

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

In the Matter of:

COUNTY OF NASSAU, N.Y.

Respondent

HUDALJ B-92-UC-36-0101

Decided: August 9, 1994

Brian E. Elliff, Esq.
For the Government

Harrison J. Edwards, Esq.
For the Respondent

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a proposal by the Department of Housing and Urban Development ("HUD," "the Department," or "the Government") to reduce the 1992 Community Development Block Grant ("CDBG") for the County of Nassau, New York, based on HUD's conclusion that the County had failed to comply with CDBG requirements in previous years. The proposed reduction was attributed to construction costs in the amount of \$320,819 disallowed under Audit Report No. 88-NY-241-1006, issued by the Department on December 18, 1987. Extended negotiations between HUD and the County reduced the amount in controversy to \$201,827, the amount sought by the Department from the County in this proceeding. More specifically, HUD alleges that the Town of Hempstead, a subrecipient of CDBG funds received by Nassau County, incurred "excess" costs of \$201,827 in connection with the Town's commercial building facade improvement program during the years 1983 through 1987.¹

Section III of the Housing and Community Development Act of 1974, as amended (42 U.S.C. § 5301 *et seq.*), and 24 C.F.R. § 570.913 authorize the Department to review

¹The County does not quarrel with HUD's contention that the County is responsible for the Town's use of CDBG funds. The Town of Hempstead lies within Nassau County.

the use of CDBG funds and, after notice and opportunity for hearing, reduce future CDBG grants upon a determination that a recipient of grant funds has spent CDBG money unreasonably and unnecessarily. (See Office of Management and Budget ("OMB") Circular A-87 made applicable to this proceeding by 24 C.F.R. § 570.610.) The Respondent County requested a hearing before an Administrative Law Judge after refusing to accede to HUD's proposed \$201,827 reduction of future CDBG grants to Respondent.

Discussion

This proceeding is governed by the Administrative Procedure Act ("APA"; 5 U.S.C. Sec. 500 *et seq.*). Section 554(b)(3) of the APA requires that: "Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." The Government was ordered to file a Complaint in this proceeding in order to satisfy the notice requirements of the APA and to identify the issues to be litigated. The gravamen of that Complaint is set out in four paragraphs that read as follows:

20. Between 1983 and 1987, the Town of Hempstead, N.Y. ("Town"), as a governmental subrecipient operating under a Cooperation Agreement and Subrecipient Agreement with the County, undertook a commercial facade improvement program ("facade program") using CDBG funds.

21. Under the facade program, scored stucco was added to eleven storefronts to improve the appearance. Scored stucco is created by laying three coats of stucco and coloring and scoring the final coat to look like brick.

22. The prices paid by the Town for scored stucco in the facade improvement program ranged from \$8.85 to \$18.00 per square foot.

* * *

29. As a result of negotiations with Nassau County and a 1989 on-site evaluation by Frank Taylor, HUD Rehabilitation Specialist, NYRO [HUD's New York Regional Office] allowed an additional \$118,992, leaving a remaining disallowance for excessive costs in six of eleven facades in the amount of \$201,827. Mr. Taylor's disallowance was based on a square foot cost for scored stucco of \$2.77 per square foot.

According to the Complaint, the facade improvement projects involved nothing other than scored stucco, an assertion underscored by HUD's motion requesting appointment of a settlement judge filed in this proceeding on April 9, 1993, several months before the Complaint was filed. Paragraph 7. of the motion reads as follows:

7. At issue in the case is whether the Town's expenditures for its facade improvement program were excessive in the amount of \$201,827. Specifically at issue is the reasonable cost of a

construction procedure which involved the application of stucco, coloring and scoring to building exteriors to create an appearance similar to brick. [footnote omitted]

Notwithstanding these clear expressions of the scope of the Government's claim, the Government proffered evidence at hearing to support a much wider claim covering all of the costs of the projects, not just the "excess" costs of scored stucco. That evidence showed that the projects involved not only scored stucco but also, among other things, windows, doors, roofs, signs, carpentry of various kinds, electrical work, interior finish work, paint, concrete, gutters, downspouts, demolition, and cartage. (GX. 3)² The Complaint does not even mention these other elements of the facade rehabilitation program, let alone allege that their costs were excessive. Because the Complaint is silent regarding every element of the facade rehabilitation projects except scored stucco, it cannot be construed to raise an issue concerning any other construction element of the facade rehabilitation program. The failure of the Complaint to address construction elements other than scored stucco is misleading.

The Complaint also misleads by attributing the entire amount of HUD's claim, \$201,827, to the "excess" costs of scored stucco. The evidence adduced at hearing shows that the \$201,827 figure was derived not by determining the actual costs of the scored stucco, but rather by comparing the actual *total* cost of each of six facade projects, including all constituent construction elements, with the total amount that each should have cost according to HUD's expert. (GX. 3) However, the Complaint did not notify Respondent to defend at hearing the cost of every element of six of eleven facade rehabilitation projects, and the record does not show that Respondent was otherwise timely informed before the hearing that HUD's claim was based on allegedly "excess" costs for six facade rehabilitation projects each considered in its entirety.³ Respondent therefore properly objected at hearing to the introduction of evidence regarding the cost of constructing anything other than scored stucco.

The Complaint is also inaccurate. Although it asserts that the Town spent \$201,827 too much for scored stucco on six different facades, the evidence shows (and the Government concedes on brief) that scored stucco was applied to five, not six, of the facades for which "excess" costs were alleged. (GX. 1, 3; Government's Brief, p. 26) The sixth project, designated as Elmont Facade #90, did not involve scored stucco at all,

²"GX." stands for "Government's Exhibit."

