Appeal of:	:	
WILLIAM JAMES GILBERT,	:	HUDBCA No. 95-G-130-D21
	:	Docket No. 95-5043-DB
Respondent	:	

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DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

May 2, 1997

Statement of the Case

By letter dated March 2, 1995, Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner, U.S. Department of Housing and Urban Development ("Government," "HUD," or "Department"), notified William James Gilbert ("Respondent") that the Department was considering debarring him and his affiliates from participating in primary covered transactions and lower-tier covered transactions as either a participant or a principal at HUD and throughout the Executive Branch of the Federal Government, and from participation in procurement contracts with HUD for a period of five years. The letter named Gilbert Properties, Inc., Eastfield Management, Inc., Cedar Springs Management, Inc., Murdock Terrace Management, Inc., Bruton Oaks Management, Inc., Kingsgate Maintenance Company, Inc., Warren A. Gilbert, Jr., and Warren A. Gilbert, III as affiliates of Respondent.

The letter of the Assistant Secretary for Housing-Federal Housing Commissioner stated that the proposed debarment is based on serious irregularities by Respondent as "owner or principal" of Eastfield Management, Inc., Kingsgate Maintenance Company, Inc., Cedar Springs Management, Inc., Murdock Terrace Management, Inc., and Bruton Oaks Management, Inc. with regard to the management of certain HUD-owned or HUD-assisted multifamily housing projects. The letter also stated, as grounds for debarment, that Respondent: (1) made unauthorized transfers out of tenant security accounts, failed to transfer tenant security deposits to the management agent succeeding you within the time required by your termination notice, and falsely stated the amounts of tenant security deposits in monthly accounting reports; (2) transferred funds from the reserve for replacement accounts without

advance authorization from HUD, and failed to transfer reserve for replacement accounts to the management agent succeeding you within the time required by applicable termination notices; (3) used undisclosed identity of interest firms to purchase supplies and repairs for HUD projects, and failed to obtain competitive bidding where required for purchases; (4) improperly used project funds from particular HUD-insured projects for the benefit of other projects; (5) incurred Unnecessary late fees in or about the amount of $88,784 because of late mortgage payments; (6) failed to file, or failed to timely file, annual audit reports for fiscal year 1992; and failed to file annual audit reports for fiscal year 1993; and (7) failed to properly submit monthly accounting reports.

By letter dated March 20, 1995, Respondent filed a timely appeal of the proposed debarment only on his own behalf. Respondent's affiliates filed a separate appeal with this Board. By Order dated April 28, 1995, the two appeals were consolidated. On September 11, 1995, the appeal filed by Respondent's affiliates was dismissed with prejudice for lack of prosecution. By Order dated April 15, 1996, the Board granted the Government's motion for leave to file an amended complaint against Respondent. On May 15, 1996, the Government filed its amended complaint, basing Respondent's proposed debarment on substantially different grounds and reducing the proposed period of debarment of Respondent from five years to three years.

In the amended complaint, the Government abandoned numbers 1 and 2, and 4 through 7 of the grounds for debarment listed above in the Assistant Secretary for Housing-Federal Housing Commissioner's letter. The Government's amended complaint essentially charges Respondent with failure to report identity of interest firms from whom substantial purchases were made; causing excessive charges for purchases of goods purchased from identity of interest firms; and causing payments for supplies or materials to exceed the amount ordinarily paid in the area where the supplies or materials were furnished. (Govt. Amended Complaint, Counts I, II and III.) The amended complaint also alleges that certain of Respondent's actions were willful violations of public documents, regulatory agreements, management agreements, and grounds for debarment under 24 C.F.R. § 24.305(b), (d) and (f).
(Govt. Amended Complaint, 40.) Respondent filed an answer to the amended complaint on June 6, 1996. A hearing was held in this matter in Dallas, Texas, on October 28-30, 1996.

Findings of Fact

1. At all times relevant, Eastfield Management, Inc. ("Eastfield") was the management agent for 22 HUD-assisted properties. In March 1992, Respondent went to work for Eastfield Management, Inc. at the request of Warren A. Gilbert, Jr., the owner of Eastfield and Respondent's father. Because of Respondent's background in banking, accounting, and real estate management, Respondent was hired to control expenses in order to reduce losses on the properties managed by Eastfield. As of February 1993, Warren A. Gilbert, Jr. was the owner of Eastfield, and Respondent was the operations manager. It is unclear what Respondent's title was prior to February 1993. (Answer to Amended Complaint at 4; Exh. G-1; Tr. 492-4, 532, 541.)

