

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

LAN ASSOCIATES INC.,
JOHN LACZ, and
KENNETH H. KARLE

Respondents.

HUDALJ 90-1567-DB (LDP)
HUDALJ 90-1568-DB (LDP)
HUDALJ 90-1569-DB (LDP)
(Decided September 5, 1991)

Michael J. Pasquale, Esq.
For the Respondents

Sam Rosenblum, Esq.
For the Government

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DETERMINATION

Jurisdiction and Procedure

This is an appeal by the Respondents, LAN Associates, Inc., John Lacz, and Kenneth H. Karle, from a Limited Denial of Participation ("LDP") which was issued on August 6, 1990, by Theodore R. Britton, Jr., Manager of HUD's Region II Area Office in Newark, New Jersey. It is conducted pursuant to the regulations of the Department of Housing and Urban Development (HUD) that are codified at 24 CFR Parts 24 and 26 (1989), and jurisdiction is thereby obtained. The one-year LDP took effect on the date of the letter of notice from the Newark Office and prohibited the Respondents' participation in programs within the jurisdiction of the Assistant Secretary of Public and Indian Housing, namely, Low Rent Public Housing, Comprehensive Improvement Assistance Program ("CIAP") and Section 23-Leased Housing within the jurisdiction of the Newark Office in the State of New Jersey. Further, the Respondents were informed that all other HUD Regional Offices are permitted to act on such an LDP in accordance with the regulations found at 24 CFR 24.705(a)(11)(c).

The regulation that is codified at 24 CFR 24.705(a)(2) states that an LDP shall be based upon adequate evidence of irregularities in a participant's or contractor's past performance in a HUD program. As his reason for issuing this LDP, HUD's Newark Manager stated that it was based upon adequate evidence of the Respondents' failure to honor contractual obligations and to proceed in accordance with contract specifications, and their making of false certification for the purpose of influencing actions by HUD, all with respect to certain contracts entered into by LAN as Architect/Engineer with the

Passaic Housing Authority ("PHA"), namely: (a) Contract Number 6 for Exterior Masonry Repairs and Waterproofing at NJ13-1 as to CIAP Program NJ13-911 at Speer Village; and (b) Contract for Project designated as NJ39-P013-010 for Conventional Housing Program (construction) at Chestnut Street.

More specifically, the Manager stated that the following actions and conduct constituted adequate evidence to justify issuance of the LDP:

1. Failure to make required or necessary visits to the sites involved and/or to determine whether or not the work involved was progressing in accordance with the Contract Documents or in a good workmanlike manner;
2. Failure after each visit to submit written reports to the Housing Authority including all observed deficiencies;
3. Making of reports which failed and neglected to report deficiencies and/or which falsely certified that the work was progressing in accordance with the Contract Documents, or that the work was being performed, or had been performed in a good workmanlike manner; and
4. Failure to execute required change orders when the construction contract had been modified and/or to obtain required HUD approval for change orders.

In accordance with instructions contained in the letters of notice, Respondents requested a conference for reconsideration of their LDPs. An informal conference for the presentation of information and materials was held on August 23, 1990 at the HUD Area Office in Newark. On September 14, 1990, Respondents were notified by the Manager that their LDPs were affirmed. In this letter of notice, the Respondents were also advised of their rights, including their right to this proceeding.

On October 3, 1990, the Respondents filed a timely request for a hearing to appeal their LDPs, and I issued a Notice Of Hearing And Order on October 29, 1990. In accordance with this Order, the Department timely filed its Complaint on November 28, 1990, and the Respondents timely filed their Answer And Separate Defenses on December 7, 1990. These cases were consolidated during a conference telephone call on December 12, 1990, and a hearing was conducted in New York City on May 20 - 22, 1991. In accordance with an oral order at the hearing, the Secretary and the

Respondents filed their post-hearing briefs on July 12, 1991. Thus, this case became ripe for determination on this last-named date.

Findings of Fact

1. Contractual Scheme

Both PHA projects were funded by HUD pursuant to provisions of the Housing Act of 1937, as amended. 42 U.S.C. sec. 1437, *et seq.* As a requirement for such assistance from HUD, Housing Authorities are required by the codification found at 42 U.S.C. sec. 1437(c)(4) to comply with HUD procedures to assure sound management and operation of the Housing Authority and its projects. Housing Authority programs and projects must be administered in a manner consistent with government regulations and HUD procedures as set forth in various HUD regulations.

