



**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:

WILLIAM D. MUIR and  
METRO COMMUNITY DEVELOPMENT  
CORP.,

Respondents

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: HUDBCA No. 97-A-121-D15  
: Docket No. 97-7081-DB (LDP)  
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Dean D. DeChaine, Esq.  
Miller, Nash, Wiener, Hager  
& Carlson, LLP  
3500 US Bancorp Tower  
111 SW 5th Avenue  
Portland, OR 97204-3699

Counsel for Respondent

Donald C. Miller, Esq.  
Office of Counsel  
U.S. Department of Housing  
and Urban Development  
400 SW 6th Avenue, Suite 700  
Portland, OR 97204-1632

Counsel for the Government

FINDINGS OF FACT AND RECOMMENDED DECISION

Statement of Jurisdiction

On June 18, 1997, this Board received and docketed Respondents' request for a hearing on a Limited Denial of Participation (LDP) imposed upon them by the United States Department of Housing and Urban Development (HUD or Department). The administrative judges of the HUD Board of Contract Appeals are authorized to serve as hearing officers and to issue findings of fact, conclusions of law, and a recommended decision upon request of a respondent upon whom an LDP has been imposed. 24 C.F.R. §§ 24.105, 24.314(b)(2), and 24.713(b).

Findings of Fact

1. During all relevant times, Metro Community Development Corp. (Metro), an entity incorporated in 1991 in the State of Oregon, was involved in the development and management of low-income housing. At one time, Metro owned and/or managed 66 units of low-income housing. Some of the low-income housing projects involved Federal Community Development block grants made available to Metro through the City of Portland, Oregon, while other projects were completely privately financed. William D. Muir (Muir) was the president and chief executive officer of Metro when it was founded in 1991; he became Metro's executive director in 1993. For at least the past twelve years, Muir has been substantially involved personally and with various organizations in social, political, and developmental activities on behalf of homeless persons. (Tr. 158-165).

2. On May 24, 1995, a Notice of Funding Availability (NOFA) for the development of housing units under Sec. 811 of the Cranston-Gonzalez National Affordable Housing Act of 1990, P.L. 101-625 (811 program), appeared in the Federal Register. The 811 program provides for the development of housing for persons with disabilities. The capital advance for the project in which Metro desired to be a co-sponsor was \$2,021,900, and an additional \$300,000 was expected for operating expenses over the first five years of the project. (Adm. Record; Govt. Exhs. 1 and 2; Tr. 28-31, 44, 97).

3. Metro was one of three co-sponsors selected to develop Hillsboro Supportive Housing, Project No. 126-HD015 (Hillsboro project) at a site near Portland, Oregon. Muir had no prior disclosed involvement with HUD multifamily programs until Metro's co-sponsorship of this project. The two other co-sponsors were Accessible Space, Inc. (ASI), an entity involved in low income housing located in St. Paul, Minnesota, and Quadriplegic United Against Dependency, Inc. (QUAD), which had an existing project in Portland, Oregon. ASI was involved because it had sufficient capital and a line of credit, and desired to co-sponsor a HUD project in the 1995 NOFA funding cycle. QUAD was involved because it had Medicare agreements with the State of Oregon, an existing 19-unit site on North Williams Street in Portland, and was expected to provide property management and on-site care at the Hillsboro project. (Adm. Record; Gov. Exh. 13; Tr. 130, 166-168).

4. The HUD Portland, Oregon Office provides to sponsors, prospective sponsors, and consultants representing sponsors in the 811 program various handouts explaining the application process, a copy of the NOFA, the list of exhibits for the application package, workshops, training programs, and assistance with architectural, cost, environmental, technical, and legal problems. Muir and other

representatives of Metro attended some of these sessions, which were conducted by HUD personnel, and received handouts relating to the obligations of sponsors in the 811 program. (Govt. Exhs. 5 and 6; Tr. 29-32, 140, 190-1, 207.)

