expressed concern to HUD that its reputation was being hurt by association with the poor maintenance being performed by Sunbelt. Although the warning sign problem was initially due to HUD running out of the signs, that supply problem was corrected within a few days. Sunbelt did not replace Property Watch warning signs with Sunbelt signs even after there were enough signs to post. For a property located at 2531 NW 42nd Street, which was assigned to Sunbelt on June 10, 1993, Sunbelt failed to comply with any of the requirements of Service Item 3 of the contract. (AF Tab 3.20; Exh. G-4; Tr. 862-864, 913.)

12. Service Item 7 of the contract required Sunbelt to remove and dispose of interior and exterior trash and debris, and to leave the property "broom clean" within ten days of assignment, and thereafter as conditions warrant. On one property in the contract inventory, Sunbelt failed to remove clothing, "junk" and broken glass in a room, and debris in the yard, including broken glass, as evidenced by a HUD inspection report. On another property, Sunbelt failed to remove truck parts in the yard and in the garage, despite receiving Rapid Reply letters from Nix about the need to remove them. Failure to remove these items from the two properties was in violation of Service Item 7 of the contract. (Exh. G-9.)

13. Service Item 8 of the contract required Sunbelt to secure properties to prevent unauthorized entry and damage by the elements, as conditions warranted. The specifications for securing were set out in Exhibit 3 to Service Item 8 in the contract. Securing included replacing broken glass, broken locks, and securing doors and windows. If vandalism was a persistent problem, Sunbelt was to board up the windows and doors in accordance with the contract specifications. One property in Sunbelt's inventory was found, upon inspection, to be unsecured, with windows "wide open," three weeks after the condition was initially called to Sunbelt's attention in a Rapid Reply letter. Another property had an unsecured storm cellar, which Nix had directed Sunbelt to correct by a certain date, but Sunbelt did not do so. A third property had three broken windows and a broken French door that needed to be secured promptly. Nix directed Sunbelt to correct these items, but Sunbelt still failed to make these repairs and to secure the property weeks after the problem was called to its attention. (AF Tab 2.1; Exh. G-10.)

14. Service Item 10 of the contract required Sunbelt to secure and/or winterize swimming pools in accordance with local

codes within five days of assignment. Also, Service Item 12 of the contract required Sunbelt to eliminate conditions which present a safety hazard within 24 hours of discovery. On a property included in the initial listing, there was an above-ground pool with stagnant water that was undrained and unsecured. Sunbelt did not drain the pool or secure the pool within five days of assignment. The GTR sent Sunbelt a directive to drain the pool by June 15, 1993, but Sunbelt failed to do so. The GTR again directed Sunbelt to cure the safety hazard at the property and secure the pool, extending the time to do so until July 2, 1993, after Sunbelt failed to correct the problem, which was a safety hazard, by June 25, 1993. Sunbelt contended that it did not drain the pool because the property had been sold, but failed to produce any evidence to support that contention. (AF Tab 2.1; Exh. G-11.)

15. Service Item 13 of the contract required Sunbelt to "[a]ssume responsibility for keys and/or lock boxes, per HUD's instructions" within 48 hours of assignment and ongoing. Exhibit 6 of the contract specifications grid states that Sunbelt must install at its own expense a HUD-approved lock box and key, but that HUD would provide the lock box. Whenever a lock was missing or inoperative, the lock box was to be replaced by Sunbelt. Within 48 hours after notification that a property was scheduled to close, Sunbelt was to issue keys to the purchaser, and to remove the lock box and lock box key. The purpose of the lock box was to provide access to the properties to appraisers, repair contractors, real estate brokers, and inspectors. Sunbelt, at Walker's direction, refused to install lock boxes as required by the contract, until Sunbelt "had an agreement with HUD as to who was responsible for payment of the same." As a result of Sunbelt's refusal to install lock boxes within 48 hours of assignment, per Service Item 13, appraisers were not able to perform appraisals on at least 21 properties in Sunbelt's inventory. The lock box problem continued until July 12, by Sunbelt's own admission. (AF Tabs 2.1, 3-12, 3.14; Exhs. G-7, G-8, G-12; Tr. 186-188, 838.)