The Chestnut Street project involved development construction; *i.e.*, new construction of a housing project. With respect to development matters, the HUD regulation that is codified at 24 CFR 503(b) provides that Housing Authorities may not agree to any changes or additions to the work required under a construction contract except as authorized by the contract itself or by the HUD Field Office. The HUD regulation found at 24 CFR 503(c) provides that a Housing Authority shall contract for the services of an architect or other person licensed under state law to assist and advise the Housing Authority in contract administration and inspections to ensure that the work is done in accordance with HUD requirements.

The Speer Village project involved improvement construction; *i.e.*, repointing of and application of weatherproofing to the exterior brick walls of multi-story apartment buildings. With respect to improvement construction, the regulation that is codified at 24 CFR 968.251 provides that Housing Authorities shall provide adequate supervisory and inspection personnel for the improvement work to ensure work quality and progress.

In accordance with the above-cited HUD regulation 503 and the Annual Contributions Contract under which Housing Authorities are funded, the PHA and LAN executed a HUD Standard Form of Agreement Between Owner and Architect (HUD Form 51915)¹ for the Chestnut Street project. (S 1).² Among other things, the Agreement provides under Section 1.28, Architect's Services, as follows:

¹ This contract form provides blank spaces for the day, month, and year of the agreement. In the contract for Chestnut Street, the first two spaces remain blank, and the year is filled in as 1983. As submitted during the hearing as S-1, there is a cover letter dated August 22, 1983 from Respondent Lacz to

j. Make periodic visits to the site to become familiar with the progress and quality of the Work and to determine if the Work is proceeding in accordance with the Contract Documents. On the basis of his onsite [sic] observations he shall endeavor to guard the Owner against defects and deficiencies in the Work. After each visit, he shall submit a written report to the Owner which shall include all observed deficiencies. ... The Architect shall not be responsible for construction means, methods, techniques, sequences, or for safety precautions and programs in connection with the Work, and he shall not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

* * * * *

l. Review and recommend to the Owner payment of periodic estimates of the value of acceptable Work in place, and material delivered to and properly stored on site.

Donald Pieri, Deputy Executive Director of PHA, which appears to transmit the final version of the agreement.

² The Secretary's exhibits are cited with a capital S and an exhibit number, and the Respondents' exhibits are cited with a capital R and an exhibit number. Capital letter T stands for the transcript of the hearing, and the number following it is the transcript page.

With respect to the Speer Village project, in accordance with HUD regulation 968.241, cited above, and also under the Annual Contributions Contract through which Housing Authorities are funded, the PHA and LAN entered into another Agreement (S 2)³ which provides, in pertinent parts, as follows:

1. ... which work by Lan shall include ... supervision and observation of the work performed by the Contractors in conformance [sic] with the program and the contract entered into between the Contractor and the Authority, and any and all other work of any nature and kind whatsoever in connection with the above referred to program.

* * * * *

6. All work performed by Lan shall be subject to the approval of the Authority and HUD, with particular reference but not limited to all plans, drawings, specifications, or other documents or work to be performed under this contract, and said approval shall in no way relieve Lan of responsibility for sufficiency and practicability [sic] of design and of the drawings and specifications or for the workability of details except as to feature thereof upon which the Authority has specifically instructed Lan in writing, nor shall any such approval relieve Lan of its responsibility to fulfill any other obligations under this contract.

* * * * *

9. Lan shall assist the Authority ... in connection with advertising for ... bids and shall, if requested by the Authority, be present at the public opening of bids, to review and tabulate contractors' proposals and to make recommendations to the Authority regarding the award of contracts

10. Lan and any independent professional engaged by it to perform the services required hereunder shall observe the construction of the respective parts of the work of the contractors. Such observation shall be unlimited and

³ This Agreement also lacks a day and month and indicates the year 1987. What appears to be the letter of transmittal for the document, from LAN to Paul A. Marguglio of PHA, is dated January 12, 1987.

observation and supervision shall be a continuing obligation of Lan to insure the proper completion of all work. Lan shall advise on all problems and changes necessitated by unforeseen conditions encountered in the course of construction and shall assist in final inspection, check and countersign construction change orders and sign certificates of completion. It is understood that all change orders shall not only be approved by Lan but by the Authority and HUD. No change order shall be effective without such approvals.