5. On July 10, 1995, Muir, in his capacity as executive director of Metro, executed Form SF-424, Application for Federal Assistance. On that application, item number 17 asks: "Is the Applicant Delinquent on any Federal Debt?" Muir checked the box indicating: "No." At that time, Metro was not delinquent on any debt to the Federal Government, nor was Metro specifically delinquent on any Federal taxes. In the latter part of 1995, Metro encountered substantial financial difficulties which resulted in a delinquent obligation to the Internal Revenue Service (IRS). This financial difficulty was primarily due to the loss of almost \$100,000 in grant funding from the City of Portland, Oregon. These financial difficulties, which began in late 1995, continued through and into the fall of 1996, and resulted in Metro owing the IRS a substantial amount in delinquent Social Security and employee withholding (payroll) tax obligations. (Govt. Exh. 3; Tr. 169-174.)

6. On November 10, 1996, Muir, in his capacity as executive director of Metro, executed HUD Form 92013-Supp, Supplement to Application for Multifamily Housing Project. In response to the question presented on that form: "Are you or have you been deficient on any Federal debt? If Yes, attach a letter from the affected agency that the debt is satisfied or under a workout agreement," Muir checked the box indicating: "No." Muir's execution of the form included his certification that the information contained on the form was true and correct to the best of his knowledge and belief. (Govt. Exh. 4)

7. Some Federal forms provide specific examples of various types of Federal debt, such as delinquent direct Federal loans, HUD-insured loans, student loans, Small Business Administration loans, or judgment liens against property for money due to the Federal government. Neither Form SF-424 nor HUD Form 92013-Supp provided any examples of Federal debt. (Govt. Exhs. 4 and 8; Tr. 80-81).

8. Muir states that he tried to answer HUD Form 92013-Supp truthfully and to the best of his ability, and that when he executed the form, he was very busy and was urged to execute it and fax it back immediately to Frederick Olson, Consultant for the Hillsboro Supportive Project. (Tr. 178, 190).

9. At the time that Muir executed the HUD Form 92013-Supp, Muir believed the question referred only to "any HUD debt," and that Metro did not have an existing HUD project which was in

default. Also, at the time Muir executed this form, Muir was aware that Metro was delinquent in its tax obligations to the IRS and had already planned to meet with an IRS official at a meeting which had been postponed from November 3, 1996 to November 13, 1996. Muir testified that when he completed the form:

it didn't strike...me that the phrase "federal debt" included the income [sic] tax; otherwise I would have included the Troy [Reichlein, Certified Public Accountant] letter and the fact that we were meeting with the IRS next week on that.

Muir also testified that he now knows that the question at issue in the HUD form refers to all Federal debt including debts to the IRS. (Tr. 176-179, 190-191, 199).

10. On November 13, 1996, Muir was advised at the meeting at the IRS that Metro's workout proposal had been rejected and that the IRS had already filed liens on certain Metro properties in October 1996. This action taken by the IRS in October resulted in adverse credit information being received by a credit reporting agency which thereupon resulted in Metro being denied approval for additional financing from Wells Fargo Bank. This adverse credit information also came to the attention of HUD by way of a credit reporting agency. At the hearing, the Government submitted a report from a credit reporting agency which reflected adverse financial information regarding Muir personally. (Govt. Exhs. 9 and 10; Tr. 67-69, 179-184).

11. From September 10, 1996 through February 4, 1997, HUD requested, through several letters to Muir and principals representing the Hillsboro project's co-sponsors, an explanation of the negative financial information received by HUD regarding Metro and Muir, but no timely acceptable response or explanation was received. (Govt. Exhs. 11, 12, and 14; Tr. 69-79).

12. On February 3, 1997, a firm commitment to fund the Hillsboro project was issued, but by letter dated February 28, 1997, Thomas C. Cusack (Cusack), Director, Multifamily Housing Division of the HUD Portland, Oregon Office, advised each co-sponsor that Metro was unacceptable as a sponsor of a Section 811 project and Bill Muir unacceptable as an officer of the Owner's board of directors; he directed that they be removed from the project. (Govt. Exhs. 13 and 15).