16. Sunbelt refused to remove some lock boxes from properties, as required by Service Item 13 of the contract, because it was not given notice to remove them until after the closing had taken place. As of about July 1, 1993, Sunbelt, at Walker's direction, refused to accept responsibility for the removal of any of the lock boxes after a closing had taken place, and told brokers or purchasers to remove them because Walker was concerned about the liability of Sunbelt for its employees entering a closed property. Even before July 1, 1993, HUD had received complaints about Sunbelt's failure or refusal to remove lock boxes, and Nix sent a number of Rapid Reply letters to Sunbelt to perform this contract obligation. The issue of lock box removal was primarily caused by the lack of notice to Sunbelt of an impending closing, which was under HUD's control. However,



in the first month of the contract when Sunbelt was still willing to remove lock boxes after closing, even if timely notice was not given, there were delays of as long as 3-1/2 weeks for the removal to take place. (AF Tab 2.1; Exh. G-12; Tr. 193-201; 857-861.)

17. Service Item 14 of the contract required Sunbelt to ensure that grass and shrubbery were cut in a professional looking manner, with clippings removed, snow removed from walkways and sidewalks, and that "properties are maintained in a presentable conditions at all times." This work was to be done "as needed," in accordance with Exhibit 7 of the contract specifications grid. Exhibit 7 required that initial maintenance services per Service Item 14 be completed within 5 days after a property was assigned. Lawn mowing was required to be done twice a month, approximately every 14 days, and grass was to be cut no higher than two inches. Sunbelt was required by the contract to regularly cut down weeds, and to edge paved areas and planting bed three times during the mowing season. The premises were to be cleared of clippings, debris, leaves, and cuttings. Pruning of bushes and trees was to be done within the first 30 days of the mowing season, or within 30 days after receipt of a new acquisition. Sunbelt was required by Exhibit 7 to provide, at its own expense, "competent, full-time supervision of the work while it is actually in progress." If climate conditions required more frequent or less frequent lawn mowing services, HUD could direct Sunbelt in writing to increase or decrease mowing services. Exhibit 7 further stated that there would be no additional compensation allowed for oversized lots, excessive grass growth or debris removed. No lawn mowing services were to be performed on an occupied property. (AF Tab 2.1.)

18. Sunbelt consistently failed to perform the requirements of Service Item 14. As of June 29, 1993, HUD found that only a few lawns had been mowed on the properties in Sunbelt's inventory, based on property inspections and telephone complaints made to HUD. Walker had directed all lawn services to cease for about 10 days at the start of the contract so that he could decide how to handle them. As of July 7, 1993, some lawns had still not been cut. At some properties, the grass and weeds were over three feet tall. Neighbors cut some front yards when Sunbelt failed to do the required mowing, so that the neighborhood would not look so bad. Rapid Reply letters were sent to Sunbelt when complaints were received, to direct Sunbelt to mow the problem lawns immediately. Walker, who dealt with the Rapid Reply letters, ignored Rapid Reply letters from HUD indicating a lawn was ready to be cut. Nix and other HUD employees sent Rapid Reply letters to Sunbelt when HUD was being cited for municipal violations and charged fines because properties were so overgrown that their conditions were in violation of local ordinances, but Sunbelt did not do the work required. Some lawns were not cut for six or eight weeks, and



HUD was unable to persuade Sunbelt to perform the required lawn maintenance service tasks on these properties. When dates for performance were extended by Rapid Reply letters, Sunbelt still failed to comply. Walker made little effort to respond to HUD's communications about lawn maintenance because he believed that the property conditions were so poor that it would take months to get them properly cut and trimmed. He did not try to get the work done on the time schedule required by the contract. Sunbelt never provided the required on-site supervisor for the lawn maintenance work, as required by the contract, letting the subcontractor, Pruitt, "supervise" himself. Sunbelt, through Jones, entered into an agreement with Pruitt that he could leave grass clippings on the properties and mulch them the next time he serviced those properties, in violation of the contract requirement that all clippings were to be removed when cut. Jones was the inspector for this work. He believed that all lawns were not properly cut and cleared until around July 12, 1993, six weeks into the contract. (AF Tab 4.20; Exhs. G-13, G-14; Tr. 838, 906-908, 927-928, 946-947, 949, 965-966.)

