

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

In The Matter of:

W. Stephen Bowen
Bowen Construction Company
Bowen Plumbing and Electric
Winston Bowen
Specialty Construction Company

Respondents.

HUDALJ 92-1781-DB(LDP)

Decided: December 28, 1992

W. Stephen Bowen, Jr., *pro se*

Mark A. Scott, Esquire
For the Government

Before: Paul G. Streb
Administrative Law Judge

INITIAL DETERMINATION

STATEMENT OF THE CASE

W. Stephen Bowen, Jr. ("Mr. Bowen") has appealed a Limited Denial of Participation ("LDP") issued on March 27, 1991, by the Regional Administrator, Region IV, U.S. Department of Housing and Urban Development ("the Government" or "HUD") pursuant to 24 C.F.R. Part 24, Subpart G. The LDP covers Mr. Bowen and his alleged affiliates, Bowen Construction Company, Bowen Plumbing and Electric, Winston Bowen, and Specialty Construction Company.

The LDP prohibits them from participating in any programs administered in Region IV by the Assistant Secretary for Housing for a period of one year beginning March 27, 1991. The sanction was based on Mr. Bowen's alleged violation of contractual provisions and HUD regulations, and other irregularities concerning his construction of a HUD-financed housing project.

Respondent requested reconsideration of the decision, and on October 22, 1991, the Regional Administrator affirmed his decision to impose the LDP. Following the filing of Mr. Bowen's appeal, the Government's Complaint, and Mr. Bowen's Answer, the Government was ordered to file an Amended Complaint setting forth the allegations with greater specificity. The Amended Complaint was filed on March 27, 1992.

A hearing was held in Atlanta, Georgia on May 11, 1992. At the parties' request, the date for filing post-hearing briefs was established as July 27, 1992, and the briefs were filed on that date.¹

ANALYSIS, FINDINGS AND CONCLUSIONS

Background

Mr. Bowen is the sole owner and proprietor of Bowen Construction Company ("Bowen Construction") and Bowen Commercial Construction Company ("Bowen Commercial"). Ex. G-2.² Elderwood, Inc. is an entity that was established to develop Elderwood Manor, a multi-family housing project for elderly and handicapped persons. Tr. 57-59. Elderwood, Inc. obtained a loan from HUD for the construction of Elderwood Manor. Tr. 58.

On November 28, 1988, Elderwood, Inc. entered into a "cost plus" contract with Mr. Bowen, doing business as Bowen Construction, for construction of Elderwood Manor. The contract provided that Elderwood, Inc. would pay Mr. Bowen the actual cost of construction plus \$61,639 and any applicable incentive payment for a total not to exceed \$803,809. The contract also provided that, upon completion of the project, Mr. Bowen would furnish a certificate of actual cost verified by a public accountant. Ex. G-1.

Upon completion of the project, Mr. Bowen submitted a certificate of actual cost to a certified public accounting (CPA) firm. Ex. G-2; Tr. 77. The certificate and the firm's report, which found some problems with Mr. Bowen's cost documentation, were submitted to HUD on October 9, 1990. Ex. G-2.

HUD identified additional problems with the certificate. Tr. 30-31. By letter of January 15, 1991, HUD instructed Mr. Bowen to provide certain information to document those costs. The letter advised him that the final determination concerning his cost certificate would be made on February 15, 1991. Ex. G-3.

¹The Government attached several documents to its brief. Because those documents were filed after the record was closed, Tr. 159, I have not considered them.

²The following abbreviations refer to the record in this case: "Tr." for "Hearing Transcript" and "Ex. G" for "Government's Exhibit."

As of March 27, 1991, Mr. Bowen had not replied to the letter. Consequently, HUD imposed the LDP on that date. The LDP notice advised Mr. Bowen that HUD had disallowed \$218,478 of the costs that he had certified. Ex. G-5.

Burden of Proof

An LDP will be sustained if the Respondent is covered by the applicable HUD regulations, if there is cause for an LDP, and if an LDP is necessary to protect the public interest and the federal government's interest in doing business with responsible persons. 24 C.F.R. §§ 24.110, .115, .700. The Government bears the burden to prove by "adequate evidence" that there is cause for the LDP. The Respondent has the burden to establish mitigating circumstances. *Id.* §§ 24.313(b)(3) and (4), .705(a).