³Consistent with the allegations of the Complaint, Respondent's expert at hearing addressed only the cost of scored stucco in his testimony. He did not attempt to justify the cost of the other elements of the facade program, which together constituted from 86.1% to 94.9% of the total cost of the six facades at issue, depending on whether one accepts HUD's or Respondent's estimates for the cost of the scored stucco. (1,381 square yards of scored stucco times the per-square-yard cost--either \$29.73 or \$80.91--divided by \$803,617 (stipulated total cost to the Town for the six facade projects at issue) equals 13.9% or 5.1%, subtracted from 100% equals either 86.1% or 94.9%.)

yet

HUD demands that the Respondent County pay back \$81,055 in claimed "excess" costs for the Elmont Facade #90 project alone. (GX. 3)

The Complaint is incoherent as well. It alleges that scored stucco was applied to all eleven of the Town's rehabilitated facades, but HUD is apparently satisfied with the final cost of five of the eleven projects because the total cost of each of those five projects, including all constituent elements, was less than the Government's reasonable cost estimate for that project. The Government seeks to recover only for those six projects where the Town's final cost for the entire project exceeded the reasonable final cost as determined by the Government's expert. Yet, if \$2.77 per square foot is the maximum reasonable amount the Town should have spent for scored stucco, as alleged in the Complaint, and if the Town actually spent at least \$8.85 per square foot for scored stucco on every project, then the Government should be seeking to recover "excess" costs for every project that involved scored stucco, not just those projects where the final cost of the entire project exceeded HUD's estimate of the reasonable final cost. All expenditures of CDBG funds must be "necessary and reasonable." (OMB Circular A-87)

Finally, the Complaint is incomplete. It does not even identify which of the eleven projects are at issue.⁴ Therefore, HUD's larger claim for recovery of the "excess" costs of all the constituent elements of six out of eleven facade rehabilitation projects completed by the Town from 1983 through 1987 must fail. The Complaint, at best, states a claim for the recovery of the "excess" costs of scored stucco in six unidentified projects (reduced to five projects by the evidence).

Even when viewed only as a claim for the "excess" costs of scored stucco in five projects, the case still fails, because there is no evidence in the record to prove how much the Town actually paid for scored stucco. The Government's expert, Mr. Taylor, testified to the effect that the scored stucco should have cost no more than \$3.30 per square foot, and Respondent's expert, Mr. Levine, testified that it could have cost as much as \$8.99 per square foot, but no testimony or documents were offered to demonstrate the *actual* cost of the product to the Town. Both experts offered only estimates. (See Government's Brief, pp. 25-27.) As Respondent stated in paragraph 10 of its Answer:

⁴Exhibit E of the Complaint is a copy of Audit Report No. 88-NY-241-1006 issued by the Department on December 18, 1987. Finding 1B. of the Audit disallows \$263,943 of CDBG funds spent by the Town on six identified facades. Only three of the facade numbers in the Audit coincide with the facade numbers which are the subject of this proceeding, and in no case does the amount disallowed in the Audit coincide with the amount HUD seeks to recover in this proceeding. Exhibit E of the Complaint therefore cannot be construed to identify which of the eleven projects are at issue in this proceeding.

Respondent...admits that Respondent secured post audit architectural estimates of what the general costs of the scored stucco (brickface) treatment and comparable treatments were at the time the projects were carried out and that said estimates were in the range of \$8.85 to \$18.00 depending upon the nature of the treatment applied and on site conditions at the particular projects under review. The Respondent also notes that the Town did not make any specific payments for scored stucco in a particular project, nor were specific figures made available to the Town for each item of work to be performed when the original bids were submitted. Thus, it is inaccurate to state, as the Government has, that the Town paid a specific amount for brickface on each contract. The cost of the brickface on each contract was included in the gross amount of the contract.

In order to conclude that the Town incurred "excess" costs for scored stucco, the record must show how much the Town actually paid for it. Because the record fails to do so, I cannot conclude that those costs were excessive. Based on the record before me, it is possible only to speculate. The Town may indeed have paid as much as \$8.99 per square foot for the scored stucco, as suggested by Respondent.⁵ On the other hand, it is likewise possible that the Town's actual costs for scored stucco for all eleven facade rehabilitation projects were no more than \$3.30 per square foot, the reasonable cost estimate determined by HUD's expert. The record does not contain sufficient "reliable, probative, and substantial evidence" to support a reasonable conclusion one way or the other. (See 24 C.F.R. § 570.913(c)(7).)

In sum, the Complaint is misleading, incomplete, inaccurate, and incoherent. According to the record, HUD did not give Respondent notice of the true nature of the Government's claim before the hearing, and the evidence adduced at hearing does not prove the allegations of the Complaint, even when liberally construed. Accordingly, I cannot sustain HUD's proposal to reduce the amount of future CDBG grants to Respondent, and the Complaint must be dismissed. It is so **ORDERED**.

/s/

THOMAS C. HEINZ
Administrative Law Judge

⁵In that case, the most the Government could recover would be \$70,721, slightly less than a third of the amount HUD seeks to recover in this proceeding. (12,429 square feet of stucco in five projects x \$3.30 = \$41,016. 12,429 x \$8.99 = \$111,737 - \$41,016 = \$70,721.)