19. Service Item 16 of the contract required Sunbelt to forward homeowners association bills to HUD's contractor for payment to avoid penalties. Late payment penalties would be assessed to Sunbelt. This was to be done within five days of assignment "and ongoing." A property in Sunbelt's inventory was unable to close on schedule because Sunbelt had failed to get the homeowner's association dues bill paid in a timely manner. Walker was responsible for the payment of bills. (AF Tab 2.1; Exh. G-15; Tr. 991.)

20. Service Item 18 of the contract required Sunbelt to inspect completed repairs to ensure that repairs were satisfactory. Sunbelt had to complete an inspection report form (Form 9519) and a Form 1106 within 24 hours of notification by the repair contractor that the work was done. (AF, Tab 2.1; Tr. 272-273.)

21. The GTR issued repair authorization letters to Sunbelt to have repairs done on properties to make those properties marketable. Sunbelt knew that time was of the essence to get the repairs completed so that the properties could be sold. It was Sunbelt's duty under Service Item 18 and Exhibit 8 of the contract specifications grid to actively monitor the progress of the repair work, and to identify and resolve potential performance problems. If a repair authorization letter expired, it was Sunbelt's duty to request an extension from the GTR. (Exh. G-17; Tr. 273-275, 918.)

22. Starting on June 21, 1993, Nix sent Sunbelt Rapid Reply letters with lists of properties with expired repair authorization letters that needed to be extended, and the repairs completed. Sunbelt was directed to advise Nix of the status of

these repairs within three days of the date of each Rapid Reply letter. Sunbelt ignored Nix's request in the first Rapid Reply letter. Nix again asked for the status of all but one of the same repairs in a second Rapid Reply letter dated June 29, 1993. Sunbelt did not provide Nix with the information she requested, or request an extension of the expired repair authorization letters. Starting on June 3, 1993, Nix sent Sunbelt Rapid Reply letters concerning unacceptable repairs ordered by the prior REAM contractor but which Sunbelt needed to get corrected, and she also sent Sunbelt Rapid Reply letters concerning the status of repairs ordered by Sunbelt. Sunbelt did not respond to the Rapid Reply letters. The closing of at least one property was delayed due to Sunbelt's failure to have defective paint repaired. According to Walker, he refused to have any defective paint repaired unless HUD paid to have a lead-based paint test performed on the paint prior to removal, which the contracting officer refused to do. Walker was aware that Sunbelt was responsible under the contract for repair of all "defective paint," but did not inquire prior to bidding whether Sunbelt had to test for lead-based paint under that contract provision. The contracting officer never directed Sunbelt to test for lead-based paint. Sunbelt had the equipment to easily test for the presence of lead-based paint, but refused to do so without additional compensation. No defective paint was repaired on any houses because Walker refused to order those required repairs, and there is no evidence that any of the defective paint presented a lead hazard. (Exh. G-17; Tr. 276-286; 957-963,)

23. Sunbelt and Walker knew or should have known about repairs for which the prior REAM contractor, Property Watch, had contracted or obtained HUD approval to contract because Sunbelt was given the prior REAM contractor's files for each property that was in the contract inventory as of mid-May, 1993. Those files contained repair listings and repair authorization letters, including information on repairs that were escrowed and were to be done after closing at HUD's expense. (Tr. 287-291.)

24. Service Item 28 of the contract required Sunbelt to provide appropriate assistance on an ongoing basis to all interested parties regarding properties available for sale. "Interested parties" included potential homebuyers, repair contractors, appraisers, HUD officials, and city officials regarding code violations. Sunbelt was to provide repair contractors with information, if requested, on the repair work that would be needed on a property, and whether those repairs would be performed before closing or after closing as "escrowed repairs." Information about "escrowed repairs" was required to be posted in the properties, and escrow repair sheets were required to be kept by Sunbelt in each property file. Sunbelt received many telephone calls for information that it did not believe it was required to provide. Sunbelt, at the direction of Walker, refused to provide information about escrowed repairs to

purchasers and brokers until Sunbelt was directed by the contracting officer to do so at a meeting on June 18, 1993. After that date, Sunbelt complied with that specific directive, and was relieved of the duty of providing some sales information. (AF Tab 2.1; Tr. 291-294; 831, 935-936.)