2. Respondent was never an owner, officer, or director of Eastfield. While an employee of Eastfield, Respondent did not have check-writing authority or final decision-making authority. When Respondent developed policy changes at Eastfield, he would review them with his father prior to implementation. Respondent's father had ultimate decision-making authority for Eastfield. (Tr. 276, 494-6, 528-9, 532.)

3. HUD requires that its management agents disclose in the Management Entity Profile all firms with which the management agent has an identity of interest. The owner of the management agent is the one responsible for making the management certifications. At all times relevant, Eastfield did not disclose any identity of interest firms. (Exhs. G-24, G-24a, G- 64; Tr. 70, 107, 142, 154.)

4. Respondent held an ownership interest, along with his father, brother and sister, in Washington Street, TCMC, a cabinet company. In 1991, Respondent's brother was listed as the Vice President of Washington Street, TCMC, and Respondent's sister was listed as the Secretary/Treasurer. In 1992, neither was listed as an officer of the Washington Street, TCMC. In return for his investment in Washington Street, TCMC, Respondent received a dividend for 1990. Between 1990 and December 31, 1992, Respondent did not receive any further distributions from Washington Street, TCMC. Respondent and his family divested their ownership interest in Washington Street, TCMC in late 1990 or early 1991. (Exhs. G-37, G-41, G-42, G-77; Tr. 509-10, 539.)

5. When Respondent began working for Eastfield in 1992, he did not have an ownership interest in Washington Street, TCMC, he did not have access to, or authority over, the records and accounts of Washington Street, TCMC, and he was not an officer, director, or a registered agent for Washington Street, TCMC. The record does not reflect the amount of services, if any, ordered or received by Eastfield from Washington Street, TCMC. (Exh. G- 77; Tr. 282, 289, 438-40, 510-1, 539.)

6. Cherry Kirby, HUD senior asset manager from the HUD Dallas office, knew that Respondent had authority to act on behalf of Eastfield for purchases and repairs related to the properties managed by Eastfield, but that he was not the projects owner. (Tr. 49-50, 79-80.)

7. Darville Davis, HUD asset manager, was under the impression, after a March 31, 1992 meeting with Respondent and Respondent's father, that Respondent "was coming in and taking over Eastfield Management Company." However, Respondent had only identified himself as the operations manager for Eastfield Management. Respondent did not hold himself out as an owner of Eastfield Management, nor did he use the word "officer" or "director" when identifying himself to Davis. (Tr. 123-124, 128, 139.)

8. Windell Durant, an auditor with HUD's Office of Inspector General, concluded that Respondent was in charge of, and had authority to act on behalf of, Eastfield Management as the operations manager, even if he was not an owner, officer, or director (Tr. 175.)

9. At all times relevant, Richard Goldich was the owner, along with his wife, of an entity doing business as the Phoenix Company ("Phoenix"), a distributor of janitorial supplies and chemicals with which Eastfield did business. Goldich believed that Respondent "headed up" Eastfield, and had assumed responsibility for the operation of the company. However, no one actually told Goldich the extent of Respondent's authority to act on behalf of Eastfield. (Tr. 277, 427, 436, 440, 441, 451, 465, 498.)

10. Under the relevant management agreements, the management agent is required "to obtain contract materials, supplies and services at the lowest possible cost and on the terms most advantageous to the project and to secure and credit to the project all discounts, rebates or commissions obtainable on behalf of the project." (Govt. Exh. G-4; ~g also Govt. Exhs. G-5 through G-24)

11. When Respondent began working for Eastfield, Eastfield ordered supplies, including Glidden paint from a Glidden store,through Phoenix. Respondent did not have an ownership interest in Phoenix, nor did Respondent have any authority or control over the records, accounts, or activities of Phoenix. When the properties managed by Eastfield needed paint, the property managers would submit a purchase order to Warren A. Gilbert, III, Respondent's brother, and the purchase order would be forwarded to Phoenix to be filled. Alternatively, Respondent, Warren Gilbert, Jr., or the property managers would call Glidden directly to order paint, and the paint would be charged to the Phoenix account. Goldich instructed Glidden not to ship any orders phoned in from Eastfield without Goldich's consent. Orders for paint were made under this system through December 1992. Billing activity between Glidden and Phoenix after December 1992 reflects certain credits to Phoenix's account. During the course of their business relationship, Eastfield purchased well in excess of $1,000 in paint from Phoenix. (Exh. G-66; Tr. 387-389, 391, 449, 450, 454, 464, 497, 499-500.)