To further the purposes of the Architect's agreements, the federal statutes and HUD regulations, HUD requires that each payment to a contractor for its work to date be subject to completion of HUD Form 51000, entitled Periodical Estimate for Partial Payment ("Periodical Estimate"). (S 3,4; T 51, 57). The face side of the Periodical Estimate contains a schedule prepared by the contractor of items of work and the value of each item completed through a certain specified date. This is certified to by the contractor on the reverse side of the form to the effect that all items and amounts shown in the schedule are correct and that all work has been performed and material supplied in full accordance with the terms and conditions of the construction contract.

The Periodical Estimate also contains a certification approving payment of the amount requested and certified to by the contractor, to be executed by the party engaged or assigned to inspect the work, in this case LAN. The inspecting party's certification is that he has inspected the work, and any duly-approved changes, and found that it has been performed in full accordance with the plans and specifications.

The HUD regulatory plan created by the above-cited federal statutes and regulations, as well as the provisions of the Periodical Estimate form and the Agreements, taken together, require the architect to inspect the work in a diligent and careful manner to detect deficient work and to report such deficiencies to the Housing Authority during the progress of the work and not after the work has been fully or substantially completed. The duty to so report deficiencies is explicit, and it is clearly not sufficient to simply advise the contractor's employees on how to proceed with respect to unsatisfactory work. If the work that is deficient is included under a Periodical Estimate, and payment for it is being requested by the contractor, it is the obligation of the architect to deduct an amount sufficient to correct or complete the work being billed for.

In all of these contracts, a standard amount of "retainage" is set aside from payments to the contractor until final acceptance of the completed project. It is clear from the Periodical Estimate form itself that in cases where the architect finds work that is billed on a Periodical Estimate to be deficient, it is not sufficient for the architect to rely

on the standard retainage set aside from payments to the contractor since retainage is not intended to cover amounts that are necessary for correction of specific deficiencies.

The Architect's Agreement for the Chestnut Street project is the HUD form agreement and provides for periodic visits by the architect to determine if the work is proceeding in accordance with the contract documents. On the basis of these on-site observations, the architect is to guard the Housing Authority against defects and deficiencies in the work. After each visit the architect is to submit a written report to the Housing Authority which shall include all observed deficiencies. (T 44; S 1)

The Architect's Agreement for the Speer Village project does not use a HUD form agreement, but in substance it imposes similar obligations on the architect, provides for supervision and observation of the work as to conformance with the program and the construction contract. Under the agreement, observation and supervision is a continuing obligation of the architect for the purpose of observation and supervision of the work. (T 47; S 2).

The certifications in each of the Periodical Estimates contain provisions to the effect that all work and material included in the Estimates has been inspected by the architect or its authorized assistants and that such work has been performed or supplied in full accordance with the drawings and specifications as well as the terms of the Construction Contract. (T 51, 57; S 3, 4). HUD regulations require outside architects to be engaged for Housing Authority construction that is financed by HUD because the Housing Authorities generally do not have the competence to do the supervision of construction work. (T 106-7, 602). Thus HUD relies entirely on the supervisory architect and its inspection reports to ensure that the project is being built in accordance with the plans and within the set costs. (T 63-65, 596-6).

The thrust of HUD's complaint is that the Respondents did not make adequate inspections of all the work so as to enable it to determine the existence of deficiencies; did not report all deficiencies during the progress of the work; certified Periodical Estimates which included payment for work which was deficient while failing to make deductions for the deficient work; failed to process change orders for deviations from the plans and specifications where work which it certified was a deviation; and that the individual respondents as officers of the corporate respondent participated in the actions constituting the failures of the corporate respondent.

2. Chestnut Street

LAN's contract with PHA for the Chestnut Street project was to provide certain architectural and engineering services with regard to construction of 70 residential units in 11 buildings. The contract was a standard HUD form which essentially provided that LAN would design the project, prepare bid documents, including plans and specifications, and provide construction oversight services. (T 62-3, 849). The language contained in the contract was described by a HUD employee who testified as a witness at the hearing as "boiler plate" and standard in form. (T 60).