25. Sunbelt conducted its business out of the offices of Walker & Walker, which was a law firm operated by Walker's parents. The telephone used by Sunbelt to provide information and assistance about the contract properties was sometimes answered as "law offices," and not as "Sunbelt Properties." This caused considerable confusion. Also, persons answering the telephone on behalf of Sunbelt refused or were unable to provide basic information about the contract properties to brokers, buyers, and city officials, and were often rude in their refusal to provide the information sought. HUD received a number of complaints about Sunbelt's refusal to provide assistance and information. The GTR and other HUD employees were often unable to reach Sunbelt by telephone because of a constant busy signal, which had a negative impact on administration of the contract. Walker considered HUD's concerns about the telephone problem to be "Mickey Mouse," and had no intention of getting additional phone lines for the contract. Walker and Jones believed that the telephone problem had been solved at a meeting with HUD on June 18, 1993, but the GTR was still having trouble getting through as late as July 9. Jones also did not return the calls of GTR Nix in a timely manner, which eroded the working relationship between HUD and Sunbelt. (AF Tab 4.12; Exh. G-18; Tr. 295-305; 849-854, 914-915, 935, 942-943, 987.)

26. Service Item 33 of the contract required Sunbelt to arrange for daily weekday mail pickup and delivery to and from the HUD office, except on holidays. HUD considered daily written communication to be essential for proper contract administration and performance because of the time-sensitive nature of the contract. Sunbelt was to deliver inspection reports to HUD on a daily basis, and to receive Rapid Reply letters from HUD the same day they were written, if possible. Sunbelt failed to comply with Service Item 33 of the contract. The contract began on Tuesday, June 1, 1993. Sunbelt did pick up its mail from HUD that day, but Sunbelt did not pick up its mail again at HUD until Monday, June 7, 1993, when Jones came in after 3 p.m. to pick up Sunbelt's mail. Nix was so concerned about Sunbelt's failure to pick up its mail on a daily basis that she brought the problem to the attention of the contracting officer. The problem recurred on June 29, 1993, when Sunbelt again failed to pick up its mail. Jones would sometimes leave mail in the mailbox if he didn't believe it was important. This conduct impeded efficient performance and administration of the contract. (AF Tabs 4.8, 4.11; Exh. G-19; Tr. 306-312, 866.)

27. Service Item 36 of the contract required Sunbelt to

complete HUD Form 9516A, the initial inspection report, within five working days of assignment of a property, and thereafter as required by HUD. The initial inspection report is a particularly important document for administration and performance of the REAM contract because it identifies the initial condition of a property, its insurability, and what repairs are needed before it can be sold. Sunbelt had a pattern of failure to complete HUD Form 9516A and to deliver it to HUD within five working days of assignment of a property. This problem was exacerbated by Jones' refusal to bring the reports into Nix's office, and by putting these reports in a mail slot assigned to Sunbelt for receipt of mail from HUD to Sunbelt. (AF Tab 2.1; Exh. G-20; Tr. 316.)

28. Service Item 38 of the contract required Sunbelt to provide a fully staffed office available to HUD contractors, appraisers, and HUD authorized personnel during weekday business hours of 8 a.m. to 5 p.m., except for Federal holidays. Problems with an adequately staffed office and competent phone answering services occurred immediately, when Sunbelt's phone rang unanswered, was constantly busy, or was picked up and immediately disconnected. One HUD staff member dialed Sunbelt's phone over 100 times in a single day before she was able to reach Sunbelt. On June 3, 1993, Nix called Jones to find out why there was such a problem reaching Sunbelt by telephone, and Jones informed her only that he was "working on the problem." (AF Tab 4.7; Exh. G-21; Tr. 330-331.)

29. Service Item 23 of the contract required Sunbelt to collect rental amounts on a timely basis, per HUD's instructions. Service Item 24 required Sunbelt to deposit rental collections within 24 hours of receipt, per HUD's instruction, in accordance with Exhibit 10 of the contract specifications grid. Exhibit 10 also required Sunbelt to forward rent and other collections to the HUD lock box within 24 hours after receipt, and to complete a separate transmittal form for each check or money order transmitted. Sunbelt received a rental check for \$600 on or about June 2, 1993, but it remained on Walker's desk until at least June 25, when Nix called Jones to find out if Sunbelt had received the rental check. Jones told Nix that Sunbelt had received the check, but did not know what to do with it. Sunbelt's failure to forward the \$600 rental check to the HUD lock box for over three weeks, and to make no inquiry about how to forward it to the HUD lock box, was a failure by Sunbelt to perform Service Item 24 of the contract. (AF Tabs 2.1, 4.19; Tr. 340.)