13. Muir subsequently resigned as an officer of the project; Metro's involvement in the Hillsboro project was also terminated upon a change in the owner's articles of incorporation, by-laws, and certificate of incumbency. Construction on the project has

proceeded without difficulty. There is no evidence that Muir's completion and submission to HUD of HUD Form 92013-Supp had an adverse financial impact on the Hillsboro project. (Adm. Record; Govt. Exh 14; Tr. 79).

14. By letter dated February 28, 1997 addressed to Gordon Hunter (Hunter), President, and Muir, Executive Director of Metro, Cusack notified them that an LDP was being imposed "against William D. Muir, an individual and Metro Community Development Corporation, a corporation...." (emphasis added). The letter stated that the LDP prohibited Muir and Metro from participating "in any program under the jurisdiction of the HUD Assistant Secretary for Housing-Federal Housing Commissioner, including programs of Supportive Housing for the Elderly Persons with Disabilities under 24 CFR Sec. 891." The letter also stated that the LDP would be "effective from the date of this Notice throughout the State of Oregon, the State of Idaho, and the counties of Clark, Klickitat and Skamania in the State of Washington...for a period of 12 months from the date of issuance of the Notice...." (Adm. Record; Govt. Exh. 16; Tr. 108-109).

15. Cusack further stated in this letter that the LDP was "based on information received by the Department indicating that a false statement was made by William D. Muir acting as executive director of Metro Community Development Corporation," and that such conduct constituted adequate cause for "issuance of this LDP under the following subsection of 24 CFR Sec. 24.705.... (a)(7). Falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD." In its conclusion, the letter advised Muir and Metro that they were "entitled to an informal hearing" if such was requested within thirty calendar days from the receipt of the letter and that a conference would be held within ten working days of the receipt of that request. (Adm. Record; Govt. Exh. 16).

16. By letter dated May 6, 1997, Cusack forwarded a letter to Hunter, Metro President, and Muir, Metro Executive Director, which stated:

Dear Gentlemen:

Subject: Notice of Limited Denial of  
Participation

This is to notify you, pursuant to 24 C.F.R. Sec. 24.700, that the United States Department of Housing and Urban Development (HUD) is restricting your participation in HUD programs throughout the State of Oregon, State of Idaho, and the counties of Clark, Klickitat

and Skamania in the State of Washington.  
(emphasis added.)

The letter stated that the LDP would be effective for a period of 12 months from May 6, 1997. The letter advised Hunter and Muir of their right to request not only an informal conference pursuant to 24 CFR Sec. 24.712, but also of their right to request a "formal hearing before a Departmental hearing officer pursuant to 24 CFR Sec. 24.713." The letter also stated that it would "serve as the Department's complaint in any formal hearing in this matter." (Adm. Record; Govt. Exh. 17; 24 C.F.R. § 26.10(c)).

17. A second letter, also dated May 6, 1997 from Cusack to Hunter and Muir regarding the LDP, advised them that the letter imposing the LDP dated February 2[8], 1997 was thereupon rescinded and that the letter dated May 6, 1997 "reissuing" the LDP was sent "because the first letter failed to correctly notify you of your right to forgo a conference with me, and instead proceed directly to a hearing before a hearings [sic] officer." (Adm. Record; Govt. Exh. 18; Tr. 110-111).

18. Following a review of a letter dated May 8, 1997 submitted by Respondents' counsel and an informal conference presumably attended by Cusack, Hunter, Muir, and Respondents' counsel on May 8, 1997, Cusack issued a letter to Hunter and Muir dated May 28, 1997 stating that he had concluded "that the LDP issued against you on May 6, 1997 is affirmed and will "remain in effect until May 5, 1998." (emphasis supplied). This letter also stated that the failure to disclose Metro's delinquency to HUD was cause for an LDP under 24 C.F.R. § 24.705(a)(7), (9), and (10). Subsections 24.705(a)(9) and (a)(10) were not included as causes in the two LDPs previously issued. (Adm. Record; Govt. Exhs. 19-22; Tr. 115-116).

19. Cusack testified that the effect of the imposition of the LDP was immediate, and that Respondents have been excluded from participation in HUD programs in the manner set forth in the LDP of Muir and Metro since February 2[8], 1997 and will remain so excluded through May 6, 1997. (Tr. 126-127.)

