In the Matter of:

ELAINE DUNN,	:	HUDBCA No. 97-C-116-D11
	:	Docket No. 97-7054-DB(LDP)
GEORGE DUNN,	:	HUDBCA No. 97-C-117-D12
and	:	Docket No. 97-7055-DB(LDP)
WILLIAM FRENCH,	:	HUDBCA No. 97-C-118-D13
		Docket No. 97-7056-DB(LDP)

Respondents

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FINDINGS OF FACT AND RECOMMENDED DECISION
by Administrative Judge Jean S. Cooper
December 5, 1997

Statement of Jurisdiction

This Board received and docketed the requests of Elaine Dunn (Respondent) George Dunn (Dunn), and William French (French) for a hearing on a Limited Denial of Participation (LDP) imposed upon each of them by the Director of the Georgia State Office of the United States Department of Housing and Urban Development (HUD). The administrative judges of the HUD Board of Contract Appeals are authorized to serve as hearing officers and to issue findings of fact and a recommended decision for consideration by a HUD official who imposes an LDP. 24 C.F.R. §§ 24.105, 24.314(b) (2), and 24.713(b). The findings of fact and recommended decision set forth below are based on the administrative record in this case, including the contract Appeal File (AF), the written submissions of the parties to this proceeding, and the transcript and exhibits admitted at a hearing held in this matter on September 15-18, 1997, in Atlanta, Georgia. The proceedings ended as of November 5, 1997, with receipt of a complete copy of the Government's post-hearing brief.

Statement of the Case

On January 30, 1997, Charles E. Gardner (Gardner), Director of the Office of Housing of the Georgia State Office of HUD, imposed an LDP on Respondent. The notice of LDP states that Respondent is subject to an LDP as a participant, contractor, and principal, as defined at 24 C.F.R. § 24.105. The five reasons cited for the LDP were: 1) failure to fully perform REAM contract services by not performing all required inspection services; 2) submitting claims for payment to HUD for services not performed, such as inspection services; 3) submitting claims for payment to HUD for fees Respondent was not entitled to

receive, including claims for management fees before HUD received an initial closing package, for management fees after a property had closed, for preservation and protection inspections, for some lock charges, and for mileage fees for systems checks; 4) ordering structural inspection reports on almost all properties without obtaining prior HUD approval; and 5) hiring George Dunn, Respondent's husband, an identity of interest affiliate to perform many of the systems checks. Respondent was charged with overbilling HUD under the REAM contracts in excess of $90,000. At the hearing on Respondent's LDP, the Government withdrew two of the cited reasons for the LDP, the one concerning George Dunn and the one concerning mileage fees for systems checks.

The causes cited as the legal basis for imposition of the LDP on Respondent are irregularities in a participant's or contractor's past performance in a HUD program, 24 C.F.R. § 24.705(a) (2); failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations, 24 C.F.R. § 24.705(a)(4); falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD, 24 C.F.R. § 24.705(a)(7); and making or procuring to be made any false statement for the purpose of influencing in any way an action of the Department, 24 C.F.R. § 24.705 (a)(10).

The LDP was imposed for a period of twelve months, and it was effective throughout the jurisdiction of the Georgia State Office of Housing, which includes the entire state of Georgia. It also cited Dunn, Respondent's husband, and French, Respondent's son, as "known affiliates" subject to Respondent's LDP. The supporting documentation for imposition of the LDP was listed in the notice of LDP and in Attachment A to the notice.

On February 7, 1997, Gardner imposed an LDP on Dunn as an affiliate of Respondent and Elaine Dunn Realty (EDR). The notice of LDP states that Dunn is an affiliate of Respondent because he is her husband, and "by virtue of this marital relationship, Elaine Dunn controls or has the power to control you in your REAM related activities," citing the definition of "affiliate" at 24 C.F.R. §24.105. The LDP notice further states that Dunn participated in some of the activities for which Respondent was sanctioned with an LDP. The LDP was imposed for a period of twelve months, and it prohibits Dunn's participation in all HUD housing programs within the State of Georgia.

On February 7, 1997, Gardner also imposed an LDP on French as an affiliate of Respondent. The notice of LDP states that French is an affiliate of Respondent because he is her son, and "by virtue of this family relationship, Elaine Dunn controls or has the power to control you in your REAM related activities," citing the definition of "affiliate" at 24 C.F.R. §24.105. The LDP was imposed for a period of twelve months, and it prohibits French's participation in all HUD housing programs within the State of Georgia.

Respondent, Dunn and French were each notified of their

right to request a conference on the LDP, with William M. Miller designated as the presiding official at the conference, or to request a hearing before a hearing officer. Each requested a conference on the LDP, which was held for all three of them on March 12, 1997. On April 1, 1997, Miller issued a written decision based on the information provided at the conference. Miller found that the LDP imposed on Respondent was supported by adequate evidence, and he affirmed the LDP imposed on her. He also affirmed the LDPs imposed on French and Dunn as affiliates of Respondent, based on their familial relationships with Respondent.

