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

In the Matter of:	
CKJ REALTY & MANAGEMENT, INC.	HUDBCA No. 98-A-111-D8
CLINTON WILLIAMS, JR.	Docket No. 98-8074-DB(LDP)
Respondents	

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For the Government

FINDINGS OF FACT AND RECOMMENDED DECISION

Background of the Case

On June 1, 1998, 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).

On April 14, 1998, HUD issued an LDP charging Respondents CKJ Realty and Management, Inc. ("CKJ") and its president and owner, Clinton Williams, Jr. ("Williams") with failure to secure $19,908.39 in cash receipts of a housing project during the months of August, September, October, and November 1995. The LDP also charged that Respondents' July 14, 1995 certification that fidelity bond coverage existed was false, and that Respondents' failure to obtain fidelity bond coverage constituted a breach of its contractual obligations and a violation of its management agreement .

The parties mutually agreed to waive the time within which a hearing must commence pursuant to 24 C.F.R. § 24.314(b)(2)(B)(ii). A hearing in this matter was held on August 19-20, 1998 in Denver, Colorado. The findings of fact, conclusions of law, and recommended decision are based upon the administrative record, the testimony of witnesses and exhibits admitted at the hearing, legal arguments, and post-trial submissions by both counsel. Due to the submission of post-trial briefs, documentary evidence received after the hearing, and for additional time needed to prepare the findings of fact, conclusions of law and recommended decision, the time within which these findings, conclusions, and recommended decision must be issued was extended for good cause in accordance with 24 C.F.R. § 24.314(b)(2)(B)(ii).

Findings of Fact

1. Lakota Community Homes ("Lakota") is a nonprofit cooperative residential property "subject to a mortgage which will be insured under Section 221D3 of the National Housing Act." Lakota received project-based Section 8 rental assistance, a subsidy which was dependent upon a specific rental unit and was not mobile with a particular tenant. Each tenant pays 30 percent of their income as rent. HUD then pays the remaining portion up to the market rent charged by the owner. (Adm. Record, at 4, para. 4; Tr. 35-36).

2. HUD Handbook 4381.5 REV-2, The Management Agent Handbook, Paragraph 2.14, requires that all management agents certify that they carry fidelity bond coverage and that each project be insured under the fidelity bond policy for the value of two months' gross potential income for the project. This paragraph also provides that the HUD Loan/Asset Management Staff must "determine whether the [management] agent has adequate bonding." Minimum fidelity bond requirements cannot be waived. The management agent is also responsible for securing cash receipts in order to prevent unauthorized use of project funds, including rental income. (Adm. Record, at 5 and 6; Tr. 30-34).

3. Although HUD reserves the right to approve the management agent of any HUD-insured property, HUD does not review the management agreement between the owner and management agent. Instead, HUD requires the owner and management agent to sign a Management Certification setting forth the responsibilities of the management agent. The Certification contains a warning that "whoever knowingly and willingly makes or uses a document or writing containing any false, fictitious or fraudulent statement ..." has committed a crime pursuant to 18 U.S.C. § 1001. (Adm. Record, at 3; Tr. 25-34, 212).

4. At the request of Brenda McGlynn, a board member of Lakota, Respondents were asked to submit a proposal to manage the Lakota property. On July 14, 1995, Respondents executed a Management Certification in which they certified on HUD Form No. 9839-8 that they had in force, and would maintain, hazard insurance coverage, public liability coverage, and "[f]idelity bond or employee dishonesty coverage for all

[of CKJ's principals] and for all persons who participate directly or indirectly in the management and maintenance of the project and its assets, accounts and records." The fidelity bond would cover members of the Lakota Community Homes board of directors who have the responsibility of signing all checks. CKJ also agreed in the Management Certification to comply with the housing project's Regulatory Agreement, Mortgage and Mortgage Note and any applicable requirements in HUD handbooks, notices or other policy directives relating to the management of the housing project. The Management Certification was endorsed by HUD employees Linda Mahon Cluck, Asset Manager, and Justina Walls, Section Chief, on August 17, 1995. Cluck and Walls made no investigation at that time as to whether adequate insurance coverage had been obtained by Respondents for Lakota. However, HUD customarily relies solely upon the accuracy of this certification to determine whether or not acceptable fidelity bond coverage has been obtained. (Admin. Record, at 3; Tr. 46, 62, 100-101,159-160, 236).