12. At the direction of his father, Respondent assumed the responsibility for the ordering of supplies, including paint, sometime in the fall of 1992. Respondent's brother, Terry Gilbert, was in charge of procuring paint supplies prior to the time Respondent assumed responsibility for paint procurement. Respondent implemented a new ordering procedure where Respondent would place orders with Phoenix only if the property manager signed the purchase order and Respondent agreed that the supplies were necessary. The new procedure was instituted, according to Respondent, in order to better control expenditures, but the procedure was not fully implemented until late 1992 or early 1993. (Exh. G-1; Tr. 54, 501-2, 533-4.)

13. During the latter part of 1992, certain Eastfield property managers suggested to Respondent that Eastfield order paint from Sherwin-Williams, instead of obtaining the Glidden paint from Phoenix. When Respondent discovered that Phoenix was marking up the Glidden paint sold to Eastfield by 30 percent, Respondent contacted Glidden. Glidden representatives informed Respondent that they could provide Eastfield directly with paint at the same price that Glidden charged Phoenix. Glidden also agreed to deliver the paint to the properties, a service not provided by Phoenix. By the end of 1992, Eastfield had discontinued ordering paint through Phoenix. In 1993, there were

outstanding invoices from Phoenix to Eastfield for the Glidden paint. Respondent suggested to his father that Eastfield not pay the outstanding invoices because of the price charged by Phoenix. (Tr. 437, 442, 504-6, 576.)

14. Respondent resigned from Eastfield in October 1993. Since that time, Respondent has been self-employed as a management and investment consultant. Respondent is presently the sole owner of Sterling Ventures, Inc., a consulting company. Sterling Ventures has no involvement with HUD-insured properties. With the exception of the present proposed debarment action, the investigation leading thereto, and this administrative proceeding, neither Sterling Ventures nor Respondent have been the subject of a criminal or administrative proceeding or investigation. (Answer to Amended Complaint, at 4; Tr. 582-587.)

15. Respondent was not aware of HUD guidelines and regulations relating to permissible expenditures made by the managing agent. Respondent never read the management agreement between Eastfield and HUD. (Tr. 525, 537.)

16. Paragraph 17, Handbook 4370.2, REV-i (May 1992) states as follows:

> A listing of identity-of-interest (as defined below) companies doing business with the mortgagor and/or management agent of the project, along with a breakdown of services rendered and amounts received, shall be required if the payments for services performed for the project totalled $1,000 during the operating period.
>
> HUD assumes an identity of interest to exist between the project staff and the lender/vendor when (1) the project staff member, or (2) any officer, owner, or director of the project, or (3) any person who directly or indirectly controls 10 percent or more of the project's voting rights is also (1) an officer, owner, or director of the lender/vendor, or (2) a person who directly or indirectly controls 10 percent or more of the lender/vendor's voting rights, or (3) directly or indirectly owns 10 percent or more of the lender/vendor. A vendor is any individual or establishment that provides goods or services of any kind to the project for compensation or renumeration.

(Exhs. G-75, R-l.)

17. Handbook 4381.5, REV-l (June 1986) states as follows:

> An individual or company that provides management services to the project and whose relationship with the project owner is such that the selection process and management fee will not be determined through arms-length negotiation.
>
> (1) An identity-of-interest relationship is considered to exist when the owner entity or a general partner of the owner entity or any officer or director of the owner entity

or any person who directly controls 10 percent of more of the voting rights or owns 10 percent or more of the owner entity is also an owner, general partner, officer or director of the management company or sub-contractor or a person who directly or indirectly controls 10 percent or more of the management company's or subcontractor's voting rights or owns 10 percent or more of the management company or subcontractor.

(2) As used in Subparagraph (1):

a. The term "person" includes any individual, partnership, corporation, or other business entity. Any ownership, control or interest held or possessed by a person's spouse, parent, child, grandchild, brother or sister is attributed to that person.

b. The term "subcontractor" means any individual or company that contracts with the management agent to provide management services to the project.

(Exh. G-74.)