By a single letter dated April 17, 1997, Respondent, Dunn and French requested a hearing on their LDPs before a hearing officer. Respondent, Dunn, French, and HUD agreed to waive the start of the hearing within 45 days, under 24 C.F.R. § 24.314(b)(2)(iii). It was further agreed that Respondent's LDP case, the contract appeal that EDR had filed after its REAM contracts were terminated for default, and the LDPs of Dunn and French would all be heard at a single hearing, but the contract appeal would be decided separately.

Findings of Fact

1) Respondent is the sole owner and operator of Elaine Dunn Realty (EDR), a real estate brokerage and property management business located in the State of Georgia. She is a licensed real estate broker in the State of Georgia, and she has an associate degree in accounting. (Transcript 658; Appeal File Tab 2.1.)

2) EDR was awarded two Real Estate Asset Management (REAM) contracts by the Georgia State Office of HUD in August, 1992, for Area 2 and Area 9 in the State of Georgia, with four additional option years after the base year of 1992-1993. The purpose of a REAM contract is to maintain HUD-owned properties so that they can be sold as soon as possible. The REAM contractor is the property manager with responsibility for the properties in the contract inventory from assignment to sale of the properties. The REAM contractor is the "eyes and ears" of HUD in the field. The schedule of work, description of contract services, and specifications were contained at Section C-4 of the contracts on a service matrix. Both contracts had the same service requirements. (AF Tabs 2.1, 2.27; Tr. 59-60.)

3) Both contracts provided at Section B, Part I, as amended by Amendment 2 to the Invitation for Bids (IFB), that EDR would be entitled to be paid 30% of the contract fee after HUD received and approved the initial inspection report, and the remaining 70% when the sale of the property closed. Section G-4 (a)(1) of the contract, - as amended by Amendment 2 to the IFB, provided that EDR should send to the contracting officer, not later than the tenth day of the month following the period covered by such statement, an invoice for the 30% management fee for those properties for which HUD received and approved the initial inspection report, and a 70% management fee for those properties which were closed during the period. (AF Tab 2.1.)

4) HUD continued to exercise the additional option years on both REAM contracts through 1995. HUD did not exercise the option year for 1996

because it was changing its method of procurement of REAM services throughout Georgia. By a series of amendments to both contracts, the performance period was extended on a month-to-month basis. The compensation schedule based on 30%/70% was replaced by monthly fees to be paid monthly. The monthly compensation schedule greatly increased the price of both contracts. The amendments changing the compensation schedule and fees stated that "all other terms and conditions remain unchanged." The last amendment to each of the REAM contracts signed by Respondent for EDR on October 21, 1996, and by the contracting officer on October 30, 1996, stated the completion date would be extended to December 31, 1996. (AF Tabs 2.19-2.25, 2.44-2.51, Tr. 75, 554.)

5) Government Technical Representatives (GTRs) were assigned to monitor EDR's REAM contract performance on a rotating basis. GTRs would do selective inspections of EDR's properties, inspect EDR's office operations once a year, including files maintained under the two contracts, and review and approve EDR invoices sent to HUD for payment. Between 1992 and 1995, various GTRs assigned to monitor EDR would make corrections, both large and small, on invoices prepared by EDR and certified by Respondent as accurate. Respondent never challenged or questioned any of the changes made to EDR invoices by the GTRs. In 1995, Carol Warren was the EDR employee who prepared the invoices for EDR, but when she left EDR in late 1995, Respondent assumed the duty of preparing EDR's invoices, as well as certifying to their accuracy. (AF Tab 4.27; Tr. 245, 296-297, 662-663.)

6) Respondent certified all invoices sent to HUD as being true and correct without verifying their accuracy. Respondent made no attempt to avoid making the same mistakes repeatedly on invoices, and took no action to assure the actual reliability or accuracy of EDR's invoices that were sent to HUD for approval for payment, despite the fact that she had an associate degree in accounting. Respondent relied upon what she viewed as a course of conduct by HUD GTRs to correct invoices, and Respondent considered the invoices prepared by EDR to be a "scratch" or draft invoice only, to be corrected and finalized by the GTR. Although Respondent generally attended training sessions for REAM contractors, at which REAM contractors were repeatedly reminded that they were responsible for the accuracy of invoices sent to HUD, Respondent did not accept the responsibility for the accuracy of EDRs invoices. (Tr. 685, 696-700; 750-755.)

7) Starting in 1996, the GTR assigned to EDR was Elmer Butler. Butler made no corrections on EDR's invoices, and apparently did little or nothing to check them for accuracy before approving them for payment. Respondent was annoyed that Butler was not correcting EDR's invoices, because to her that meant he was not doing his job. During the period when Butler was the GTR assigned to monitor EDR's performance on the REAM contracts, the compensation schedule for both contracts changed from the 30%/70% compensation schedule to the monthly schedule. EDR would be entitled to receive compensation for each month in which it performed contract services on a property until that property was sold, and the sale closed. EDR had to keep track of when a property closed so that it would know when to stop performing contract services on that property. Under the 30%/70% compensation schedule, EDR could invoice for 70% of its management fee as of closing, and its receipt of timely payment of this fee was dependent on EDR knowing when a property closed. When the contracts were amended in 1996 to provide for monthly

compensation, EDR still had a contract duty to know when a property sale closed, so that it no longer performed or invoiced for monthly contract services. (AF Tabs, 2.1, 2.27; Admission 37; Tr. 698.)