30. The SAMS inventory report given to Sunbelt at the start of the contract was not accurate, primarily because it continued to list some properties that had already been sold. The confirming delivery order dated June 1, 1993, which was given to Sunbelt on June 15, was also inaccurate. Sunbelt detected many of these errors during the course of the contract but Sunbelt had

no contractual duty to determine whether a property was correctly listed in the inventory prepared by HUD. Jones also found from going through county records that at least 34 properties listed in the contract inventory had already been sold at the start of the contract. The SAMS reports given to Sunbelt never were completely accurate, and the problem was compounded by the fact that neither HUD nor its closing agents were promptly notifying Sunbelt when a property closed and was removed from the inventory. However, Sunbelt failed to place proof of this information as to each of these sold properties in evidence so that it could be compared to the lists of properties on which HUD found performance failures. In the absence of that evidence, there is insufficient proof on which to find that errors in SAMS reports and confirming delivery orders were the cause of Sunbelt's performance failures. (AF Tabs 2.1, 2.5, 2.6, 2.7, 2.8; 5, 6; Exhs. G-1, G-23; Tr. 424-427, 449-460, 832-837, 857-861, 950-951.)

31. On June 11, 1993, the contracting officer issued a letter of concern to Walker about the many complaints that HUD had received concerning Sunbelt's performance failures and the GTR's concerns about Sunbelt's lack of performance. As of that date, Sunbelt was failing to satisfactorily perform most of the service items of the contract. The contracting officer was not satisfied by Walker's response to the letter of concern because Walker only "repudiated" all of the problems identified by the contracting officer. (AF Tabs 3.13, 3.16, 4.12; Tr. 383-384.)

32. On June 16, 1993, the contracting officer issued a cure notice to Sunbelt because there was no apparent improvement or correction of the contract performance problems noted in the letter of concern. The contracting officer sent a cure notice to Sunbelt, although he knew that he was not required to do so because of the nature of the contract. The contracting officer wanted Sunbelt to cure its performance deficiencies so that the contract would not have to be terminated. (AF Tab 3.15; Tr. 382-383, 400.)

33. The contracting officer set up a meeting with Jones and Walker for June 18, 1993. The meeting was partially audiotaped, and the audiotape was later transcribed with the assistance of Joyce Swallow, who had attended the meeting for HUD. The meeting was attended by Walker, Jones, and Mark Estes for Sunbelt, and by the contracting officer, Nix, and Larry Cook for HUD. The meeting lasted for several hours and a number of subjects were discussed, including a properly staffed office, providing appropriate assistance to HUD, its clients, and appraisers; the repair escrow sheets, lock boxes and keys, the computer system developed by Estes for Sunbelt, and curing defective paint. Estes was trying to computerize the initial inspection reports, and he was having difficulty with that computer program, which caused delay in production of initial inspection reports. The

contracting officer considered it a waste of time to computerize inspection reports because it was not required by the contract, and the forms were provided by HUD to be filled out during the inspections themselves. Sunbelt was also demanding that HUD provide the keys for the lock boxes at HUD expense. Sunbelt, through Walker, refused to cure any defective paint, claiming that it did not want to risk exposing any subcontractor to a lead hazard. The contracting officer considered Sunbelt's refusal to cure any defective paint, in spite of the contract requirement that it do so, as a repudiation of the contract requirement, and a default. Nonetheless, it was the impression of Estes and Walker that everything was settled between HUD and Sunbelt, and that their problems were resolved. Swallow also has the impression that, for the most part, Sunbelt and HUD would continue on a new and better footing, but she was not present for the last part of the meeting. (AF Tab 4.17; Exh. G-24; Tr. 387-392, 396-399, 707, 763-764, 986.)

