

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

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In the Matter of .
ROBERT THOMPSON, SR. . HUDALJ 87-1102-DB(TDP)
TOMROB, INC. .
Respondents .
.

David R. Harbarger, Esquire
For the Respondent

William Johncox, Esquire
For the Department

Before: ALAN W. HEIFETZ
Administrative Law Judge

INITIAL DETERMINATION
Statement of the Case

This is an appeal from a Temporary Denial of Participation ("TDP") imposed on Robert Thompson, Sr. and his affiliate Tomrob, Inc. ("Respondents") by the Cleveland office of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") pursuant to 24 C.F.R. § 24.18 (1987), and from a Suspension imposed on Respondents by Thomas T. Demery, Assistant Secretary of HUD, pursuant to 24 C.F.R. § 24.13 (1987). The TDP and Suspension were imposed upon Respondents as the result of an indictment returned against Respondents by a Federal Grand Jury convened for the U.S. District Court, Northern District of Ohio, Eastern Division, charging violations of 18 U.S.C. §§ 1001 and 1341 (1982).

On October 31, 1986, the acting manager of HUD's Cleveland office notified Respondents that the TDP was to take effect as of that date and would be in effect for a period not to exceed one year or pending resolution of the subject matter of the indictment or demonstration that it is in the best interest of the government to resume business with them. By letter dated March 19, 1987, the Assistant Secretary notified the Respondents that pending resolution of the indictment and debarment proceeding by the Department of Labor ("DOL") and HUD, they were suspended from further participation in HUD programs.

In response to a Motion to Consolidate filed by the Department on March 19, 1987, I consolidated the appeals of the TDP and the Suspension, limited by 24 C.F.R. §§ 24.5(c)(2) and 24.7 (1987) to the submission of documentary evidence and briefs. Upon consideration of the evidence presented and arguments made, I make the following findings and conclusions:

Findings of Fact

Respondent Robert Thompson, Sr. is President of Tomrob, Inc., which has offices in Cleveland, Ohio. (Exs. A, B).

On August 17, 1982, Respondents entered into a contract with HUD to perform construction on the Summit Gardens project, a multifamily housing development in Kent, Ohio. (Ex. 4). As part of this contract, Respondents agreed to pay their laborers the prevailing wage rates as established by the DOL under the Davis-Bacon and Related Acts ("DBRA"). (Ex. B).

By a letter dated September 30, 1983, a HUD Labor Standards Assistant, Patricia Hartwig, notified Respondents that a laborer, who performed work for the Respondents on the Summit Gardens project, had filed a complaint with HUD alleging that Respondents failed to pay him in accordance with the established DBRA wage rate. (Ex. B). On October 11, 1983, Ms. Hartwig informed Respondents that the Department had discovered a number of labor standards violations and that an escrow account would be established at final endorsement if the violations were not resolved. (Ex. B).

On January 9, 1984, after Respondents made payments to HUD to correct any improper wage payments which may have occurred, Respondents sent a letter addressed to Ms. Hartwig, in which they requested she enter into a Waiver of Lien on behalf of the Department. (Ex. C). This letter contained the following language:

[U]pon acceptance of these checks, the U.S. Department of Housing and Urban Development shall consider all funds owing and due paid in full and shall release TOMROB, INC., Summit Gardens (Project No. 042-35390-PM-L8), and Robert R. Thompson, personally, from all claims and damages whatsoever, now and in the future in regard to this contract. Thus, we are requiring that all parties sign the enclosed Waiver of Lien upon receipt of the checks. (Ex. C).

On or about October 31, 1986, a Grand Jury, convened for the United States District Court for the Northern District of

Ohio, Eastern Division, returned an indictment charging Respondents with 10 counts of mail fraud and making false statements in violation of 18 U.S.C. §§ 1001 and 1341 (1982). The indictment charged that Respondents knowingly and intentionally devised and intended to devise a scheme to defraud the Department, in connection with the Summit Gardens project and executed this scheme through the United States Postal Service, all of which violated 18 U.S.C. §§ 1001 and 1341 (1982). The alleged scheme involved wage payments other than the DBRA rate. The indictment also charged Respondents with violations of 18 U.S.C. § 1001, in connection with Veterans Administration and National Aeronautics and Space Administration construction projects. (Ex. 2).

Conclusions of Law

The Department argues that pursuant to 24 C.F.R. §§ 24.13 and 24.18, the indictment against Respondents is cause for the Suspension and TDP. (HUD Brief at 6-8). These regulations permit the Department to suspend a contractor or grantee based upon an outstanding indictment, 24 C.F.R. § 24.13(c) (1987), and temporarily deny a contractor or grantee from participation in HUD programs when "the contractor or grantee is suspected, upon adequate evidence of . . . [m]aking or procuring to be made any false statement for the purpose of influencing in any way the action of the Department." 24 C.F.R. § 24.13(a)(2)(ii) (1987).¹ It is undisputed that Respondents are "contractors or grantees" within the meaning of these regulations.