8) In early to mid October, 1996, Respondent called Lydia Faircioth, a GTR who had been assigned to monitor EDR at various times and who had become a personal friend of Respondent, to find out why EDR's invoice for September, 1996, had not yet been approved. Faircloth found the invoice on Butler's desk. In late October, Faircioth brought EDR's September invoice to Debbie Bonelli, a supervisory real estate owned (REO) specialist at HUD, to process it for payment. Bonelli was very familiar with EDR's property inventory, and she thought the list of properties receiving contract services on EDR's September invoice looked "weird" because too many properties were listed on it. Bonelli input the case numbers for the properties listed on EDR's September invoice into her computer to see if and when those properties had been sold. The computer program provided the date of sale closing for any property that had closed. Bonelli concluded from the information in the computer that EDR was invoicing HUD for contract services months after properties had been sold and closed. (Tr. 246-250, 613.)

9) Bonelli was very concerned with the pattern of overcharges that she saw on EDR's September invoice. She went to HUD's Contracting Division to report what she had found. Bonelli wanted advice as to the procedure to pursue on EDR's invoice. On November 4, 1996, EDR submitted its invoice for October services to HUD. Bonelli again analyzed the charges on EDR's invoice by using the computer data base, and found that the pattern of billing for services after properties had closed was repeated on the October invoice. Both invoices had been prepared and certified by Respondent. (Af Tab 1.1, Tr. 57, 60, 81-83.)

10. Based upon the information developed by Bonelli and further analyzed by Anita Wender, a HUD contract specialist, contracting officer Michael Swan issued a cure notice to EDR, dated November 6, 1996, for erroneously billing HUD on both REAM contracts. The cure notice states that EDR's invoice for October services overbilled HUD $6,094, its invoice dated October 30, 1996 for lock charges and systems check overbilled HUD "at least $1,902.03," and its invoice for September services overbilled HUD $6,094. No specific information as to the overbilling was given with the cure notice. All three invoices were returned to Respondent for correction and resubmission. The cure notice further stated that HUD was also investigating prior invoices submitted by EDR for January through August, 1996. The cure notice informed Respondent that the overbillings were false claims, and both contracts could be terminated for default. Respondent was given ten days to provide an acceptable explanation for what had occurred, and to provide a plan for preventing any further reoccurrence. (AF Tab 3.12; Tr. 535, 538.)

10) When Respondent received the cure notice, which was sent to her by FAX, she requested a meeting. Swan did not meet with her, but on November 8, 1996, Bonelli and Wender met with Respondent, who wanted to find out how to correct the invoices and "make things right." Respondent told Bonelli and Wender that EDR was not receiving notices of closings from closing attorneys, and she did not know when property sales closed. She also told them that HUD GTRs always corrected EDR's invoices in the past, and she could not understand why that had not been done with the invoices at

issue. Respondent also was not waiting to deliver initial inspection reports to HUD before billing for services on newly assigned properties and Bonelli and Wender characterized those charges as overbillings. Respondent was frightened by her meeting with Bonelli and Wender, and she did not correct or resubmit the invoices that were the subject of the cure notice. (Tr. 87, 90, 250-250, 675-678.)

11) By letter dated November 15, 1996, attorneys for EDR responded to the cure notice. They stated that EDR had not been sent any prior notification of problems with its billings, problem areas were not identified in the cure notice, HUD had always corrected EDR's invoices in the past, and EDR was not getting notices of closings. The November 15, 1996, response letter proposed no changes in the way that EDR would prepare invoices in the future to avoid the problems on the rejected invoices. (AF Tab 3.15.)

12) HUD staff investigated Respondent's statement that EDR was not receiving notices of closings, and thus did not know when to stop providing contract services for properties. Closing attorneys who represent HUD at the closing of the sale of HUD-owned properties are required by their contracts with HUD to provide the REAM contractor with notice of closing within 24 hours after closing. That notice can be given by FAX, telephone, or otherwise delivered in writing. The files for the HUD closing attorneys checked by HUD staff contained the required notices from the closing attorneys. There was no record of any complaints from EDR in 1996 that closing notices were not being sent to it. Also, some of the properties for which EDR billed HUD after closing had been sold by EDR, and it had direct knowledge of the closing dates for those properties. Based upon this investigation, Bonelli, Wender, and Swan all concluded that EDR was not experiencing a problem with closing notices that would excuse or mitigate Respondent's practice of invoicing HUD for contract services months after closing. (AF Tab 4.21; Tr. 39, 83-84, 102-103, 255, 539.)