5. On August 1, 1995, Respondents entered into a management agreement with Lakota for a period of five years. Lakota was a "troubled" project, i.e., a project characterized by serious financial, physical, environmental, gang, drug, and/or occupancy problems which often adversely impacts a project's cash flow position. According to the terms of the agreement, CKJ agreed to comply with all "pertinent requirements of the Regulatory Agreement, the HAP Contract and directives of the Secretary" of HUD. The Management Agreement stated, at paragraph 16, that CKJ:

> will furnish, at its own expense, a fidelity bond in the principal sum of <u>Two Hundred Seventy Thousand Fifty Eight Dollars</u> ($270,058), which is at least equal to the gross potential income for two months and is conditioned to protect the Owner against misappropriation of Project funds by the Agent and its employees. The Owner shall provide a bond of a like kind to cover the on-site personnel expressed in Section 13 and it shall be paid for from property income. The other terms and conditions of the bond, and the surety thereon, will be subject to the approval of the Owner. (emphasis in original)

Under this provision of the Management Agreement, it was Respondents' obligation to have a fidelity bond in a specific amount to cover Respondents' employees. However, it was Lakota's responsibility to provide, and pay for, a fidelity bond "to cover on-site personnel." (Adm. Record, at 4; Tr. 58, 59, 155, 161-2)

6. Williams is a highly trained and experienced property manager who holds a Masters degree in Public Administration from the University of Colorado. He is a certified property manager, a licensed real estate broker, a former senior housing management officer of the Colorado Housing and Finance Authority, and a former faculty member of the National Center of Housing Management and the Institute of Real Estate Management. Prior to August 1, 1995, CKJ had no past performance problems with HUD, including insurance or fidelity bonding transactions, in the management of HUD-subsidized properties, and enjoyed a good reputation in the management of sizable properties, including ten troubled properties. Between 1990 and 1992, Respondents had

successfully managed Lakota. During that period and during Respondents' management of Lakota in 1995, a fidelity bond had been purchased with Lakota funds. During both periods, CKJ employees were also covered by a million-dollar theft and liability policy with American Family Insurance Company paid for by CKJ, but that policy did not cover employees hired by CKJ who were working at Lakota. (Tr. 58-60, 63-65, 136-148, 158-9, 167, 179-180, 187, 200, 221).

7. Williams attended a Lakota board meeting on September 14, 1995. At the meeting, which was also attended by Scott Olsen of the AFLAC Insurance Company, Williams believed that a fidelity bond for Lakota was already in place although neither he nor his agents had secured a new fidelity bond for Lakota at that time. Williams' recommendations to the Lakota board to increase fidelity bond coverage due to increased monthly revenue, to increase auto insurance coverage, and to increase supplemental health insurance for Lakota employees were accepted. Thereafter, Williams instructed Jeffrey Heried, CKJ's on-site manager who had also attended the meeting, "to contact our insurance carrier that was carrying the fidelity bond and have this [policy limit] increased." Heried was instructed to contact Ben McFarland of Farmers Insurance Group of Sturgis, SD about workmen's compensation, employee benefits and auto insurance. The next day, Heried talked to McFarland about these matters and about consolidating the insurance needs of Lakota through one agency, but no commitments were made. Heried also discussed insurance matters with Gene Fairchild, a representative of Agents of Insurance, Inc. of Rapid City, SD.

On October 26, 1995 a new board of directors for Lakota was elected. For reasons not fully set forth in this record, the new board of directors terminated Respondents' management agreement on November 6, 1995, 96 days into a five-year contract. Neither a new fidelity bond nor an increase in the fidelity bond was obtained by Respondents prior to the termination of Respondents' management agreement with Lakota. On the date of termination, Respondents' staff left the premises, under threat by the sheriff, without removing certain accounting documents and other records. Checkbooks and other Lakota files in CKJ's possession were returned. (Stipulation of Facts and Exhibits, paras. 3 and 4; Adm. Record, at 9; Resp. Exh. D; Tr. 39, 48, 70-73, 117-122, 125-126, 129-131, 164-166, 168, 188).

