

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D. C.

In the Matter of:

ROBERT E. SCHMIDT, JR.,
Appellant
ROBERT L. SABOW,
Appellant
TREBOR DEVELOPMENT CORP.,
Appellant

80-697-DB
HUDBCA No. ~~80-494-D35~~
80-698-DB
HUDBCA No. ~~80-495-D36~~
80-699-DB
HUDBCA No. ~~80-496-D37~~

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For the Government

DETERMINATION

Statement of the Case

By letter dated August 23, 1979, Robert E. Schmidt, Jr. was notified that he, Robert L. Sabow, Hugh Malo, Trebor Contracting, Inc., and any firm in which Malo, Schmidt or Sabow were principals, were temporarily denied participation in Section 8 rental assistance and multifamily insurance programs for a period of one year. The action was based on the alleged failure of Trebor Contracting, Inc. to pay fringe benefits for a three-month period in accordance with the Davis-Bacon Act

until HUD withheld approval of a draw for payment and failure to pay fringe benefits for February, March, April and May, 1979 to workers employed by Trebor Contracting, Inc. on a HUD project known as Fernwood Court. Counsel for the affected parties requested an informal hearing on reconsideration of the temporary denial of participation (TDP) and such a conference was held on November 13, 1979. By letter dated January 16, 1980, the request to terminate the TDP was denied. On January 24, 1980, Robert E. Schmidt, Jr., Robert L. Sabow, and Trebor Development Corporation requested a hearing pursuant to 24 C.F.R. §24.7. Trebor Contracting, Inc. and Hugh Malo did not request hearings.

A hearing was held in Milwaukee, Wisconsin to determine the rights of the parties. This determination is based on the record of that hearing considered as a whole.

APPLICABLE REGULATIONS

The departmental regulation applicable to temporary denials of participation, 24 C.F.R., Part 24, provides in pertinent part as follows:

§24.4 Definitions.

(d) "Affiliates." Business concerns are affiliate of each other when either directly or indirectly one concern or individual formulates, directs, or controls the other concern; or has the power to formulate, direct, or control the other concern; or has the responsibility and authority either to prevent in the first instance, or promptly to correct, the offensive conduct of the other concern. Business concerns are also affiliates of each other when a third party is similarly situated with respect to both concerns.

* * *

(f) "Contractors or grantees." Individuals, ... and public or private organizations that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources including, but not limited to, ... builders, ... or those in a business relationship with such recipients ..., all participants, or contractors with participants, in programs where HUD is the guarantor or insurer...

(h) "Temporary denial of participation." Unless taken as a result of a pending investigation or an indictment which gives rise to suspension of the contractor or grantee, a temporary denial is an exclusion from HUD programs by an Area Office Director, Insuring Office Director or a Regional Administrator for a specified period not to

exceed twelve months. The denial is limited in effect to the jurisdiction of the office initiating the action and the specific program under which this action is taken.

* * *

§24.18 Temporary denial of participation; conditional denial

(a) Causes and conditions under which a temporary denial of participation may be invoked.

(2) Causes for denial of participation shall include:

* * *

(ii) Adequate evidence of irregularities in contractor's or grantee's past performance in a Department program; and

* * *

(iv) Causes under §24.13(a).

(3) Period and scope of temporary denial of participation.

* * *

(iii) Denial of participation to affiliates shall be in accordance with §24.14(b).

* * *

§24.13 Causes and conditions under which contractors or grantees may be suspended.

(a) The Assistant Secretaries may, in the interest of the Government, suspend a contractor or grantee:

* * *

(2) For other causes of such serious and compelling nature, affecting responsibility as may be determined in writing by the appropriate Assistant Secretary to warrant suspension. Among such causes are cases where the contractor or grantee is suspected, upon adequate evidence of--

(i) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance or guarantee or to the performance of obligations incurred pursuant to a grant of financial assistance or conditional or final commitment to insure or guarantee.

§24.14 Period and scope of suspension.

* * *

(b) Scope of suspension. (1) Suspension may include all known affiliates of a contractor or grantee.

(2) A decision to include known affiliates in a proposed suspension is an individual determination and, as such, must be made on a case-by-case basis. Among the factors to be considered in making this determination are:

(i) Likelihood of the affiliate's knowledge of or participation in the suspected improper conduct, and

(ii) The impact of its suspension on Department programs.

(3) The criminal, fraudulent, or other seriously improper conduct of an individual may be imputed to the organization with which he is connected when the impropriety involved was performed within the course of his official duty, or with knowledge or approval of the organization.

Findings of Fact

1. Trebor Contracting, Inc. ("TCI"), a Wisconsin Corporation, entered into a subcontract with Chudnow Construction Corporation on October 3, 1978 for excavation, grading, masonry and concrete work on Fernwood Court, FHA Project No. [REDACTED] (Stipulation of Parties, No. 2, Gov.'t Exhibit #1).

2. Incorporated into the subcontract between Chudnow and TCI were provisions of FHA Form No. 2554 ("Supplementary Conditions of Contract for Construction"). (Stipulation of Parties, No. 2).