LAN Associates initially did preliminary design and investigation of six sites for construction of 120 units. Each preliminary plan was rejected by HUD and each site was deemed unsuitable by HUD. (T 846-7). The project was scaled down to 70 units and HUD gave LAN approval to proceed with drawings for the Chestnut Street site. (T 847). The project was offered for bidding, and following one round of rejected bids, an award of contract was made to Jet Construction Company, Inc. ("the contractor"). (T 848, 851).

HUD also approved the budget for the project at \$3,684,400 with a contingency of "two to three percent." (T 847-8). The purpose of the contingency, or retainage, is to provide a cushion for unexpected problems encountered in the construction of such a project and is typically set at five to ten percent. (T 848).

Construction took place over a twenty-month period, and the project was accepted for occupancy by HUD in December of 1986. (T 877). During the course of construction, Jet Construction submitted 19 Periodical Estimates for payment. (S 3). Each estimate was revised by LAN to decrease the amount to be paid to the contractor. The reductions in amounts are imprecise as to what they are for. The nineteenth request was rejected in its entirety, and no further money was paid to the contractor at that time. (T 990-1).

Also during the construction period, LAN submitted written reports of its "field inspections" to the Housing Authority. The reports were frequent, sometimes actually daily, and they are extremely detailed. (R 13).⁴ They show clearly that LAN was dealing with a contractor that imposed problems on its own project by short-cutting, poor workmanship, and under-staffing. It is also apparent from the reports that LAN had a great deal of difficulty getting the contractor to adequately correct the noted deficiencies.⁵

⁴ R 13 is a bound volume created by LAN, dated May 17, 1991, and entitled "List of Deficiencies." It is a collection of photocopies of field reports, memos, specifications, and photographs collected and put together by LAN for ease of reference during this litigation.

⁵ For example, in item 15 of the field inspection report dated March 25, 1986 (R 13, p. 143), Respondent Karle states that, "Joe was shown where the studs were missing under the sheetrock of Building

It is difficult to imagine that the number and types of deficiencies described by LAN in these reports is ordinary or common to the construction industry. While it is sometimes difficult to tie the deficiencies noted in the field reports to the lowering of payable amounts on the Periodical Estimates, one can generally see the relationship as well as the amount of energy expended in working with the contractor to effect corrections.⁶

The first HUD note of problems and deficiencies in the work at the site, leading to this case, was in a Project Engineering Survey filed on October 13, 1987, by Benjamin Castro, a HUD Maintenance and Monitoring Engineer for the Assisted Housing Management Branch at HUD's Newark Office, some 18 to 24 months after occupancy by the tenants (T 129, 995; S8). The report states that Castro inspected the Chestnut Street project on September 18, 19, and 23, 1987. (T 115, 126). An undated Supplemental Report is attached to the Survey.

In the Survey, Castro states that:

The Chestnut Street Project consists of eleven (11) row houses and fits in with its surroundings. It has an appealing spaciousness about it (both inside and out) and engenders pride and appreciation in the tenants.

Many apartments were inspected and all were found to be neat and attractive. All tenants are proud of "their homes".

However, there are several observations that indicate that the construction workmanship and inspection services may have

#7." In Item 8 of the field inspection report dated April 15, 1986 (R 13, p. 151) Karle notes that, "The missing studs at the end apartments of Building #7 were never installed before spackling." Nothing of record indicates that HUD or the PHA ever did anything with a great deal of information of this sort that is contained in the reports.

⁶ For example, R 13 at p. 125 is Periodical Estimate No. 12 for the period January 25, 1986 to February 25, 1986. It shows generalized item descriptions, such as "electric (rough)," in a column of 43 items. The column to the right shows an amount of money being requested as a periodic payment for each item by the contractor, in this case \$182,400, and to the right of that the amount that LAN was willing to recommend approval upon, in this case \$127,690, if different from that requested by the contractor. While nothing appears on the form to explain why LAN is recommending less, it is clear from memos from LAN to the contractor and PHA, letters from the contractor to both, field reports, and the memos written by various parties to memorialize meetings conducted to discuss and negotiate the reduced amounts, that there was no doubt, or there should not have been, among the involved parties regarding why the amounts were reduced. (R 13, pp. 111-150). These memos and field inspections also reveal clearly LAN's continued dissatisfaction with corrective work.

been indifferent. These observations are itemized below in Part II - Observations.