The indictment against Respondents for mail fraud and making false statements is cause for the Suspension and TDP in this case. HUD Suspension regulations permit a suspension based solely on an outstanding indictment. 24 C.F.R. § 24.13(c) (1987). Since the Department has shown that Respondents are the subject of an outstanding indictment, the imposition of the Suspension pending the indictment's resolution is proper. HUD regulations permit a TDP upon adequate evidence of a suspected false statement designed to influence the actions of HUD. 24 C.F.R. § 24.13(a)(2)(ii) (1987). The Department has shown that Respondents were indicted for making false statements to HUD as part of a scheme to defraud the Department. Because the indictment alleges that this scheme was designed to cause HUD to overpay Respondents, the imposition of the TDP was proper under 24 C.F.R. § 24.13(a)(2)(ii) (1987).

Respondents argue that these administrative sanctions may not be based solely on the indictment, because an indictment is merely a statement of charges. (Respondents' Brief at 3).

1. HUD's TDP regulation incorporates 24 C.F.R. § 24.13(a)(2). See C.F.R. § 24.18(a)(2)(iv) (1987).

HUD regulations require that a Suspension and TDP be based upon "adequate evidence." 24 C.F.R. § 24.13 (1987). The phrase "adequate evidence" is similar to the term "probable cause" as used in the criminal law vernacular. Horne Brothers, Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972). Since a federal grand jury determines "whether there is probable cause to believe a crime has been committed," United States v. Calandra, 414 U.S. 338, 343 (1974), and should not return an indictment when probable cause is lacking, Bache Halsey Stuart Shields Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1045 (D. Utah 1983), the evidence necessary for a grand jury to return an indictment is within the scope of "adequate evidence." Because Respondents have neither alleged nor shown that the federal grand jury had insufficient evidence to properly return the indictment upon which this action is based, the Suspension and TDP in this instance were based on adequate evidence. ²

Respondents contend that even if the Department establishes "adequate evidence" under the regulations, the Department is estopped from these administrative proceedings. (Respondents' Brief at 5). Estoppel attaches to the government's actions only when it acts in a proprietary capacity. Federal Deposit Insurance Corp. v. Harrison, 735 F.2d 408, 413 (11th Cir. 1984). Since Respondents have neither alleged nor shown that HUD is acting in a proprietary capacity in seeking these administrative sanctions, this proceeding is not barred by the doctrine of estoppel. Moreover, even if Respondents were able to overcome this threshold burden, they have failed to demonstrate that the traditional elements of estoppel are present in this case.


Respondents also contend that use of the evidence of the criminal proceeding against them is estopped by a waiver of lien signed by Ms. Hartwig, a HUD Labor Standards Assistant. (Respondents' Brief at 8). However, Respondents have neither demonstrated that a release from "all claims" in any way affects criminal liability or encompasses anything other than compensatory or equitable matters, nor shown that Ms. Hartwig is an authorized agent of the Department of Justice with the power to bar or limit federal criminal litigation. Accordingly, I conclude that the waiver of lien is of no consequence to this proceeding.

2. Respondents contend that public policy demands that these administrative sanctions not be based on indictments. (Respondents' Brief at 3-7). Because Respondents have neither cited authority which would have the affect of voiding HUD regulations permitting administrative sanctions based on indictments, see 24 C.F.R. §§ 24.4(h) and 24.13(c) (1987), nor demonstrated the propriety of attacking validly promulgated regulations in this non-rulemaking, administrative proceeding, I find their argument misplaced.

Suspension and TDP ³, the Suspension and TDP are sustained and shall continue in effect pending resolution of the indictment. ⁴

ORDER

For the foregoing reasons, the imposition of the Temporary Denial of Participation and of the Suspension are sustained and may continue pending resolution of the indictment.


Alan W. Heifetz
Chief Administrative Law Judge

Dated: August 12, 1987

3. Any arguments Respondents may have raised by letter dated November 26, 1986, but which were not addressed on brief are considered to have been waived. (Ex. E).

4. The Department imposed the Suspension pending resolution of DOL and HUD debarment proceedings against Respondents. HUD regulations do not state that a Suspension may be imposed due to pending administrative sanctions hearings but, rather, require that a suspension "not be based upon an unsupported accusation." 24 C.F.R. § 24.12 (1987). Since the Department has not established the cause for the DOL debarment action nor demonstrated that there is any debarment action pending at HUD, I conclude that the duration of the Suspension and TDP in this case cannot properly be affected by any other administrative hearing in which Respondents may be involved.