"Adequate evidence" is defined as "[i]nformation sufficient to support the reasonable belief that a particular act or omission has occurred." *Id.* § 24.105(a). The "adequate evidence" standard is a minimal one; it is similar to the standard of probable cause for an arrest, search warrant, or preliminary hearing in criminal cases. *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972); *In re Emily Guillen and Emily Investments*, 1991 WL 45853, HUDBCA No. 91-7008-D99, slip op. at 11 (Final Determination, April 9, 1992) (citations omitted).

Jurisdiction

The regulations governing LDPs apply to all persons who have participated, are currently participating, or may reasonably be expected to participate in transactions under certain federal programs. 24 C.F.R. § 24.110(a). Mr. Bowen was the contractor for Elderwood Manor, a project financed with a HUD loan. Therefore, he participated in a covered transaction and he is covered by the regulations. See *id.* §§ 24.105 (m) and (p)(14), 24.110(a)(1)(i) and (ii)(C)(12).

LDP actions may include affiliates of a participant who are specifically named and given notice. *Id.* §§ 24.710(c), 24.711(a). Individuals or legal entities are affiliates of each other "if, directly or indirectly, either one controls or has the power to control the other Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, [or] common use of employees" *Id.* § 24.105(b).

The Government alleges that Bowen Construction, Bowen Plumbing and Electric, Winston Bowen, and Specialty Construction Company ("Specialty Construction") are affiliates of Mr. Bowen, and consequently, are also subject to the LDP. Because Mr. Bowen owns, and thus controls Bowen Construction, notice of the LDP to him constituted notice to Bowen Construction. Moreover, Mr. Bowen filed his appeal of the LDP on behalf of Bowen Construction. Therefore, that entity is covered by the regulations.

The Government concedes that it did not give notice of the LDP to the other alleged affiliates as required by 24 C.F.R. § 24.711(a). Therefore, I find that HUD improperly imposed the LDP on them.

Analysis Of The Allegations

Generally, the Government alleges in its Amended Complaint that Mr. Bowen failed to: (1) provide adequate documentation to support various costs that he had claimed in his certificate of actual cost, (2) comply with requirements concerning the employment of subcontractors with whom he had an identity of interest, and (3) provide documentation showing that he had complied with the requirements of the Davis-Bacon Act.

Documentation Of Actual Cost

The Government alleges that Mr. Bowen failed to provide adequate documentation to support 14 costs that he had claimed in his certificate of actual cost. Amended Complaint, par. 2(a)-(i), (k), (m), (n), (p), (r)(i)(1). In its January 15, 1991 letter to Mr. Bowen, HUD instructed him to submit copies of invoices, receipts, canceled checks, and other documentation establishing the validity of the costs in question. Ex. G-3.

The letter advised him that the final determination concerning his cost certification would be made on February 15, 1991. Ex. G-3. As of March 27, 1991, when the LDP was imposed, Mr. Bowen had not replied to the letter. Ex. G-5.

Article 10 of the contract required Mr. Bowen to certify his costs by furnishing a "'Contractor's Certificate of Actual Cost,' . . . supported by an independent public accountant's certificate as to actual cost." Moreover, this provision required him to maintain "accurate records of account of the . . . actual cost of construction, and . . . make such records and invoices, receipts, subcontracts and other information . . . available for inspection by ... HUD." Ex. G-1.

Thus, Mr. Bowen had a duty to document his costs and to comply with HUD's reasonable time limit for submitting that documentation for review. Mr. Bowen had ample time to correct the problems with his documentation. The CPA firm advised him on August 28, 1990, that some of the documentation was inadequate and provided him an opportunity to justify the questioned costs.³ Ex. G-2; Tr. 77. Prior to issuing the January 15 letter, HUD officials met with Mr. Bowen in an attempt to resolve all of the questioned costs. Tr. 30-31.

³Although Mr. Bowen asserted at the hearing that the CPA firm had a conflict of interest in this matter, he appears to have abandoned that argument because he did not mention it in his brief. In any event, the argument has no merit. Mr. Bowen selected the CPA firm, and he has not shown any error in the firm's findings concerning his cost certificate.