13) The contracting officer also did not consider EDR's reliance on HUD GTRs to correct its invoices to be an excuse for submitting invoices replete with overbillings because the contractor is required to submit certified, accurate invoices on which HUD can rely. Swan did not consider either Respondent's oral presentation to Bonelli and Wender or the written response to the cure notice from EDR's attorneys to be acceptable. The problems described in the cure notice were not cured, EDR did not correct and resubmit the rejected invoices, and it failed to develop a plan to avoid future overbillings. Swan concluded that a termination for default of EDR's REAM contracts was the next step to be taken, under the circumstances. (Tr. 539-542.)

14) On November 25, 1996, EDR's two REAM contracts were terminated for default, effective immediately. That same day, Bonelli went to EDR's office to collect all of the contract files, so that the files on active property listings could be delivered to the temporary contractors who would be taking over EDR's duties. (AF Tab 1.1; Tr. 94-95, 255-256, 259.)

15) Bonelli had the temporary contractors make copies of everything in the active listing files so that she could analyze EDR's billings for January through October, 1996, by comparing them to the contents of EDR's files. Bonelli prepared a separate sheet for each- property for

which EDR had billed HUD for contract services, and then listed and analyzed the contents of EDR's file for each property. She also cross-referenced that information to the computerized data base for each property. Twelve files were missing altogether for properties that had been invoiced by EDR. (AF Tab 1.3; Tr. 256-261.)

16) Bonelli concluded from her comparison of EDR's invoices, its files, and the computer data base that EDR had billed HUD 86 times for monthly contracts services after properties had closed. Bonelli's data analysis is reliable and I find that EDR billed HUD 86 times for monthly contract services after sales of properties had closed, sometimes for many months after closing. She also concluded that EDR had billed HUD a monthly fee for contract services on 40 properties before an initial inspection report had been received by HUD for those properties, which she classified as an overbilling under the terms of the two contracts. (AF Tab 1.3; Tr. 262-263.)

17) Both contracts required that EDR inspect each property in its inventory every 15 days. They also required that the inspections be documented by inspection reports, and that the inspection reports be kept in the file for the properties inspected. Bonelli made a graph to notate if and when inspections had been performed on each property in the contract inventories. She looked for documentation of inspections by inspection reports, but found very few inspection reports in EDR's property files. Of those inspection reports in the files, some of them appear to be photocopies of the same report, with only the date changed, indicating that even those inspections may not have actually been performed, and were at least unreliable as to what was actually observed. Inspection report forms contained the purported signatures of Respondent or Dunn, but two subcontractors doing inspections for EDR were told by Dunn to sign either his or Respondent's name to all inspection reports, rather than their own names. Dunn made the assignments to subcontractors for inspections. Two of the subcontractors, Steven Cowart and Ray Smith, were inspecting their own work immediately after they completed it, but this fact was concealed from HUD by having the subcontractors sign either Respondent's or Dunn's name to the inspection sheets. Although both Cowart and Smith testified that they performed inspections for EDR every 15 days on properties assigned to them by Dunn, and that Respondent would not pay them for their services unless they prepared inspection reports, most of those inspection reports have not been produced in evidence and were missing from EDR's property files. Respondent also failed to present convincing testimony or documentation that all of the required inspections had been performed, as required by the two contracts, even if inspection reports were missing from EDR's files. (AF Tab 1.3, AF Tab 2.1 - Service Items 24 and 33; Tr. 156, 266-268, 284.)

18) Under the terms of both contracts as modified, EDR was to install a Kwikset Protecto lock at its own expense on each property that did not have one when assigned to EDR, but EDR would be compensated for its actual cost of subsequent lock installations at the same property. EDR was to report these subsequent lock installation needs as vandalism under Service Item 6 of the service matrix. If a lock change was needed after closing, EDR would be paid $50 for each such lock, without regard to EDR's actual cost for that work. (AF Tabs 2.1, 2.3.)

19) Bonelli was unable to find supporting documentation in EDR's property files for lock changes billed by EDR to HUD on its October 30, 1996, invoice. EDR billed all lock changes at $50 per lock replacement, and Bonelli assumed from that manner of invoicing that all of the lock changes for which EDR invoiced HUD were for post-closing lock changes because of the $50 charge. No subcontractor invoices for lock replacements were provided to HUD in support of the invoice for locks, and EDR's property files did not, in most cases, record the initial installation of a lock installed at no cost to HUD, which was a prerequisite to billing for subsequent lock replacements. Furthermore, the October 30, 1996, billing was for locks purportedly installed on some properties that had closed months before, and in one case the same lock installation was billed to HUD twice. Bonelli determined that these lock charges were not allowable under the contract because there was no justification in the files for allowance of those items for payment. Respondent testified that she "grouped" lock replacements for many months on the October 30, 1996, invoice, and she believed that EDR was entitled to be paid for all of them, even if the dates for actual installations, or the costs for the ones that were not installed after closing, were not presented at any time to HUD, or at the hearing. (AF Tab 1.3; Tr. 270-274, 276, 337.)

20) EDR has failed to document the installation date or costs for the lock replacements for which it billed HUD in its October 31, 1996, invoice. It has also failed to establish the allowability of those lock changes as being a second installation on the same property, or as a post-closing installation, as required by the contract.