20. By letter dated June 6, 1997, counsel representing Muir and Metro requested a hearing before a Departmental hearing officer. The Board received Respondents' request for a hearing on June 18, 1997, and, upon mutual agreement of the parties, held a hearing in Portland, Oregon on September 3, 1997. (Adm. Record.)

Conclusions of Law

Underlying the Government's authority not to do business with a person or entity is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," is used in the context of HUD administrative sanctions such as suspension, and 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 text 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). The purpose of these administrative sanctions is to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

It is uncontested that Respondents were, at all times relevant, participants in a HUD program, and, as such, are subject to the administrative sanctions set forth at 24 C.F.R. Part 24. Upon adequate evidence of certain causes listed at 24 C.F.R. § 24.705, an LDP may be imposed. 24 C.F.R. § 24.705(a)(7) lists as a cause for imposition of an LDP: "Falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD."

There was extensive collateral and auxiliary evidence presented at the hearing regarding Government circulars, HUD training sessions for sponsors, and other efforts by HUD to familiarize sponsors with what is expected of them in the 811 program, as well as testimony regarding Muir's broad public service on behalf of the homeless. Nevertheless, the pivotal issue in this case is simply whether or not Muir's representation that Metro was not delinquent in any Federal debt was a false statement.

The Government essentially contends that HUD expects potential sponsors for a capital advance program to be familiar with HUD practices, procedures, and requisite forms, and that they would understand how important it is that sponsors reply with due diligence and accuracy in making statements upon which HUD must rely in accessing the credit worthiness of a participant in a HUD program. The Government submits that HUD has ample justification to exclude Muir and Metro from participating in its program in this instance because, notwithstanding the fact that other Government forms may itemize or provide examples of various types of Federal debt, the question to which Muir responded incorrectly was clear and unambiguous. The Government argues that Muir's excuses as to why he answered this key question falsely are insufficient to exculpate Muir from the potential damage to the integrity and financial solvency of a HUD program.

Respondents argue that a misreading of the question at issue is not unlikely, and that other documents, such as Government Exhibit 8 which was a HUD Directive entitled "Delinquent Federal Debt," provide specific examples of what a Federal debt could be, e.g., direct loans, HUD-insured loans, student loans, Small Business Administration loans, judgment liens and the like, without specifying obligations to the IRS. Respondents point out that the inaccurate statement made by Muir was on a document which did not list these examples of types of Federal debt. Respondents contend that this misreading of a question due to misinterpretation could reasonably result in misinformation, yet that misinformation does not, per se, rise to a level of a false statement. Respondents also contend that, even though Muir may have made an inaccurate statement, that action represented an honest mistake, and there is no evidence that Muir deliberately intended to mislead HUD. Finally, Respondents submit that, in the absence of an intent to make a false statement, there should be no penalty, particularly in the absence of any showing of injury to the Hillsboro project.

The administrative sanctions authorized by 24 C.F.R. Part 24 are sanctions intended to ensure that HUD only does business with responsible persons. 24 C.F.R. § 24.115(b) states that debarments and suspensions, and, by extension, LDPs, "are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment." Respondents' argument that the LDP in this case constitutes a penalty for alleged misconduct is not convincing. Respondents have made no showing that the imposition of an LDP under the circumstances of this case does not reflect the Government's desire to protect the public interest pursuant to 24 C.F.R. § 24.115(a) or that its imposition reflects an abuse of agency discretion. Consequently, Respondents' arguments that the LDP in this case is punitive and constitutes a penalty fails for lack of proof.

Upon careful consideration of the record of this proceeding, I conclude that Muir made a false statement when he represented that Metro was not delinquent in any Federal debt when he clearly knew that Metro was delinquent at that time in an obligation to the IRS. At the time that he answered that specific question in the negative, Muir was well aware that Metro did not have any agreement with the IRS to repay Metro's tax debt. Had such an agreement been reached, a persuasive argument might then be made that Metro's tax obligation to the IRS was no longer in a delinquent status. Yet the agreement failed to materialize. I further conclude that Muir materially misrepresented Metro's financial liability to the Federal government by not affirmatively noting that Metro had been delinquent in Federal debt prior to November 10, 1996, which was also a critical part of the question Muir failed to answer accurately.