3. FHA Form No. 2554 provides, in pertinent part, as follows:

A. (1) All mechanics and laborers employed in the construction of the project shall be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, except such payroll deductions as are permitted by Regulation of the Secretary of Labor For the purposes of this clause, contributions made or cost reasonably anticipated under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics.

* * *

(3) (a) A copy of all payrolls, including those of all subcontractors, shall be submitted weekly to the FHA by the prime contractor. The copy of each payroll shall be accompanied by a "Weekly Statement of Compliance" ... The statement shall be executed by the employer (owner, partner or corporate officer)

* * *

D. (1) The Contractor, his subcontractors and any lower tier subcontractors shall insert conditions A through E hereof in any subcontracts into which they may enter. The Contractor shall not thereby be relieved of responsibility for compliance with the aforesaid conditions.

* * *

E. (1) In the event of failure of the Contractor or any subcontractor to comply with the foregoing conditions, the owner may withhold from the contractor any payment or advances payable to the contractor until the Contractor establishes, to the satisfaction of the Federal Housing Commissioner, that the violations of the aforesaid conditions no longer exist.

4. Throughout the life of the contract between TCI and Chudnow Construction, Hugh Malo, Vice President of TCI, submitted payroll certificates stating that fringe benefits had been or would be paid to appropriate programs for the benefit of all TCI employees working on Fernwood Court (Stipulation of Parties, No. 5, Gov't. Ex. #2 (Payrolls)). The payroll certificates contained the warning that the willful falsification of any of the above statements may subject the contractor or subcontractor to civil or criminal prosecution (Gov't. Ex. #2).

5. During November and December, 1978 and January, 1979, TCI failed to make fringe benefit payments on behalf of its employees working on Fernwood Court (Appellant's Ex. #1). Tr. Vol. I, 21, 87, 120; Tr. Vol. II at 13, 33).

6. Alex Jordan, the union representative, contacted Michael Klion, HUD Labor Relations Officer, (Tr. Vol. I at 21) to notify him that a field audit showed that TCI was delinquent in paying fringe benefits. The delinquencies included both Fernwood Court and non-HUD projects (Tr. Vol. I at 22-25).

7. Klion held a meeting on March 5, 1979 that included Jordan, Malo, and Robert Sabow, Secretary-Treasurer of TCI, to discuss the fringe benefit problem (Tr. Vol. I at 23). The meeting ended with an agreement that TCI would pay the delinquent fringe benefits (Tr. Vol. I at 25) (Stipulation of Parties, No. 7). Welfare payments were made immediately and the remaining payments were made when the March draw was received by TCI on March 21, 1979. The welfare payments were paid by Sabow and Robert Schmidt, Jr., TCI President, out of their personal funds (Tr. Vol. I at 88).

8. In April, 1979, Jordan again notified Klion that fringe benefits due for February and March, 1979 had not been paid by TCI (Tr. Vol. I at 26). In fact, February fringe benefits were paid on April 21, 1979 (App. Ex. #6, 7).

9. In May, 1979, Sabow and Robert Schmidt, Jr., President of TCI, became aware that fringe benefits were again not being paid, despite the assurance of Malo that the matter was under control (Tr. 119, 166).

10. On May 29, 1979, Klion held a second meeting to resolve the continuing problem with the payment of fringe benefits. The meeting was attended by Sabow, Schmidt, their

attorney, Mr. Saichek, and a HUD employee, Mr. Paulsen (Tr. Vol. I at 26). Klion asked TCI to pay between \$3,000-\$4,000 in unpaid fringe benefits. Schmidt and Sabow, as officers of TCI, refused to make the payments, contending it was the responsibility of Chudnow Construction to make the fringe benefit payments (Tr. Vol. I at 27).

11. Schmidt and Sabow based their refusal to pay the fringe benefits for March and April, 1979, on an alleged oral agreement between Chudnow and TCI that Chudnow would pay the fringe benefits. (Tr. Vol. I at 28, 136, 165). Schmidt and Sabow testified that an oral agreement by Chudnow Construction to pay fringe benefits was made at a meeting between Joseph Chudnow, Schmidt, and Malo in late February, 1979 (Tr. Vol. I at 173). Schmidt and Sabow testified that Chudnow agreed to advance TCI draws to cover the net payroll, withholding, and fringe benefits. Chudnow would pay suppliers directly because TCI had not been paying its suppliers (Tr. Vol. I at 172-173).