21) On December 6, 1996, after EDR's REAM contracts had been terminated for default, EDR submitted an invoice to HUD for the contract for Area 2, in which it billed HUD for five systems checks on properties and for 15 rewinterizations. Five of the rewinterizations invoiced were on the same properties for which EDR performed systems checks. (AF Tab 4.23.)

22) Service Item 9 on the service matrix required EDR to winterize operating systems and equipment in accordance with Exhibit 4 of the contracts, "if conditions warrant, within 5 days of assignment or subsequently as warranted." Service Item 31 on the service matrix of the contract for Area 2 required EDR to have operating systems tested and to furnish a report of conditions with estimated repair costs within five days of a request by HUD. Exhibit 4 of both contracts, applicable to winterization services, required that EDR winterize each property in its inventory as of November 1 of each year, and each additional property assigned to it until the following February. Basic winterization was not a reimbursable contract expense. It was included in the management fee for each property. The contract for Area 9 allowed EDR to subcontract for systems checks and to invoice HUD for the cost of the checks. The contracting officer, Wender, Bonelli, and Norma Cannon, who was the Director of the Contracting Division, all maintain that rewinterization is part of a systems check if a property that is already winterized has to have a systems check, and is not to be separately compensated. (AF Tabs 2.1. 2.7, 3.5; Tr. 62, 178-180, 286-289, 619-621, 685-689, 785.)

23) Subcontractors who did systems checks for EDR only billed EDR a single fee, which included rewinterization. There is no evidence that EDR incurred additional expenses for rewinterizations done as part of systems checks. Lydia Faircloth had approved additional rewinterization

charges done as part of systems checks when she was the GTR assigned to EDR, and she did that based on guidance she sought from the Contracting Division, but she could not remember who had given her the advice that rewinterizations could be paid separately when done as part of a systems check. Respondent claimed that Cannon approved such a charge, but Cannon denied it. (Exhibit G-6; Tr. 433, 609, 615- 616, 625, 730.)

24) EDR performed structural inspections on certain properties without obtaining prior authorization from HUD for each inspection if termite reports on those properties indicated the immediate need for a structural inspection. The termite inspections had been required by HUD under Service Item 11 on the service matrix. Respondent testified that a GTR assigned to monitor EDR had directed EDR to order a structural inspection immediately if a termite report so indicated, without waiting for individual authorizations. EDR only obtained prior authorizations for three structural inspections out of 33 performed in 1996. Evidence of termite reports requiring structural inspections on these properties was not presented. (Tr. 283, 289-291, 689-690, 731.)

25) On EDR's "close out" invoice dated December 11, 1996, Respondent billed HUD for the "unpaid 70%" REAM fee on every property. Respondent admitted at the hearing that she made "a mistake" in billing for a 70% REAM fee because EDR had received far greater payment for contract services on the monthly billing schedule than it would have under the prior 30%/70% compensation schedule. (AF Tab 4.23; Tr. 727.)

26) Bonelli and Wender analyzed the contents of EDR's files for 1996 for evidence of notices of closings from closing attorneys, and also for other notices and communications to EDR that would indicate that a closing was scheduled. For most of the properties for which Respondent continued to invoice HUD for monthly services after closing, EDR's own files contained closing notices from closing attorneys or other indicia that a property was scheduled for closing within days, such as a termite inspection report or a notation that keys had been sent by EDR to the closing attorney to be given to the new owner at closing. Furthermore, for five properties that had closed and for which Respondent continued to invoice HUD after closing, EDR was the selling agent and received a commission when the sale closed. For all but two of the properties for which Respondent invoiced HUD for services after closing, there is no evidence that EDR performed any inspections after closing. (AF Tabs 1.3, 4.29; Tr. 102, 105-107, 112-120, 265, 283-285.)

27) Respondent did not look at the contents of each property file to prepare EDR's invoices to HUD. She did not look at inspection reports, communications from closing attorneys, notes about closing, invoices from subcontractors, or other documentation that would be necessary to prepare accurate invoices. She copied-the information from the immediately previous invoice, and she would only remove a property listing from the invoice if she saw a closing notice from a closing attorney. There were many closing notices in EDR's files that Respondent apparently did not notice, because she continued to list such properties on the invoices for months after EDR had received the closing notice. (Tr. 697-698, 704, 722-723, 734-735, 745-747.)

28) Dunn is a real estate sales agent at EDR. He receives compensation for the sale of properties, but not for other duties he performs. He is the husband of Respondent. Dunn is not an owner or officer of EDR. EDR

is run by Respondent, but Dunn is actively involved in making business decisions affecting EDR. (Tr. 658, 569-660, 663, 703, 736, 755, 760.)