Discussion

Because Respondent was an employee with management and supervisory responsibilities of a corporation which entered into a management agreement with HUD, Respondent was a participant and a principal as defined by 24 C.F.R. § 24.105(m) and (p), and subject to debarment by HUD.

Under applicable HUD regulations, at 24 C.F.R. § 24.305, a debarment may be imposed for:

> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:
> (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
> (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
> (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.
>
> * * *
>
> (d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person;
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> * * *
>
> (f) In addition to the causes set forth above, HUD may debar a person from participating in any programs or activities of the Department for material violation of

> a statutory or regulatory provision or program requirement applicable to a public agreement or transaction including applications for grants, financial assistance, insurance or guarantees, or to the performance of requirements under a grant, assistance award or conditional or final commitment to insure or guarantee.

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for suspension and debarment exists. 24 C.F.R. § 24.313(b)(3), (4); James J. Burnett, HUDBCA No. 80-501-D42, 82-1 BCA 15,716. Existence of a cause for debarment does not automatically require imposition of a debarment. In gauging whether to debar 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. §§ 24.115(d), 24.314(a), and 24.320(a). Respondent bears the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.313(b) (4).

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," as used in the context of suspension and debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. 48 Comp. Gen. 769 (1969). The test for whether a debarment 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). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

The Government contends in its amended complaint that Respondent breached his duty, under the relevant management agreements, as follows: (1) by failing to purchase paint supplies at the lowest possible cost; (2) by failing to report to HUD the existence of an identity of interest relationship with Washington Street TCMC, Inc., and with the Phoenix Company; and (3) by purchasing goods on behalf of Eastfield while holding an identity of interest in Washington Street TCMC, Inc., and the Phoenix Company, at prices in excess of those that could be obtained by making arm's-length purchases on the open market. (Govt. Amended Complaint, at 24-39) Such omissions, violations, and misconduct by Respondent, argues the Government, constitute evidence of a serious lack of responsibility.

In reply, Respondent submits that, as operations manager of Eastfield, Respondent did not have the level of influence, control, or authority over Eastfield which would cause the regulations and provisions of the management agreements, which the Government contends were violated, to be applicable to Respondent. Respondent also argues that, even if Eastfield had an identity of interest relationship with Washington Street, TCMC, Inc. or the Phoenix Company, it was not his responsibility, as operations manager of Eastfield, to make that disclosure to HUD. Respondent further asserts that, to the extent Eastfield was not complying with the relevant provisions of the

management agreements and HUD regulations, Respondent took timely corrective actions to remedy such non-compliance and that this mitigating circumstance should be given substantial probative weight by the Board. Finally, Respondent claims that the Government has failed to carry its burden of proof that Respondent is not presently responsible.

Duty to Purchase Paint Supplies at Lowest Possible Cost

When Respondent became employed by Eastfield Management in March of 1992, the allegedly improper paint procurement process involving Phoenix was indisputably already in place. Once Respondent took over the responsibilities of paint procurement, he implemented internal procedures to increase accountability and to control expenditures regarding purchase orders for paint supplies. When Respondent became aware that Phoenix was marking up the price of Glidden paint purchased by Eastfield by thirty percent, and that Glidden could provide Eastfield with paint at the same price that Glidden charged Phoenix, Respondent began phasing out paint purchases and discontinued the improper practice of ordering paint through Phoenix.

When Respondent assumed responsibility for paint purchases, approximately seven to nine months after commencing his employment with Eastfield, Respondent seems to have acted, in the absence of evidence to the contrary, in a prudent manner by curtailing an improper practice already in place. By the end of 1992, Respondent had completely eliminated the practice of ordering paint through Phoenix, thus eliminating the 30 percent mark-up on paint purchases which the Phoenix company charged Eastfield. Terry Gilbert, and not Respondent, was in charge of paint procurement when the bulk of the alleged improper paint purchasing occurred. Respondent's brother had a duty under HUD regulations and the management agreements to purchase paint supplies at the lowest possible cost, and appears to have been, along with Eastfield's owner, the culpable party with respect to the commencement and continuation of these costly paint purchases, and not Respondent. The record is silent as to whether Eastfield or any of its employees received any benefit from the unusual mark-up of the paint re-sold by Phoenix to Eastfield. In any event, I find that there is insufficient evidence in the record of this proceeding to show that Respondent breached his duty to purchase paint supplies at the lowest possible cost as the Government alleges or that Respondent abetted or perpetuated the paint purchasing scheme involving Phoenix.