34. On June 29, 1993, the contracting officer issued a notice to Sunbelt to show cause why the contract should not be terminated for default. The contracting officer did this to give Sunbelt "every reasonable opportunity" to respond to HUD's concerns, because the contracting officer still wanted to avoid terminating the contract for default. (AF Tab 3.21; Tr. 400.)

35. Walker responded to both the cure notice and show cause notice in a single document, but he failed to satisfy the concerns of the contracting officer about Sunbelt's performance. HUD continued to receive so many complaints about Sunbelt's failure to perform contract service items that the contracting officer concluded "[t]here was no end to the complaints and the problems." In his written response on behalf of Sunbelt, Walker demanded that all new delivery orders be in writing, never orally given with confirmation in writing; he refused to have documents delivered directly to Nix's desk, although directed to do so; and he admitted that Sunbelt had failed to remove lock boxes after it had been given notification to do so. (AF Tab 3.22; Tr. 401-404.)

36. On July 8, 1993, Nix wrote a memorandum to the contracting officer about the continuing serious problem of Sunbelt's lack of contract performance. Inspection reports showed that lawn maintenance problems had not been solved, and cuts were being made late or were not complete in some cases. After further consultation with Nix, the contracting officer terminated Sunbelt's contract for default on July 12, 1993. (AF Tabs 1.1, 4.22, 4.23, 4.30; Exh. G-13; Tr. 406, 408.)

#### Discussion

A Limited Denial of Participation (LDP) is an administrative sanction that allows HUD, as a Federal agency, to refuse to do



business with a person or entity that is not "responsible." 24 C.F.R. §24.115(a). The term "responsible" as used in the context of HUD administrative sanctions such as suspension, debarment, and LDP 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 an administrative sanction is warranted is present responsibility, although lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 11 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980). These administrative sanctions are to protect the public interest and are not to be used for purposes of punishment. 24 C.F.R. §24.115(b).

Both Sunbelt and Walker are subject to an LDP as participants, as defined at 24 C.F.R. §24.105(m), because Sunbelt's contract with HUD was a covered transaction under 24 C.F.R. §24.110(a)(1)(ii)(C), and Walker is Sunbelt's president. Walker is also a principal, as defined at 24 C.F.R. §24.105(p)(14), because he is an officer of Sunbelt with primary management responsibilities who had critical influence and substantive control over the REAM contract, which involved rehabilitation of HUD-owned and held properties. Procurement contracts are expressly included within the types of transactions covered by the LDP regulations. 24 C.F.R. §24.110(a)(1)(ii)(C).

The reason for Sunbelt's and Walker's LDP was Sunbelt's default on the REAM contract. HUD cites 24 C.F.R. §24.705(a)(4) as cause for both LDPs. That regulation provides that failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations is a cause for an LDP if it is based upon adequate evidence. Adequate evidence is likened to the probable cause necessary for an arrest, search warrant, or a preliminary hearing. Horne Bros. v. Laird, 463 F. 2d 1268, 1271 (D.C. Cir. 1972). It is not a rigorous level of proof.

The factual record in this case is so dominated by Sunbelt's refusals to perform contract requirements and failures to perform acceptably or on time that I conclude that virtually none of the elements of contract performance by Sunbelt were acceptable. Sunbelt has further failed to show that its performance failures were beyond its control and otherwise excusable. The contracting officer in this case gave Sunbelt opportunities to correct its performance failures before the contract was terminated for default even though the issuance of show cause letters and cure notices are not required for a service contract. Emancar, Inc., supra.

From contract inception, Sunbelt failed to commit sufficient personnel to perform the contract in an acceptable and timely manner, despite Sunbelt's assurances that it would do so.



Sunbelt spent time, money, and effort on a computer program that was not required or necessary for contract performance, while failing to perform the specific requirements of the contract. The lawn maintenance requirements were all but ignored, and Sunbelt's failure to simply cut grass was so egregious that HUD was charged with municipal fines because of Sunbelt's failure to perform this basic task of its contract. Closings were postponed because Sunbelt failed to perform contract requirements. Sunbelt flagrantly ignored directives from the GTR that were reasonable, and related directly to needed performance of specific contract requirements. Sunbelt's unexcused refusals and failures to perform had an immediate and continuing detrimental effect on the administration of the REAM contract.