Part II of the Survey lists the following observations regarding the exteriors:

1. Concrete walks and ramps have cracked and started to wear exposing stone. It appears too much water was used in original mix.
2. Aluminum Fascia (between 1st & 2nd floors) has buckled and was not installed in accordance with the plans.
3. Nailing of Textured 111 Finish Sheeting is uneven, some nails are pulling out. The sheeting was poorly cut and adversely affects the fascia and window installations.
4. Some windows are not installed the proper way. A few windows have 1 1/2" to 2" of caulking as primary weather protection.
5. Some outside railings had fallen down because the stone steps they were imbedded in had cracked.
6. The support for the canopies are sculpted and appear to be grade "C" lumber.
7. Termite shields are poorly installed. Metal is lightweight and children could cut their fingers.
8. Light posts out of plumb.
9. Crawl space floor insulation is falling down.

The following observation regarding the interiors were noted in the survey:

1. Fire wall studding is on 24" centers [rather than 16"].
2. End walls, both floors are on 24" centers.

3. Based on pictures (construction progress pictures taken by the PHA) and the use of sonic stud finder, the windows do not appear to have been properly framed.
4. Some walls are out of plumb by 2 to 3 inches.
5. Interior hand rails do not appear to be properly supported.
6. Many spackling repairs were not done in a workmanlike manner.
7. The PHA reports sinks and cabinets have fallen down because these were not properly fastened to the studs.
8. Kitchen counter tops not properly supported.
9. Tile floors have cracked. Probable cause is poor sub-flooring.
10. A/C sleeves leak outside air and do not have insulation.

While some of these named deficiencies can only be construction-related (e.g., studs on 24-inch rather than 16-inch centers), some may be due to wear and abuse (e.g., light posts out of plum, felled railings, and worn concrete). LAN provided an index to the List of Deficiencies which lists all the listed discrepancies and where references to them can be found in its reports. However, some of these do not really respond to the Government's complaints.⁷ Clearly, LAN should have tied the amounts to be withheld to the deficiencies for which the amounts were recommended to be withheld with greater particularity, and the PHA and HUD should have required that LAN do so starting right from the first Periodical Estimate.

⁷ For example, there are 13 references to the fact that the builder used 2" X 6" studding on 24" centers in the end walls rather than the 2" X 4" studding on 16" centers that was called for in the plans. (R 13). LAN and the expert witnesses argue that the modification actually makes for a better-insulated wall while having the same structural strength characteristics as the wall that was designed would have, and I find that to be true. LAN permitted the change for that reason. No change order was ever submitted to or approved by the PHA, and HUD now cites this as a failing of LAN's which contributed to the issuance of the LDP. But, as noted above, this change was reported to HUD and the PHA 13 times, and neither appears to have made any comment, much less a demand for a change order.

In some instances, the reports did not site any deficiencies, but simply advised the contractor on how to proceed with corrective action.⁸ In some instances they called attention to improper work in progress where the work does not appear to be related to HUD's complaint. In some instances, the reports cited showed that the work involved had already been approved for payment, and that payment had already been made, before it was cited as a deficiency. Again, missing from LAN's extensive lists of deficiencies is an ability to take a deficiency complained of by HUD and trace where it was timely reported and where a specific amount was deducted for it on the appropriate Periodical Estimate.⁹

For example, in one report cited by the Respondents, a letter dated September 8, 1987, LAN advised the PHA that all exterior handrails should be reset with deeper penetrations. (T 906-7; R 13 p. 283). Since the letter was written as late as it was, it cannot properly be used to show that LAN had timely reported a deficiency during construction. For another example, in its List of Deficiencies, LAN cites pages 108 and 120 as indicating that LAN had reported that walls were out of plumb. Page 108 contains a clear statement that "studs were out of plumb." However, while page 120 contains many detailed deficiency reports, including some regarding studs and one that says some studs were warped, nothing on the page explicitly answers to walls out of plumb.