Mr. Bowen conceded that he had "poor documentation" for the job, and that he did not perform "as much documenting as [he] should [have]." Tr. 134, 138. Because Mr. Bowen did not comply with the contract's requirements in this regard, I find this allegation to be sustained.

Identity of Interest

The Amended Complaint contains three allegations concerning Mr. Bowen's employment of subcontractors with whom he had an identity of interest, i.e., a relationship which would give him control or influence over the price paid to them. The Government first alleges that he did not obtain HUD's prior written approval to employ two subcontractors with whom he had an identity of interest -- Specialty Construction and Bowen Commercial. Amended Complaint, par. 2(r)(i) and (ii).

HUD has specific rules governing allowable costs when there is an identity of interest. Tr. 148. Mr. Bowen concedes that he had an identity of interest with those subcontractors and that he did not seek prior approval to use them on the project. Tr. 146; Answer to Complaint. However, he contends that he did not have proper notice of the requirement to obtain prior approval and thus had no duty to comply with it. I agree.

HUD requires contractors to obtain prior approval to use subcontractors with whom they have an identity of interest. Tr. 75-76, 81; Ex. G-2. That requirement is contained in a HUD handbook. Tr. 75-76. However, there is no evidence that Mr. Bowen was provided a copy of the handbook prior to completion of construction, or that he was otherwise aware of the requirement. Tr. 143-47. On previous HUD construction projects, Mr. Bowen had employed subcontractors with whom he had an identity of interest without requesting prior approval, and he was not sanctioned by HUD for doing so. Tr. 131, 146-47.

Further, the requirement was not contained in the contract, which was a HUD standard-form contract. Ex. G-1. Nor was the handbook incorporated into the contract by reference. Article 10 D of the contract directed Mr. Bowen to require each subcontractor to certify its costs "in the event HUD determines there is an identity of interest between ... the Contractor ... and any such subcontractor" However, that provision did not require Mr. Bowen to obtain prior approval to use such subcontractors.

In addition to lacking actual knowledge of the requirement in question, Mr. Bowen did not have constructive knowledge of it. The Government has not identified any statute, regulation, or Federal Register notice containing that requirement. Although regulations are mandatory and have the force and effect of law, handbook requirements are not.

Federal agencies must publish in the Federal Register all "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552. "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.* § 552(a)(1).

Therefore, I find that HUD's allegation regarding Mr. Bowen's failure to obtain prior approval to employ Specialty Construction and Bowen Commercial is not sustained.

The Government next alleges that Mr. Bowen failed to comply with HUD's instructions to provide statements from two subcontractors -- Calvin Construction Company and Bowen Plumbing and Electric -- identifying the owners and confirming that they did not also work as employees of Mr. Bowen or the other subcontractors. Amended Complaint, par. 2(j) and (r)(i)(2). HUD instructed Mr. Bowen to provide that information in its January 15, 1991 letter to him. Ex. G-5.

Article 10(B) of the contract required Mr. Bowen to furnish information pertaining to the construction of the project to HUD upon request. Article 9(C) required him to disclose at HUD's request the names of persons with whom he had contracted. The information requested was relevant to HUD's determination pursuant to Article 10(D) of the contract, quoted above, as to whether there was an identity of interest between Mr. Bowen and his subcontractors.

Thus, Mr. Bowen had a duty to comply with HUD's reasonable time limit of February 15, 1991, to furnish the information, but he had failed to do so as of March 27, 1991, when the LDP was imposed. Mr. Bowen had ample opportunity to comply with HUD's simple instructions; he offered no reason why he could not have complied with them. Because Mr. Bowen did not comply with the contract's requirements in this regard, I find this allegation to be sustained.

The Government also alleges that Mr. Bowen failed to provide adequate documentation to support his claim for the cost of equipment used on the project by Bowen Commercial. Amended Complaint, par. 2(r)(ii)(1). Bowen Commercial rented equipment to Bowen Construction and charged a rental rate instead of actual cost as determined in accordance with HUD's rules governing identities of interest. Ex. G-2 at 2; Tr. 78-79, 149.

In order to decide the amount that would be allowed for the rental after identifying the identity of interest between Mr. Bowen and Bowen Commercial, HUD instructed him in its January 15, 1991 letter to provide information concerning the cost of the equipment. As discussed above, the contract required Mr. Bowen to keep accurate records of the actual cost of construction and provide them to HUD upon request. The contract also required him to insure that his subcontractors certified their costs in the event that HUD identified an identity of interest.