HUD has established by convincing and compelling evidence, not merely adequate evidence, that Sunbelt failed on almost every level to acceptably and timely perform the REAM contract. Most of Sunbelt's failure was attributable to Walker as the corporate officer who made all of the financial decisions concerning the contract, and who personally refused or failed to have certain contract requirements performed at all. I find that Sunbelt failed to honor contractual obligations and that it also failed to proceed in accordance with contract specifications. I further find that Walker, as a principal and participant on the REAM contract, failed to honor contractual obligations on behalf of Sunbelt, and that he also failed, on behalf of Sunbelt, to proceed in accordance with contract specifications.

The financial decision that Walker made to use so few Sunbelt employees and subcontractors to perform the contract was the primary cause of the inspection and lawn maintenance performance failures, and it also caused many of the communication problems between Sunbelt and HUD. Walker ordered that all lawn maintenance services cease for 10 days, when these services were required by the contract to be performed twice a month. Each time those lawn maintenance services were not performed fully and on time, there was a separate contract default because the REAM contract was a service contract. Emancar, Inc., HUDBCA No. 80-534-C-12, 82-1-BCA ¶15,531.

Walker's refusal to have any defective paint corrected, in defiance of the contract requirements, was not excusable. Walker's refusal was based on a belief that the defective paint was lead-based, and posed a health hazard. Sunbelt had the equipment to easily test the paint for lead content, but Walker refused to test the paint unless Sunbelt was paid for the testing. However, the contracting officer never directed any testing. The contract clearly required the correction of defective paint. It made no separate reference to defective paint with lead, nor did it provide that defective paint with lead would not have to be corrected. There is no proof at all that any of the defective paint contained lead. However, even if

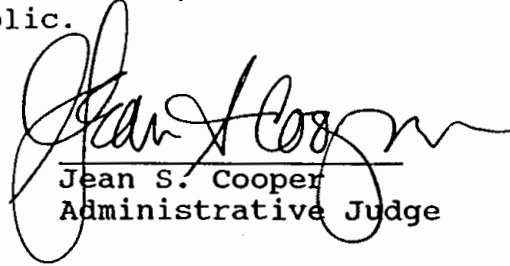
Sunbelt had tested the paint and found that it contained lead, the correction of the paint may have been more expensive, but it was not impossible or even impractical.

Refusal to perform contract requirements is a serious matter because contractors generally have the duty to continue performance while going through the contract dispute process. Melville Energy Systems v. U.S., 33 Fed. Cl. 616 (1995); J.R. Chesier Janitorial, ENGBCA 5487-Q, 95-1 BCA ¶27,376. Walker chose to stonewall HUD as his preferred method of dealing with contract disputes. His refusal to permit Sunbelt to perform specific contract tasks unless and until HUD capitulated to Walker's position was the cause of Sunbelt's default on those contract services. Walker's decision that Form 9516A was not "necessary," despite the contract requirement and a directive to fill out the form was another example of an unexcusable refusal to perform a contract requirement. Walker's refusal to allow Sunbelt to perform was not the conduct of a responsible contractor. Closings were delayed by Walker's directives forbidding performance of required repairs, and they were also delayed by his negligence in getting required contract tasks performed, such as the payment of fees and taxes due on properties before they could close. Walker's conduct directly interfered with and frustrated the purpose of the contract, which was to get the properties in the contract inventory sold as quickly as possible.

I find little mitigation in this record, considering the extent of performance failures. The problems created by or under the control of HUD, namely the error-filled SAMS reports and the lack of timely notice of closings, no doubt made performance of the contract somewhat more complicated, but there is insufficient proof that problems attributable to HUD caused the default. Walker created a poor working relationship with HUD from the onset of the contract by refusing to comply with certain contract requirements and directives from the contracting officer and the GTR. His attitude reflected an unwillingness to get the contract performed unless it could be performed Sunbelt's way, which was often at odds with the contract requirements. This is not the conduct of a responsible contractor. It was in the best interest of HUD and the public it serves that both Sunbelt's and Walker's participation in certain HUD program was limited. The LDP was properly imposed on them.

Conclusion

The LDPs imposed on Sunbelt and Walker were supported by adequate evidence, in accordance with law, and were in the best interest of both HUD and the public.



Jean S. Cooper  
Administrative Judge