8. The new board then entered into a three-year property management contract with Medicine Eagle Management (Medicine Eagle). Medicine Eagle made a similar certification on a Management Certification dated November 7, 1995 which was endorsed by the president of Lakota on December 19, 1995. There is no evidence that at the time of the certification, that Medicine Eagle had a requisite fidelity bond in place or that HUD issued an LDP against Medicine Eagle for an improper certification. Medicine Eagle was subsequently determined to be unqualified to manage HUD-subsidized properties. Medicine Eagle had access to a significant amount of Respondents' accounting records shortly after the new Lakota board of directors terminated Respondents' contract. Respondents expressed their concern to HUD regarding an orderly process of transferring funds, closing certain accounts, and the accuracy of accounting records in a letter to Cluck dated November 9, 1995. (Tr. 170, 231; Resp. Exhs. F and J).

9. Following Lakota's termination of its management agreement with Respondents, CKJ filed a civil action against Lakota, a case docketed as CKJ Realty & Management, Inc. v. Lakota Community Homes, Inc. , File No. 95-1571, in the Seventh Judicial Circuit of the State of South Dakota. On October 17, 1997, that Court entered a judgment against Lakota and in favor of CKJ in the amount of $65,032.61 for wrongful termination of CKJ's management agreement with Lakota. (Stipulation of Facts and Exhibits, para. 7; Resp. Exh. A).

10. Although Respondents did not obtain a new fidelity bond for Lakota, Williams believed that, until Respondents procured a new fidelity bond with increased insurance coverage, the fidelity bond secured by the previous manager and whose premium had been paid by Lakota in June 1995 was still in effect. Respondents submitted a copy of a premium notice and declaration form in the amount of $975 issued by the Fidelity and Deposit Company of Maryland/Colonial American Casualty and Surety Company naming as principal Lakota Community Homes and five covered employees, three of whom are identified as Lakota board members. This payment is also listed as an expense to Lakota in an independent auditor's report dated September 9, 1996. The document indicates that certain employee dishonesty coverage had an effective date of "3/26/95" and an expiration date of "3/26/96." A letter dated December 16, 1997 to Cluck from Fairchild of Agents of Insurance, Inc. stated that Respondents' on-site employees Jeff Heried, Cindy Clark, and Alex Evans "were not listed on the schedule bond during the time in question."

This policy's Employee Dishonesty Coverage Form (Coverage form A-Schedule) states, in pertinent part:

> 3. If this insurance applies on a Position Schedule basis, the following provisions also apply:
> a. The most we will pay for an "employee" serving in more than one position is the largest Limit of Insurance in effect and applicable to any one of those positions at the time loss is discovered.
> b. If at the time loss is discovered there are more "employees" serving in a covered position than the number of "employees" listed opposite that position in the SCHEDULE, the Limit of Insurance applicable to that position will be reduced.
> The reduced Limit of Insurance will be computed by multiplying the limit shown in the SCHEDULE by a factor obtained by dividing the number of "employees" shown in the SCHEDULE by the actual number of "employees" serving in that position at the time loss is discovered. (emphasis added)

Cluck was not aware until the hearing that Lakota had this policy. Joseph Kelso, Chief of Project Management of the HUD Denver Office, stated that fidelity bond coverage extends to the benefit of a particular organization and its employees, and to the positions identified in the policy, not necessarily to named individuals. I find that the policy described above was in force when Respondents assumed the management of Lakota in August 1995. I also find, in the absence of evidence to the contrary, that the three named Lakota board positions, notwithstanding any changes following the October 26, 1995 Lakota board election, and Respondents' on-site employees at Lakota, even though not specifically named in this policy, were covered by this policy because they served "in a covered position" under this policy. (Adm. Record, at 9; Resp. Exh. I, page 8; Resp. Exh. N; Tr. 49-51, 78, 167, 174, 180, 242-243, 271.)