29) Respondent relied upon Dunn to perform contract functions and to make decisions that were related to EDR's performance of the REAM contracts that EDR had with HUD. He was not paid a salary for his work on the REAM contracts. Respondent was the signatory to the REAM contracts, but she delegated most of the "field" functions of the contracts to Dunn. Dunn wrote the specifications for property repairs, gave work assignments to subcontractors, performed inspections, approved subcontractor invoices, and directed Respondent to pay invoices he had approved. Dunn did not report to Respondent on the contracts. He just "took care" of the parts of the contracts for which he assumed responsibility. Respondent did not direct or control Dunn, although she had a contractual duty to do so as the signatory to the contracts. (Tr. 745-746, 756, 760.)

30) Steven Cowart and Ray Smith performed property maintenance contract functions for EDR, and they also inspected their own work, as well as the work of others, when Dunn directed them to do so. Dunn not only instructed Cowart and Smith not to sign their own names to the inspection report forms, but Dunn also instructed Cowart and Smith to sign either Dunn's or Respondent's name to the HUD sign-in sheets at each property, rather, than their own names. Dunn's explanation to Cowart for this subterfuge was that HUD would not allow Cowart to do property maintenance and repair services and to also inspect work on those same properties. (Tr. 409-411, 422, 638-639, 702-703, 705.)

31) Dunn signed a statement prepared for the purpose of influencing HUD at the conference on the LDP that stated that Dunn had performed the biweekly inspections on all of the properties listed on the statement, when he knew that he did not perform inspections on all of the listed properties. Many of the listed properties had either not been inspected by him every 15 days or had been inspected by either Cowart or Smith. The list of properties on the statement was prepared by Respondent, and she knew or should have known that the information on it was not accurate. (AF Tab 3.24, page 17; Exhibits G6 and G17; Tr. 638-639, 741, 744.)

32) French is an associate real estate broker who sells properties through EDR. He is Respondent's adult son, but he is not an owner or officer of EDR. He very occasionally performed an inspection on a property covered by the HUD REAM contracts between EDR and HUD if he was showing a customer an out-of-the-way property that was required by contract to be inspected by EDR. French also hand-carried initial inspection reports from EDR to HUD that were related to the REAM contract. Respondent never consulted French on management decisions concerning the REAM contracts. (Tr. 658, 660, 737, 760; Exh. G-16.)

33) Yvonne Leander, Chief of the Real Estates Owned (REO) Branch of the HUD Georgia Office, knew French because he brought in initial inspection reports from EDR to the HUD office, and because he sold properties in which HUD had an interest. She also observed French on the premises of EDR, and noted that he was a more active participant in business decisions made at EDR than, the other real estate sales personnel. Leander recommended that HUD should impose an LDP on French as an affiliate of EDR and Respondent because, from her observation, EDR is a

family-run business being operated by Respondent, Dunn, and French. Leander believes that if HUD only sanctioned Respondent, French could continue to operate EDR because he had the knowledge and access to the EDR facilities to keep EDR in operation. Leander was also concerned that HUD would have to pay sales commissions on HUD properties sold by French if French were not treated as an affiliate of EDR. (Tr. 450, 471-473, 478, 481-482).

34) There is no evidence that Respondent controlled or had the power to control the actions of French, even if everything observed by Leander occurred as described. The only witness who testified on behalf of French at the LDP hearing was Respondent, but I credit her testimony as to the facts relating to French on which she provided testimony.

Recommended Decision

An LDP is a discretionary administrative sanction that is imposed in the best interest of the Government. 24 C.F.R. §24.700. Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. §24.155. The term "responsible" as used in the context of administrative sanctions such as LDPs, debarments and suspensions, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant. 48 Comp. Gen. 769 (1969). The test for whether a sanction is warranted is present responsibility, although lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980). The Government bears the evidentiary burden of demonstrating by adequate evidence that cause for Respondent's LDP exists and that Dunn and French are affiliates of Respondent. 24 C.F.R. § 24.705.

Respondent is a "participant," "principal," and "contractor," as defined at 24 C.F.R. § 105. Therefore, Respondent is subject to administrative sanction by HUD if cause exists for a sanction and it is in the best interest of the Government to sanction her. The evidentiary record supports findings of facts and conclusions of law that Respondent committed irregularities in her performance as a REAM contractor and also failed to honor contractual obligations and specifications, which is cause for an LDP pursuant to 24 C.F.R. §705(a) (2) and 24 C.F.R. S 27.705 (a)(4). Most significant, she falsely certified in connection with a HUD program, by signing EDR's invoices without in any way verifying their accuracy. This is cause for an LDP pursuant to 24 C.F.R. S 24.705(a) (7). Respondent knew or had reason to know from EDR's own files that the invoices were not accurate, and that they contained overbillings for contract services after closing that were not performed, and for which there was no right to compensation even if they were performed. This is the most serious cause cited as the legal basis for Respondent's LDP. Respondent's willful failure to check the records and documents maintained by EDR was the height of irresponsibility. Her failure to accept her contractual duty to prepare accurate invoices and to take her certification of accuracy seriously is appalling. While I cannot find from this record that Respondent knowingly made false statements on EDR's invoices for the purpose of influencing HUD, her utter refusal and failure to take her duty of accurate and honest billing seriously caused these false statements on which HUD relied, even if Respondent had deluded herself into believing that HUD would not rely on her invoices as anything more than a first draft or "scratch" copy to be corrected.