Identity of Interest Disclosure Obligations

Eastfield Management, Inc. was the management agent for HUD insured and/or HUD assisted multi-family housing projects. As a management agent, Eastfield was required to execute management agreements, or management certificates, which set out the terms and limitations of Eastfield's stewardship of these properties. These management agreements are required by HUD as a measure to protect the public interest. The owner of the management agent is the one responsible for executing the management certifications. The relevant portions of the management agreements state:

> The Project Owner and the Management Agent agree that all goods and services purchased from individuals

> or companies having an identity-of-interest with the Agent, Project Owner or the Management Agent shall be purchased at costs not in excess of those that would be incurred in making arms-length purchases on the open market.

(Govt. Exh. G-4.; see also Govt. Exhs. G-5 through G-24).

In this case, the relevant management agreements were not signed by Respondent; rather, they were signed by the owner of Eastfield, Warren Gilbert, Jr., Respondent's father. Respondent was never an owner, director, or officer of Eastfield, and he never had check-writing or final decision-making authority. Respondent was employed by Eastfield as the operations manager, and apparently lacked authority which various HUD personnel, and even Goldich, believed that he had in this position. The Government has failed to show that Respondent was obligated to make the disclosures which the Government claims were required by Eastfield. The fact that Respondent had no equity interest in Eastfield which may have required Respondent to make the requisite disclosures to HUD is fatal to the Government's case. The evidence is also conclusive that Respondent had no equity interest in Washington Street, TCMC while employed at Eastfield. In any event, the requirement that Eastfield disclose companies with which an identity of interest relationship existed was the obligation of the owner, Respondent's father, and any other owner, director, or officer of Eastfield, not that of Respondent. Respondent is, therefore, not subject to those specific HUD regulations which obligate a management agent to disclose identity of interest companies. Even if Respondent were subject to Eastfield's disclosure requirements for identity of interest entities, the Government has failed to show that Respondent had an ownership interest in a company doing business with Eastfield during Respondent's employment with Eastfield.

The Government bases a part of its case upon regulations which set forth a cause for debarment if certain proscribed actions by a principal are "willful." (Govt. Amended Complaint, at 40; 24 C.F.R. § 24.305(b)(1),(3)). However, the evidence in the record of this proceeding fails to persuade me that the violation of these pertinent regulations, if any, was, in fact, willful, or that a violation of the pertinent regulations occurred with an intent to violate them. In the absence of evidence that Respondent's conduct constituted cause for debarment under 24 C.F.R. § 24.305(b) (1) and (3), I cannot find that a debarment under these regulations is warranted.

I do, however, find troubling Respondent's admission that, during his employment at Eastfield, and especially while employed as Eastfield's operations manager, he was not aware of the relevant HUD regulations or the Management Agent Certificate guidelines relating to the management of HUD-assisted property. Respondent's testimony clearly reflected no awareness of his obligation, as an individual with a significant degree of authority in a company engaged in the management of HUD-assisted or HUD-insured properties, to familiarize himself with those HUD rules, regulations, handbooks, and management contracts which govern his conduct as a participant in a specific Federal program. Such ignorance by participants in the programs of this Department could well place at serious risk the integrity and financial solvency of the Federal programs designed to help those in need of housing assistance.

Certainly, should Respondent become a participant in a HUD program in a similar capacity at some future date, it is hoped that Respondent's ignorance of, and inattention to, applicable HUD rules, regulations, and contract provisions which delineate his obligations in programs utilizing Federal funds, will no longer exist. However, under the circumstances of this case, even if Respondent knew of the relevant regulations and guidelines, the Government has failed to show, by a preponderance of the evidence, the improper conduct by Respondent as alleged in the Government's amended complaint, any action of Respondent which would constitute grounds for debarment as alleged in the Government's amended complaint, or that Respondent is not a responsible person with whom HUD should conduct its business. 24 C.F.R. § 26.24(a).

Conclusion

For the reasons set forth above, I find that the Government has failed to prove that Respondent violated pertinent HUD rules and regulations or his duties under the terms of the management agreement between the management agent and HUD. I further find that the Government has failed to prove that the Respondent is not presently responsible. Consequently, it is my determination that a debarment is not warranted under the circumstances of this case.

_____
David T. Anderson
Administrative Judge

Date: May 7, 1997