11. A discrepancy in certain rent deposit accounts was first noticed by the management firm of Weinberg Property Management, Inc. which had taken over the management of Lakota after Medicine Eagle. The records relating to the Lakota project had to be "reconstructed" by an employee found by HUD not to have the skill and experience necessary to manage a project the size and complexity of Lakota. A certified public accountant ("CPA") performed a review of the rental accounts which was forwarded to Lakota by letter dated June 20, 1997. The CPA's report was based upon his "reconstruct[ion of] the Tenant Monthly Rent Rolls for the period of August 1, 1995 through November 30, 1995, from the tenants' ledger cards." The single page report states that it was not an audit, that no representation could be made "regarding the sufficiency of the procedures ... either for the purpose for which this report has been requested or for any other purpose...," and that the report was "intended solely for the use of [Lakota] and should not be used by those who have not agreed to the procedures and taken responsibility for the sufficiency of the procedures for their purposes."

HUD did not become aware of a discrepancy between the amount of rent receipts and rent deposits for the 96-day period that the Respondents served as the property manager for Lakota until June 1997. HUD does not allege that Respondents wrongfully took any of the rent receipts. (Adm. Record, at 11; Stipulation of Facts and Exhibits, para. 6; Tr. 39-40, 42-43, 231-232, 286).

12. On April 14, 1998, Larry Sidebotom, Director, Denver Multifamily Hub of HUD, issued an LDP against CKJ for its failure to safeguard the rent receipts of Lakota in the amount of $19,908.39, for failing to obtain fidelity bond coverage in violation of Respondents' contractual obligations, and for making a false certification in connection with a HUD program, in violation of 24 C.F.R. §§ 24.705(a)(2), 24.705(a)(4), and 24.705(a)(7) respectively. (Adm. Record, at 1).

13. Kelso was responsible for recommending to the sanctioning official, Sidebotom, that an LDP should be issued against Respondents. The rent discrepancy was not a factor in his recommendation to Sidebotom to issue the LDP, but only precipitated the search to determine whether a fidelity bond had been obtained for Lakota by Respondents. The fact that Respondents had never secured during their 1995

management period a new fidelity bond for Lakota specifically naming Respondents' on-site employees was made known to HUD in December, 1997. (Adm. Record, at 9; Tr. 49-51, 226-227, 238)

14. Subsequent to the hearing, Respondents submitted a copy of a Commercial General Liability Insurance Coverage policy issued by Continental Divide Insurance Company (Continental Divide) with a policy limit of two million dollars ($2,000,000) for the period June 2, 1995 to June 2, 1996. That policy provided for general liability, crime coverage, and commercial property coverage for the employees of CKJ. I find that this policy satisfied the requirement of the Management Certification that Williams and CKJ employees not working for Lakota had sufficient employee dishonesty coverage during that period. (Attachment to Resp. letter to Board dated September 2, 1998).

Issues

Respondents assert that the LDP imposed by HUD should be lifted because HUD has not met its burden of proof that an LDP was warranted. Respondents state that HUD used the alleged discrepancy of $19,908.39 as the primary factor for issuing the one-year LDP despite the fact that neither HUD nor Lakota had any reliable verification of the accounting discrepancy. Respondents argue that HUD did not conduct an adequate investigation into the amount or reasons for the discrepancy. Respondents argue that HUD relied on reconstructed numbers compiled by a person who lacked the skills necessary to be a HUD approved management agent.

In reply, the Government claims that Respondents failed in their duty to secure $19,908.39 in cash receipts of the housing project during the months of August, September, October and November 1995 and that such funds were not properly deposited into the bank accounts of Lakota as required by the provisions of the HUD handbook and the management agreement. The Government also argues Respondents did not carry fidelity bond coverage or an employee dishonesty policy as required by the management certificate, the pertinent HUD handbooks, and the terms of the management contract between Respondents and Lakota. The issuance of the LDP, the Government asserts, was necessary because of Respondents' failure to comply with these requirements.

Respondents submit that HUD Handbook 4381.5 REV-2 ¶ 2.14, requires the HUD loan/asset management staff to confirm that the management agent obtain the proper fidelity bond coverage, and that Respondents should not be held accountable if the HUD staff failed to do so. In response, the Government states that HUD is not obligated to confirm whether a management agent is following HUD's requirements, that the management agent has an independent obligation to comply with HUD requirements, and that HUD justifiably relies upon the management certification that the requisite fidelity bond has been obtained.