Thus, Mr. Bowen had a duty to comply with HUD's reasonable time limit of February 15, 1991, to furnish the information, but he had failed to do so as of March 27, 1991, when the LDP was imposed. Mr. Bowen had ample opportunity to comply with HUD's instructions. He conceded that he did not do an adequate job of documenting his costs. Because Mr. Bowen did not comply with the contract's requirements in this regard, I find this allegation to be sustained.

Davis-Bacon Act Compliance

The Government alleges that Mr. Bowen failed to provide documentation proving compliance with the requirements of the Davis-Bacon Act. Amended Complaint, par. 2(l), (o), (q), and (r)(i)(3). Pursuant to the Davis-Bacon Act, HUD regulations, and a supplement to the contract, Mr. Bowen was obligated to insure that he and his subcontractors paid prevailing local wages and submitted weekly payroll reports to HUD for verification purposes. 24 C.F.R. § 277.9(a); Tr. 114-15.

Mr. Bowen did not submit the payroll reports to HUD on a weekly basis. Tr. 120. HUD instructed Mr. Bowen in its January 15, 1991 letter to provide evidence of compliance with the Davis-Bacon Act for four subcontractors. However, he did not comply with HUD's reasonable time limit of February 15, 1991, for furnishing the evidence, and he did not submit it by March 27, 1991, when the LDP was imposed. Because Mr. Bowen did not comply with the requirements of the Davis-Bacon Act, HUD regulations, or the contract in this regard, I find this allegation to be sustained.

Cause For LDP

The regulations set forth various acts and omissions that constitute cause for an LDP. 24 C.F.R. § 24.705(a). The Regional Administrator determined that Mr. Bowen's actions constituted cause under section 24.705(a)(4), which provides that an LDP may be imposed for "[f]ailure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations." The Regional Administrator also invoked section 24.705(a)(2), which provides that an LDP may be based on "[i]rregularities in a participant's or contractor's past performance in a HUD program."⁴

⁴The Government asserts in its Complaint that cause for the LDP also exists under 24 C.F.R. § 24.705(a)(7) (false certification). In its brief, the Government asserts yet another cause for the LDP -- section 24.705(a)(9) (certain violations relating to financial assistance, insurance, or guarantees). Because cause for the LDP exists under other regulatory provisions, it is not necessary to decide whether cause exists under sections 24.705(a)(7) and (9).

However, it is noted that those causes were advanced by agency counsel, not by the official with authority to impose the LDP. The Regional Administrator did not rely on those sections when imposing the LDP. See 24 C.F.R. § 24.711(a)(3) (LDP notice shall state causes relied on); 24 C.F.R. § 26.10(b) (complaint may not contain allegations beyond scope of LDP notice); *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (in reviewing a determination that agency alone is authorized to make, court must judge propriety of action solely by grounds invoked by agency). Moreover, because section 24.705(a)(9) was first raised in the Government's brief, Mr. Bowen had no opportunity to object to its

I find that cause for an LDP exists under both of those provisions. As discussed above, Mr. Bowen failed to honor several of his contractual obligations in this matter, and he failed to comply with regulations implementing the Davis-Bacon Act.

use as a basis for the LDP. See *Transco Security v. Freeman*, 639 F.2d 318, 323 (6th Cir.), cert. denied, 454 U.S. 820 (1981); 24 C.F.R. § 24.310.

Public and Governmental Interest

HUD regulations state that an LDP "may be imposed for a period not to exceed 12 months" 24 C.F.R. § 24.711. However, I must determine whether a twelve-month LDP is necessary to protect the public interest and the federal government's interest in doing business with responsible persons. The LDP process is not punitive in nature. See 24 C.F.R. sec. 24.115(b). Rather, it protects public and governmental interests by precluding persons who are not "responsible" from conducting business with the federal government. See *id.* sec. 24.115(a) and (b); *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278, 280 (D. Colo. 1989).

"Responsibility" is a term of art which encompasses business integrity and honesty. See, e.g., *Delta Rocky Mountain Petroleum*, 726 F. Supp. at 280. Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a Respondent. See *Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. See, e.g., *Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983).