⁸ There was no testimony as to what is the accepted industry standard in terms of how a supervisory architect communicates with a contractor on a government-funded project.

⁹ It is clear from Mr. Karle's testimony that he believes that LAN was only required to change the value of the work submitted for billing to conform with LAN's opinion as to percentage completion, rather than citing specific deficiencies to justify such reductions on the Periodical Estimates themselves. (T 1082-86). In this regard, I note that the Periodical Estimate form contains a column headed "Description of Item" and, to its right, a column headed "Completed to Date." There is no column of space to be filled in with a named deficiency. Moreover, none of the certifications to be made on page two of the form, and none of the instructions on use of the form, demand descriptions of deficiencies. The entire form appears to be intended only to bring billings up to date for correctly completed work to date. (See, e.g., R 13 at pp. 125-6).

Further, there were instances where the documents constituting the List of Deficiencies showed that changes had been made without change orders being approved by HUD or the PHA. Respondents and one of their expert witnesses testified that change orders are only required when there is to be a substantial change in a material building system or the Contract Sum or the Contract Time. (T 1074-75). HUD claims that the definition of a Change Order taken from the General Federal Supplementary Conditions to the Chestnut Street Construction Contract, at 12.1.1, describes a Change Order as one authorizing a change in work or an adjustment in the Contract Sum or the Contract Time. (S 16, p. 3).¹⁰ I find that this requirement can be read either way and am satisfied that the industry norm, and HUD's ordinary practice, is to require change orders where there is a change in the amount to be paid under the contract or where there is a significant alteration in the building from its original plans. Thus, *i.e.*, I find that LAN was not under obligation to file a change order regarding the use of the 2" X 6" studs mentioned earlier.

By the end of the project, LAN had withheld \$200,000 in payments to the contractor over and above the ordinary retainage called for in the contract. In total, LAN recommended to the PHA that \$400,000 not be released to the contractor so as to allow for completion of the "punch list"¹¹ and the discrepancies noted in LAN's reports. (T 990-3, 995).

Prior to making many of the repairs noted by LAN, the contractor filed for arbitration of its claims against the PHA, seeking, among other things, payment of all the money withheld.¹² Following 28 days of hearings,¹³ on September 28, 1988, the American Arbitration Association, Construction Industry Arbitration Tribunal, consisting of three arbitrators, awarded \$481,413.51 to the Contractor; *i.e.*, \$200,000 retainage plus the approximately \$200,000 that had been withheld on LAN's advice, together with interest. (T 999-1004; R 7).

¹⁰ In the Speer Village Specifications (T 688; S16) change orders are required for changes in the specifications, in the method or manner of performance of the work, or in the cost of the contract. (See S 16, General Conditions of the Contract for Construction, U.S. Department of Housing and Urban Development, OMB No. 2571-0094, para. 9a, p.3).

¹¹ The punch list is a final list of minor discrepancies to be corrected before final payment.

¹² The PHA requested that an independent architect/engineer be hired to give expert testimony in the arbitration proceedings, but HUD denied the request. (T 90).

¹³ Mercifully, neither party entered a transcript of the proceedings into the record. Unfortunately, this leaves the bases for the arbitrator's decision unknown. (R 7).

3. Speer Village

The Speer Village repointing and waterproofing project was undertaken by LAN under a contract with the PHA dated January 21, 1987. (R 2). The contract was in all aspects similar in general content to the Chestnut Street contract and was also a standard architectural/engineering contract. (T 1120).

Speer Village consists of eight buildings that were constructed 42 years ago. (T 790). The site has a history of soil problems and water movement causing continuous settling. (T 787-8). The buildings also contain certain design and construction flaws that contribute to the need for repairs associated with this case; *i.e.*, steel lintels over the windows. (T 789). The buildings have been repeatedly repointed and repaired due to these conditions, and the mortar joints will continue to be adversely affected on a regular basis, especially at the steel lintels. (T 792, 1251; R 10).

In 1981 or 1982, LAN took part in addressing problems being experienced with parapet walls at the site.¹⁴ The PHA and HUD at that time expressed concern over the condition of the walls and the bulging of brick above the roof line. LAN oversaw the removal of the walls and the installation of a replacement fence, new fascia, and a new roof for each building. (T 795).