Finally, Respondents argue that HUD issued the LDP in retaliation for a judgment in their favor in a civil lawsuit against Lakota. The Government denies this assertion and claims that the imposition of the LDP was based upon Respondents' violation of HUD requirements and a false certification to HUD that they had secured the requisite fidelity bond or employee dishonesty coverage when, in fact, they had not. The Government contends that a review of Respondents' commercial liability policy with Continental Divide does not reveal that the policy contained the necessary coverage. Williams argues that if he had known that HUD required him to carry fidelity bond coverage on himself and his employees other than that obtained for himself and CKJ employees under his Continental Divide policy, he could have easily obtained the additional coverage necessary.

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(a). 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 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 prospective sanctions whose purpose 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, and 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." The Government bears the burden of demonstrating by adequate evidence that cause for imposition of the LDP exists. 24 C.F.R. §§24.314(c) and 24.713(b); James J.Burnett, HUDBCA No. 80-501-D42, 82-1 BCA ¶15,716. Existence of a cause for a sanction does not automatically require its imposition. In gauging whether to sanction a person or entity, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §24.300.

The Government essentially contends that the imposition of an LDP upon Respondents was warranted due to a false certification by Williams that a requisite fidelity bond had been secured when, in fact, it had not. However, the following facts make the justification for the issuance of the LDP highly questionable:

1) Respondents had successfully managed Lakota from 1990 to 1992. Until CKJ entered into its management agreement with Lakota in

August of 1995, Respondents enjoyed a reputation of a highly-qualified and experienced property manager, had demonstrated satisfactory performance in the management of troubled properties, and had encountered no problems in the past in obtaining fidelity bond or requisite insurance;
2) Respondents were asked to take over the management of Lakota in August of 1995 particularly because of their proven expertise and success in the management of troubled properties;
3) Respondents' problems with Lakota commenced in late October 1995 following the election of new members of the Lakota board of directors which, for reasons not clearly related to Respondents' performance, terminated Respondents' management contract;
4) it was judicially determined that Respondents' management contract with Lakota was wrongfully terminated;
5) there is insufficient evidence in the record to show that a fidelity bond, whose premiums were paid by Lakota, was not in force from August 1, 1995 through November 6, 1995, or that the existing fidelity bond effective through March 26, 1996 did not cover unnamed or additional on-site employees such as those hired by CKJ to work at Lakota;
6) HUD employees Cluck and Walls did not, as required, independently determine whether CKJ had adequate bonding, apparently relying on CKJ's judgment that adequate bonding was "in force". If they had any reservations, or if they had followed the provisions of the pertinent HUD Handbook, they should not have endorsed the Management Certificate as they did on August 17, 1995;
7) there is no proof that the "discrepancy between the rent receipts and rent deposits for the period that Respondents served as the property management agent for Lakota" was due to the improper taking of Lakota funds by Respondents or their agents;
8) HUD knew or should have known that the rental account discrepancy was based in substantial part on numbers originally "reconstructed" by a person previously been found by HUD to be unqualified to manage a project the size and complexity of Lakota. These "reconstructed" numbers were used in a report by a CPA in June, 1997 who did not validate the "sufficiency of the procedures" used and who cautioned its use by others not concurring with the procedures used;
9) there is no evidence that the monetary loss allegedly suffered by Lakota could be accurately quantified, or, if so, was unrecoverable as a result of inadequate fidelity bond coverage; and
10) there is no proof that Respondents' certification placed public funds at risk.

These uncontested facts are significant mitigating factors and should have given the sanctioning official pause to consider the necessity of so serious a sanction before the issuance of the LDP. HUD became aware of the certification by Respondents in June of 1997, and did not impose an LDP on Respondents until April of 1998, nearly 2 ½ years after Respondents' management agreement was terminated. The 10-month interval between HUD's discovery of the rental account discrepancy and the issuance of the LDP, as well as the 4-month delay between HUD's discovery of the alleged inadequate fidelity bond coverage and the issuance of the LDP, supports the inference that there was no immediacy to curtail Respondents' participation in HUD's programs and no imminent threat to the public interest.

It is incontrovertible that Respondents, like all participants in a Federal program, are expected to be familiar with, and to strictly adhere to, the rules, regulations, applicable Departmental handbooks, and contract terms relating to the specific activity in which they become involved. Participants must be held strictly accountable for their certifications and bear full responsibility for any false certification. A false certification in connection with any HUD program is a serious offense 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. A failure to do so, notwithstanding any intent to mislead, undermines the integrity of the HUD program and is indicative that HUD is not doing business with a responsible person.