As a matter of contract interpretation, Respondent did not overbill HUD for "early" invoices after the two contracts had been changed to provide for monthly compensation, because the contract requirement that no invoice be sent to HUD until the initial inspection report had been received by HUD was intrinsic to the 30%/70% compensation schedule, and had no relevance to monthly compensation. If Respondent was still required to wait until the initial inspection report was received before invoicing, there would be months in which Respondent performed substantial contract services before the delivery of the initial inspection report for which Respondent would receive no compensation. The change to a monthly compensation schedule changed all of the contract provisions that were integrally related to the 30%/70% compensation schedule. The general disclaimer in the amendments that all other contract provisions remained unchanged did not retain contract requirements solely and uniquely related to the 30%/70% compensation schedule. Thus, Respondent did not overbill HUD with "early" billings in 1996.

Respondent ordered structural inspections on properties without first obtaining prior approval from HUD in each instance, as required by the contract, and failed to present evidence that this was done because of directives in termite reports that might excuse the failure to obtain prior approval in each instance. This would constitute a failure to proceed in accordance with contract specifications, a ground for the LDP pursuant to 24 C.F.R. S 24.705(a) (4), but it is in no way as serious as the false certifications and invoices replete with overbillings, because HUD obtained a benefit from the structural inspections, even if it did not pre-approve each one before it was done.

There is adequate evidence in the record that Respondent submitted claims for payment to HUD for inspections that were either not performed, or were performed inadequately, which is an irregularity in her past performance in a HUD program. This is cause for the LDP pursuant to 24 C.F.R. S 24.705(a) (2) as well as a contractual violation pursuant to 24 C.F.R. S 24.705(a)(4). No evidence was presented on the charge concerning preservation inspections, and no findings can be made on that charge to support the LDP.

The record in this case fully supports the need for the imposition of the LDP on Respondent. Her conduct as a contractor was so thoroughly lacking in responsibility for those duties she personally performed that it is in the best interest of HUD to not have to do business with her in housing programs in the State of Georgia. Her derelictions of duty were egregious, and even if she lacked the specific intent to defraud HUD, her invoices and certifications did precisely that. It is in the public interest, as well as HUD's interest, that Respondent not be in a position of responsibility for accurate records and billings in a Government program.

An affiliate of a contractor, principal or participant subjected to an LDP may be included in that LDP ". . .solely on the basis of its affiliation, and regardless of its knowledge of or participation in the acts providing cause for the sanctions. The burden of proving that a particular affiliate or organizational element is currently responsible and not controlled by the primary sanctioned party (or by an entity that itself is controlled by the primary sanction party) is on the affiliate or organizational element." 24 C.F.R. § 24.710(c). The issue of whether Dunn and French are Respondent's affiliates presents somewhat different factual findings for the two of them, but ultimately turns on the definition of affiliate at 24 C.F.R. § 24.105, and the reason why an affiliate should be sanctioned when no bad acts are attributable to that person as cause for the sanction.

"Affiliate" is defined at 24 C.F.R. § 24.105 as follows:

> Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interest among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Control and power to control are the only factual and legal bases for treating persons as affiliates. Whether Dunn and Respondent are affiliates of each other at this time depends on a totality of facts that would establish that Respondent either controls or has the power to presently control Dunn because of their marital relationship and because Dunn worked on the REAM contract, through which she had the power to control him in the past. Likewise, French is an affiliate of Respondent at this time only if Respondent actually controls French or has the power to control him because he is her son. Indicia of control are subjective facts that may or may not prove actual control or power to control. Some of the indicia of control in the definition of "affiliate" are clearly based on legal relationships, such as interlocking management or ownership. In this case, HUD has focused on a presumed identity of interests among family members as the sole indicia of control between them. In a small family business which lacks a hierarchy of officers and employees, identity of interests among family members becomes an important consideration in looking at control and the power to control among those family members. However, familial relationship, per se, is not sufficient to establish that persons are affiliates of each other.

"Identity of interests among family members" is not defined in 24 C.F.R. § 24.105. However, it connotes more than a mere marital or familial relationship even if the marital partners or relatives ultimately share their incomes. The "identity of interests" in the regulation concerning a business interest that would be unique to a family member might include sharing the profits of the family business, serving as an officer in the business, or playing a significant role in making decisions affecting the family business, but even those indicia do not imply control between family members. The definition of affiliate addresses most clearly a group of family businesses, operating on the same premises, with essentially the same personnel. If one of those family businesses may no longer participate in Government programs, the other family businesses could take over those functions with few changes in personnel or facilities. In this case, there is only one business, EDR. It is not clear why HUD has not named EDR as a affiliate of Respondent, because the business is clearly under her legal control and it meets the definition of an affiliate. If an LDP has been imposed on EDR, it could not participate in HUD housing

programs under the direction of Respondent, Dunn, French, or anyone else.