In view of the seriousness of Mr. Bowen's acts and omissions, a lengthy period of LDP is warranted. He did not comply with several contractual provisions and HUD regulations. He admitted that he "was not really paying attention to this accounting and documentation" Tr. 134.

Although Mr. Bowen eventually provided documents to support some of the disallowed costs, that did not occur until well after HUD had imposed the LDP. On June 7, 1991, Mr. Bowen submitted additional documentation to support the disallowed costs. On July 24, 1991, HUD advised him that it had accepted his documentation for \$89,284 of the originally disapproved \$218,478, but that it would continue to disallow \$129,194 of his claimed costs because of inadequate documentation. Ex. G-6. Mr. Bowen continued to submit documents to HUD in support of his claimed costs, but HUD did not find them to be persuasive. Ex. G-7-9.

On August 28, 1991, HUD advised Mr. Bowen that it would allow additional costs if, as required by the contract, he obtained an opinion from the CPA firm that they were valid. Ex. G-9; Tr. 52. Mr. Bowen did not obtain such an opinion. Although he attempted to engage another accountant to evaluate the documentation, Ex. G-10, there is no evidence that Mr. Bowen obtained an opinion from an accountant that there was valid documentation for the remaining \$129,194 of claimed costs. Tr. 45.

Although Mr. Bowen submitted the payroll reports to HUD in the summer of 1991 in an effort to show compliance with the Davis-Bacon Act, Tr. 95-96, 112-13, 124, 154, that submission was extremely untimely. Moreover, there is no evidence that those reports established that the employees in question were paid the proper wages.

Mr. Bowen should have known generally about documentation requirements because he had been involved in at least four other HUD construction projects. Tr. 84, 131. Also, because Mr. Bowen had encountered identity-of-interest problems on prior HUD projects, Tr. 131, he should have been aware that similar problems could develop if he did not determine the type of documentation that HUD would require on account of his use of a company he owned as a subcontractor.

Mr. Bowen's actions adversely affected the owner and the public interest because HUD's final determination on the cost certification was greatly delayed. A higher interest rate was in effect on HUD's loan to Elderwood, Inc. until that final determination. Thus, Elderwood, Inc. had to pay additional money to HUD. Tr. 54-55. Because the mission of Elderwood Inc. was to provide subsidized housing, that unnecessary drain on its resources had an adverse impact on the public interest.

However, there are some mitigating circumstances that militate against imposition of a one-year LDP, which is the maximum period permitted by the regulations. One of the allegations in the Amended Complaint was not sustained, and Mr. Bowen eventually provided documentation to support \$89,284 of the originally disapproved costs.

Also, Mr. Bowen was suffering financial problems caused by the collapse of the real estate market. Those problems resulted in many changes in personnel and a shortage of employees; he had no controller or bookkeeper when he began the project. Tr. 125-26, 133-34. Further, some documents were misplaced when Mr. Bowen relocated his office.

Despite his financial and other problems, Mr. Bowen timely completed the project in accordance with the drawings and specifications. Tr. 67-68. If Mr. Bowen had not bid on the project, it would not have been completed. Another contractor had begun the project but had to withdraw due to unforeseen subsoil problems; Mr. Bowen was the only contractor available to complete the project. Tr. 58, 64, 67-69. Mr. Bowen had previous HUD contracts, yet this was the first instance when HUD disallowed any costs. Tr. 132.

Further, Mr. Bowen did not deny his errors. In fact, he expressed his remorse at the hearing. Upon consideration of both the aggravating and mitigating factors, I find that a nine-month LDP is appropriate in this case to protect the public and governmental interest.

DETERMINATION AND ORDER

My determination in this matter is as follows:

(1) The one-year LDP of Mr. Bowen and Bowen Construction is REVERSED; it is ORDERED that that action be replaced by a nine-month LDP commencing March 27, 1991.

(2) The one-year LDP of Winston Bowen, Specialty Construction, and Bowen Plumbing and Electric is REVERSED.

FINALITY AND SECRETARIAL REVIEW

This Initial Determination shall be final unless the Secretary of HUD or the Secretary's designee, within 30 days of receipt of a request for review, decides as a matter of discretion to review the Determination. Any party may request such a review in writing within 15 days of receipt of the Determination. 24 C.F.R. § 24.314(c).

/s/

PAUL G. STREB
Administrative Law Judge