One cannot in good conscience suggest that the IRS, which is part of the U.S. Department of the Treasury and whose employees are Federal employees, is not a branch of the United States Government, or that a debt to the IRS is not a debt to the Federal government. I do not find Muir's explanation for answering the subject question in the negative, i.e., that he was in a hurry or that he misunderstood the question, to be exculpatory. This type of misrepresentation, even if we accept Respondents' counsel's characterization of it as an honest mistake, is, nevertheless, a very serious mistake because HUD must rely upon the truthfulness of the representations made by those who participate in its program and who certify to the accuracy of their representations. Such excuses as advanced by Muir, notwithstanding Muir's assertion that he had no intent to mislead HUD, do not generate confidence that HUD, in doing business with Muir, was doing business with a responsible person.

Clearly, the act of misrepresenting Metro's financial difficulty on the form in question is a serious act that could well have placed the integrity of a Federal program at serious financial risk. Although there is no evidence that the project was affected financially by Muir's misstatement, Muir's act was not an action of a responsible party participating in a Federal program designed to provide housing for the disabled.

#### Recommended Decision

Based upon the findings of fact and conclusions of law set forth above, it is my determination that:

1. the causes for imposition of an LDP set forth at 24 C.F.R. §§ 24.705(a)(9) and (10), which are listed in Cusack's post-conference letter dated May 28, 1997 as cause for imposing the May 6, 1997 LDP, cannot be grounds for an LDP in this Departmental action because Cusack's May 6, 1997 letter imposing the LDP failed to notify Respondents of these causes as required by 24 C.F.R. § 24.711(b);

2. the Government has submitted adequate evidence to establish cause for the LDP pursuant to 24 C.F.R. § 24.705(a)(7), and that the imposition of the LDP under the circumstances of this case is warranted with the exceptions noted below;

3. the February 28, 1997 notice imposing an LDP on William Muir and Metro, which was rescinded by Cusack on May 6, 1997, was legally defective and void ab initio because it failed to advise Muir and Metro of their right to contest the limited denial of participation before an independent and impartial hearing officer. 24 C.F.R. §§ 24.711(e) and 24.713(a);

4. the May 6, 1997 notice of LDP directed to Gordon Hunter and William Muir, which also served as the Government's complaint in this matter, was legally insufficient as to Metro, in that it failed to state, unlike the February 28, 1997 notice of LDP which was legally ineffective because of notice defects, that Metro was a party upon which the LDP was being imposed. 24 C.F.R. § 24.711;

5. in the absence of a legally sufficient notice of LDP to Metro, Departmental restrictions upon Metro's eligibility to participate fully in HUD programs have been, and are, improper. All such restrictions against Metro shall be immediately terminated and Metro shall be restored to the eligibility status which it enjoyed with respect to HUD programs prior to February 28, 1997; and that

6. both the February 28, 1997 Cusack letter and the May 6, 1997 Cusack letter imposed an LDP for a period of 12 months. An LDP is a Departmental sanction which can be imposed to exclude, under specific conditions, certain participants in a HUD program for a period of time not to exceed 12 months. 24 C.F.R. § 24.710(a)(3). As of this date, Muir and Metro have been excluded, de facto, from HUD programs in the manner set forth in the LDPs since February 28, 1997.

7. Principles of fundamental fairness require that the LDP of William D. Muir shall not extend beyond February 28, 1998, credit being given for the period of time between February 28, 1997 and May 6, 1997 during which it appears that Muir acted in justifiable compliance with the provisions of the LDP issued on February 28, 1997. 24 C.F.R. § 24.310. Therefore, pursuant to 24 C.F.R. § 24.710(a)(3), William D. Muir shall be excluded from participation in certain HUD programs in a manner consistent with the provisions of the May 6, 1997 LDP, except that the period of exclusion shall terminate on February 28, 1998.



David T. Anderson  
Administrative Judge

November 6, 1997