The facts of this case are distinguishable from the facts in William D. Muir and Metro Community Development, Corp., HUDBCA No. 97-A-121-D15 (Nov. 6, 1997), in which Respondent Muir, as president and chief executive officer of Respondent Metro Community Development, falsely certified on HUD Form 92013-Supp, Supplement to Application for Multifamily Housing Project, that Metro was not delinquent in any Federal debt, when, in fact, he knew that Metro was delinquent in its tax obligations to the Internal Revenue Service. Such a material misrepresentation was found to have placed public funds at risk because Muir's false certification, pro se, led HUD officials to believe that Metro was a credit-worthy participant in a Federal program, when, in fact, it was not.

In the instant case, however, HUD was not misled about CKJ's capability or responsibility. Unlike Muir's grossly misleading certification, I cannot conclude that Williams' certification was a material misrepresentation, and Williams' belief that a requisite fidelity bond was in force when Respondents assumed the management of Lakota in August of 1995 was reasonable, justifiable, and accurate in the absence of any evidence of cancellation or automatic termination of Lakota's existing policy. That fidelity bond covering certain members of Lakota's board of directors and on-site management employees continued to be in force throughout CKJ's management of Lakota. I must also conclude that, if the HUD Loan/Asset Management Staff had any concerns as to whether Respondents had adequate bonding, they should have made this determination prior to endorsing Respondents' Management Certification as HUD Handbook 4381.5 REV-1, para. 2.14 required them to do. This determination is

explicitly stated. It is patently unfair for HUD to insist that participants in HUD programs strictly adhere to HUD's requirements if its public servants, for whatever reason, elect to do otherwise. However, given the findings of fact reached in this determination, the HUD Loan/Asset Management staff's failure to independently verify Respondents' bonding for the Lakota project did not result in placing the integrity of a HUD program at risk.

There is insufficient evidence in this record to show that Lakota could not be indemnified for any monetary losses arising from negligent mismanagement or misappropriation during Respondents' 96-day management of Lakota, that any attempt was made to recover money allegedly due to Lakota, or that public funds were ever placed at risk as a result of Williams' certification. In fact, a compelling argument could be made that the Lakota board, which wrongfully terminated Respondents' management agreement, was the actual party which placed public funds at risk because public funds may have been needed to satisfy the $65,032.61 judgment obtained by CKJ against Lakota.

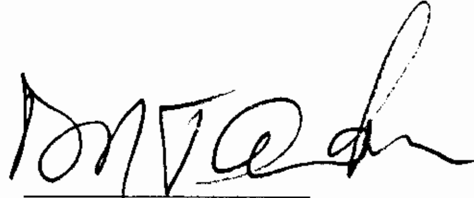
Summary

This record does not establish any failure by CKJ to secure $19,908.39 in cash receipts as charged in the LDP, that Williams' certification on the Management Certification constituted a false or fraudulent statement, or that, during all pertinent times, Respondents failed to act as responsible persons. "[T]he decision to order a limited denial of participation shall be discretionary and in the best interests of the Government." 24 C.F.R. §24.700. Respondents' professional reputation prior to the certification, Respondents' actual management of Lakota, the many items of mitigation cited above, the failure of HUD to view the certification as an immediate threat to its programs, and the documentary evidence and testimony received at the hearing, convince me that the public needed no protection from Respondents, and that the issuance of the LDP was not in the best interests of the Government or the public.

Respondents' assertions that the issuance of the LDP by HUD was in retaliation for the civil judgment obtained by Respondents against Lakota, and was therefore punitive, fails for lack of proof. Nevertheless, Respondents have needlessly suffered because of the injudicious and unfortunate imposition and continuation of this severe administrative sanction.

Recommended Decision

Based upon the findings of fact and conclusions of law set forth above, it is my determination that, even if adequate evidence existed to establish cause for issuance of an LDP, the Government has failed to show that the imposition of an LDP upon Respondents is warranted or is in the best interests of the Government. It is my recommended decision that the LDP issued against Respondents be terminated immediately.



David T. Anderson
Administrative Judge

December 16, 1998