The public purpose that underlies the sanctioning of affiliates is protection of the Government. 24 C.F.R. § 24.700. Affiliates are subject to sanction because of their status only, not because they have committed any wrongful acts. The protection of the Government's interest are only needed when there is a well-founded basis to conclude that a doer of wrongful acts could continue to negatively impact the Government and the public through the otherwise innocent affiliate by controlling or having the power to control it. In the instant case, Respondent committed wrongful acts and her LDP has been sustained. Her alleged power to control Dunn and to cause him to commit wrongful acts at her direction in the future is extrapolated from the fact that she is married to him, and that he worked on the REAM contract. Her alleged power to control French and to cause him to threaten the interests of HUD is inferred by HUD solely from the facts that he is her son and works at EDR.

Dunn functioned as a key EDR employee and not as a real estate agent in his work on the REAM contract. Under Georgia law, there is a rebuttable presumption that a licensed real estate agent is an independent contractor, rather than an employee of the real estate brokerage. Mark Six Realty, Associates. Inc. v. Drake Northside Realty. Inc. v. Drake, 219 Ga. App. 57, 463 S.E. 2d 917 (Ga. App. 1995). By virtue of the REAM contracts, Respondent not only had the contractual power but the duty to direct and control Dunn's work on the contract. Whether she actually directed him in his work on the contracts or not, she had the power and the obligation to do so at all times during the life of the contract. During performance of the REAM contract, Dunn was the employee of Respondent and EDR. Once the REAM contracts were terminated for default, the employer-employee relationship between Dunn and Respondent ceased, and Dunn returned to his legal status as an independent contractor sales agent. There is no evidence that Respondent had any further power to direct or control Dunn's work once the contract ended.

Although Dunn is in no way "presently responsible," in that. he encouraged and directed the making of false statements to HUD by having subcontractors sign his name to inspection forms and sign-in sheets, there is no evidence that Respondent actually exercised any control over him during performance of the REAM contract, or since the contract was terminated. Thus, the critical element of actual control by Respondent of Dunn is missing from this evidentiary record.

The LDP of Dunn as an affiliate of Respondent cannot be sustained as a matter of law. Although there is adequate evidence in the record to impose an LDP on Dunn for irregularities that he committed as a participant and principal, there is not adequate evidence to sustain the LDP of Dunn as an affiliate of Respondent, as defined at 24 C.F.R. § 24.105.

As a real estate broker, French is deemed, as a matter of Georgia law, to be an independent contractor, not an employee of

either EDR or Elaine Dunn, absent unusual elements of control more typical of an employment relationship. Mark Six Realty Associates. Inc. v. Drake Northside Realty Inc. v. Drake, 219 GA. App. 57, 463 S.E. 2d 917 (Ga. App. 1995). Such unusual elements of control are not shown in the evidence in this case. French is also not an owner or officer of EDR. French's livelihood comes from sales commissions for selling real estate, but there is no evidence that he has any identity of interest with EDR beyond that, and every broker affiliated with EDR could claim the same interest. He is licensed as a broker, and can sell real estate on behalf of any real estate brokerage. His employment as a broker is not dependent on his relationship with EDR, or with his mother.

HUD's notice of LDP to French makes reference to his "REAM related activities." French was not actively involved in the performance of the REAM contracts. His only recurrent REAM-related activity was to deliver initial inspection reports from EDR to HUD. There is no evidence that he prepared any of the initial inspection reports. French was acting as a courier, and nothing more, in the delivery of these reports. There was only one sign-in form produced at the hearing to indicate that French actually performed any inspections in furtherance of the REAM contract, but Respondent testified that French would very occasionally perform an inspection and an out-of-the-way property if he was going to beat the property to show it to a prospective buyer. These activities are the sum total of identifiable "REAM-related activities" directly performed by French, and they are de minimis.

Respondent had no inherent power as the owner of EDR to control French because he was not her employee. Most important, there is no evidence that Respondent ever directed him to do anything, or controlled his actions as a broker at EDR. There is also no evidence of any financial leverage that Respondent had over French that would indicate either actual control or the power to control him. The problematic invoices that are at the heart of HUD'S sanctions in this case were prepared by Respondent. French had no connection at all with the preparation of those invoices.

As a matter of fact and law, French is not an affiliate of Respondent, as defined at 24 C.F.R. § 24.105. Based upon the evidence in this case, there is no actual control or power to control between Respondent and French, despite their familial relationship. Furthermore, there is no identity of interests between them that would necessitate the sanctioning of French to protect HUD from him as one who would be directed and controlled by Respondent if he were not sanctioned as her affiliate. There is simply no discernable need for HUD or the public to be protected from French.

Conclusion

For the foregoing reasons, it is recommended that the Limited Denial of Participation imposed on Elaine Dunn be

sustained as supported by adequate evidence of causes for imposition of the sanction, and because it is in the best interest of HUD. It is recommended that the Limited Denials of Participation imposed on George Dunn and William French solely as affiliates of Elaine Dunn be terminated immediately because, as a matter of fact and law, neither is her affiliate.

Jean S. Cooper
Administrative Judge