During many repair jobs performed over the years by many different contractors, much repointing has been done by standard methods, as well as by the "tape and grout" method, on the elevations of the buildings. (T 738).¹⁵ Both methods had been used on a number of occasions of repair work being performed prior to 1987 and the work in question in this case. (T1023).

The plans and specifications for the job were prepared by LAN and the contract was awarded to MCSD, the low bidder, at \$198,000.¹⁶ This bid was substantially below the estimate prepared by LAN for the work. LAN, in its capacity as architect/engineer,

¹⁴ A parapet wall is an extension of the vertical exterior wall of a building above its roof line. It is both aesthetic and safety-related, in that it forms a barrier between one walking on the roof and the space below.

¹⁵ The standard method of repointing is to scrape out all loose mortar from every mortar line between the bricks and replace it with new mortar, pushing it into place with hand tools designed for that purpose. In the tape and grout method the individual bricks are temporarily covered with tape, mortar is spread over the area, and the bricks are then cleared off. In both methods, it is essential to clear away all the old, deteriorated mortar and replace it with new mortar.

¹⁶ The other eight bids ranged from \$42,000 to \$91,000 higher; *i.e.*, from 21 to 46 percent higher than the winning bid.

checked the references of MCSD and received high praise from the Asbury Park Housing Authority and a positive recommendation from HUD personnel. (T 1031-33). In addition, HUD specifically approved the award of the contract to MCSD. (T 704).

As with the Chestnut Street project, periodical estimates were submitted by the contractor seeking partial payments, and again, LAN reviewed and revised each request. (T 1045; S 4). MCSD claimed to have completed its work in August of 1988. However, prior to submission of a final request for payment by MCSD, or a final inspection by LAN, LAN's contract with the PHA was terminated. (T 816, 1048). At the end of the job, LAN was withholding approximately \$27,000 in retainage and hold-backs from the contractor. (T 824, 1048). HUD claims that \$230,986 worth of work is required to complete the job. (T 681; S 15).¹⁷ However, HUD's estimate of work needed was done by an employee who never visited the site and based his evaluations of the building corners on sketches instead of photographs, the existence of which was only made known upon the insistence of, and expression of incredulity by, the administrative law judge. (T 648-57, 665, 1043; S 15, 19).¹⁸

HUD also voiced a great deal of concern over the quality of the application of the waterproofing. However, the application described was of an anti-graffiti compound, not the waterproofing. The waterproofing was applied under the watchful eyes of representatives of the manufacturer, and the latter issued a warranty based upon those observations. (T 298; S 10).

Discussion

HUD is required to conduct business only with responsible persons (24 CFR 24.115). Under the regulations, a Limited Denial of Participation may be issued upon adequate evidence of a failure to honor contractual obligations and to proceed in accordance with contract specifications, or for making false certification for the purpose of influencing actions by HUD (24 CFR 24.705(4) and 24.705(10)). The basis of an LDP must be established by adequate evidence (24 CFR 24.313(b)(3)). Each and every

¹⁷ This is 121 percent of the original contract cost.

¹⁸ Because of the shape of the buildings, each of the six buildings has eight outside corners. HUD claimed in the hearing that most of the corners needed rebuilding rather than repointing, but neither the contract nor the plans called for reconstructive work. The handmade drawings of the corners greatly exaggerate the amount of bulging of the corners to the point that they appear to show an overhanging cornice created by corbeling the rows of bricks for the purpose of esthetics. The photos show no such scale of bulging. HUD's dependence on these crude and misleading drawings draws some speculation on purposes and intent.

charge of HUD need not be proven to support the administrative action, only enough to justify the action taken. (24 CFR 26.24(a)).

HUD argues that it has established by adequate evidence that Respondents had an obligation to inspect all work in a manner sufficient to detect all deficiencies; to report all deficiencies during the progress of the work; and in executing certifications under the Periodical Estimates to deduct for all amounts which would be necessary for the correction of all deficiencies; and further that Respondents failed to determine whether or not work was progressing in accordance with the Contract Documents. It claims that the Respondents failed to submit reports including all observed deficiencies, failed and neglected to report deficiencies, and falsely or mistakenly certified that the work was progressing in accordance with Contract Documents or had been performed in a good and workmanlike manner; that they failed to execute the required change orders when the construction contract or the work had been modified and to obtain required HUD approval for change orders when required. This exaggerates and misrepresents the situation.

Most of the deficiencies noted by HUD were either not deficiencies attributable to construction, were possibly attributable to wear and tear, including tenant abuse, or had in fact been adequately reported during the construction period. LAN produced 135 inspection reports that had been prepared two and sometimes three times as frequently as required, including photographs to bolster its claims. It presented the testimony of the LAN officials who had inspected the site as well as other experts in construction. In contrast, HUD could not produce the PHA or HUD employees assigned to the projects while they were being done. Indeed, there was no evidence that these officials had done anything to benefit the projects. Instead, for the benefit of this proceeding, HUD employed under-qualified people to inspect the projects and report on them some years after occupancy at Chestnut Street and of completion at Speer Village. As noted, their reports included hand-done sketches instead of photographs and a good deal of incomprehension of the work before them, such as misconstruing application of the anti-graffiti substance to be application of waterproofing, reports in error that plaster rather than mortar had been used, and no knowledge at all of the relative merits of the two methods of repointing.

HUD and the PHA should have had qualified people assigned to these projects to review the work and the reports from LAN. Instead, it appears that LAN was working in a near vacuum, inspecting the sites, writing reports, and deciding what to direct the contractor to do. There was no evidence that the PHA or HUD at any time during the work backed up LAN's demands for corrective action; their interest in the project appears to have begun some time after acceptance and occupancy. Meanwhile, it is obvious that the contractors became ever less cooperative with the overseeing architect. It is not at all

clear from these projects that the amount of the bid should be the only deciding factor in choosing a contractor.

As to the Chestnut Street project, the hold-backs recommended by LAN resulted in an American Arbitration Association proceeding between the PHA and the contractor in which the entire amount withheld, plus interest, was awarded to the contractor. While *res judicata* and collateral estoppel do not apply, the decision is evidence and is entitled to appropriate weight. As to the Speer Village project, LAN's contract was terminated prior to completion, and the superseding architect was not called upon to testify with regard to the condition of the work site and LAN's reports upon its taking over. Finally, HUD has not taken action against either construction contractor.

A debarment action, including an LDP, is a sanction which may be invoked by HUD as a measure for protecting the public interest by ensuring that only those qualified as "responsible" are permitted to participate in HUD programs. *Stanko Packing Co. v. Bergland*, 489 F.Supp. 947, 949 (D.D.C. 1980); *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C.; 1976). "Responsibility" is a term of art used in government contract law. It encompasses the projected business risk of a person doing business with the government. This includes that person's honesty, integrity, and ability to perform. The primary test for debarment is present responsibility, although a finding of present lack of responsibility can be based upon past acts. *Schlesinger v. Gates*, 249 F. 2d 111 (D.C. Cir. 1957); *Roemer, supra*.

Here, the Government failed to show, even by the minimal standard of "adequate evidence," that the Respondent is dishonest or unable to perform. On the contrary, LAN's more than required visits to the sites and detailed reports attest both to the competence and the integrity of its personnel. I have only found LAN lacking in specifically tying the amounts recommended for withholding to certain deficiencies¹⁹ and in actually having covered specifically those deficiencies chosen by HUD to site some years after completion of the jobs. However, given the enormity of the deficiencies faced by LAN as well as difficulty with the contractor, the imperfection of LAN's reporting is understandable. More importantly, it is not sufficient in nature or scope to conclude that LAN lacks the requisite integrity or professional ability to undertake business with the Government. Finally, it is important to note that, under Section 1.28, para. j of the

¹⁹ It is again noted, however, that HUD's Periodical Estimate form does not provide for explanation of the amounts recommended to be reduced.

contract, the architect, while responsible for reporting deficiencies, is not responsible for the Contractor's failure to carry out the work in accordance with the Contract Documents.

Conclusion and Order

Upon consideration of the need to protect the public interest and the need to treat fairly contractors who deal with the Government, I conclude and determine that sufficient cause did not exist to limit Respondent's participation in HUD programs as described in the opening paragraph of this determination. Accordingly, the appeal is GRANTED and the LDP is DISMISSED.

So ORDERED.

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: September 5, 1991.