12. On April 12, 1979, Chudnow Construction sent TCI a check in the amount of \$5749.16 with a notation that it was to be used to pay "union benefits for February, \$2401.16" (App. Ex. #6). TCI expected draws to arrive monthly from Chudnow Construction to cover wages, fringe benefits and withholding (Tr. Vol. I at 95). However, all future draw checks from Chudnow Construction received after the check of April 12, 1979 only covered net payroll (App. Ex. #8, Tr. Vol. I at 96). Sabow and Schmidt were not aware that Chudnow was not sending draws sufficient to cover fringe benefits or pay fringe benefits directly until May, 1979 (Tr. Vol. I at 98, 177). Chudnow testified that he never agreed at any time to give draws to TCI to cover wages and fringe benefits (Tr. Vol. II at 34). He did testify that he agreed to advance draws to TCI covering a net payroll of wages because TCI was having financial problems and Chudnow wanted to keep the men on the job to finish the project (Tr. Vol. II at 33, 54). Chudnow testified that it was Robert Schmidt's idea that Chudnow advance TCI draws covering a net payroll and TCI pay the fringe benefits. (Tr. Vol. II at 45, 47). Chudnow's explanation of why he paid TCI a draw to cover fringe benefits for February, 1979 was that the unions were threatening to walk off the job if the fringe benefits were not paid (Tr. Vol. II at 36).

13. Schmidt and Sabow believed that if the draw checks from Chudnow were not sufficient to cover fringe benefits, HUD would hold back draws to Chudnow to cover the fringe benefits (Tr. Vol. I at 104-105).

14. Schmidt spoke with Chudnow in May, 1979 by telephone to tell him that TCI was going to leave the Fernwood Court project unless Chudnow released enough funds to TCI to pay fringe benefits (Tr. Vol. I at 179-180). Chudnow refused and TCI left the project before completion (Tr. Vol. I at 168). Hugh Malo had "disappeared" from the job and corporate offices at approximately the time when TCI abandoned Fernwood Court (Tr. Vol. I at 175). Thereafter, Chudnow sent TCI a letter terminating the contract (Tr. Vol. I at 180). Chudnow finished the Fernwood Court project (Tr. Vol. I at 136).

15. Schmidt and Sabow made a mutual decision to refuse to pay the fringe benefits owed workers for Fernwood Court (Tr. Vol. I at 136).

16. Schmidt and Sabow admit that fringe benefits due on behalf of the workers at Fernwood Court for March, April, and the first two weeks of May, 1979, have never been paid by TCI (Tr. Vol. I at 128, 165, 185-186). The unpaid fringe benefits amount to between \$5,000 and \$6,000. (Tr. Vol. I at 38).

17. The officers of TCI were Robert Schmidt, Jr, President; Hugh Malo, Vice President; and Robert Sabow, Secretary-Treasurer (Stipulations of Parties, No. 4). The registered agent for TCI was Schmidt (Stipulation of Parties, No. 1). Hugh Malo was the operating manager of TCI (Tr. Vol. I at 84) and had primary responsibility for the Fernwood Court project (Tr. Vol. I at 86). Malo signed checks and payrolls on behalf of TCI (Tr. Vol. I at 87, Gov.'t Ex. #2).

18. On April 11, 1979, Schmidt and Sabow, holding a two-thirds majority of the voting stock in TCI, amended its Articles of Incorporation to change the corporate name to Mil-Brook Contracting, Inc. (Stipulations of Parties, No. 6). Hugh Malo is still a nominal officer and director of the corporation (Tr. Vol. I at 126). Schmidt and Sabow have present responsibility for managing TCI under its new name (Tr. Vol. I at 135).

19. Trebor Development Corporation (TDC) has been incorporated to do commercial construction since April, 1974 (Tr. Vol. I at 83). The officers and owners of TDC are Robert Schmidt, Jr., President, and Robert L. Sabow, Executive Vice President and Secretary-Treasurer (Tr. Vol. I at 83). Hugh Malo is not now and never has been an officer or shareholder in TDC (Stipulations of Parties). TCI and TDC are listed at the same address (Stipulations of Parties). TCI paid rent to TDC "when it was able" (Tr. Vol. I at 86). TDC is not a general contractor or subcontractor on HUD or FHA projects (Tr. Vol. I at 83).

DISCUSSION

The purpose of a temporary denial of participation is essentially the same as the purpose of the sanctions of suspension and debarment, namely, to assure the Government that "... contracts awarded by the Department and by those entities with whom it does business be made only to those contractors and grantees which can demonstrate that Government funds will be properly utilized." 24 C.F.R. §24.0. To that end, departmental policy requires "... that awards be made only to responsible contractors and grantees." Ibid. "Responsible contractor" and "responsibility" are terms of art in public contract law. The term "responsibility" has been defined by the Comptroller General to mean more than the ability to perform a contract. It includes the honesty, integrity, and reliability of the contractor. 34 Comp. Gen. 86 (1954); 49 Comp. Gen. 132 (1969).

There is no doubt that TCI (Mil-Brook Contracting, Inc.) is a "contractor or grantee" within the meaning of the regulation applicable to a temporary denial of participation because TCI received HUD funds indirectly from Chudnow Construction Company as a contractor with a participant in a program where HUD was the insurer. Schmidt and Sabow, as the corporate officers of TCI who made the decision to refuse to pay the fringe benefits, are likewise "contractors" within the meaning of the regulation. 24 C.F.R. §24.4(f).

The issue presented is whether Schmidt and Sabow were legally justified in refusing to pay the fringe benefits. They rely solely on an alleged oral contract with Chudnow Construction to pay TCI sufficient draws to meet its gross payroll, including fringe benefits. Joseph Chudnow denies that such an oral contract was ever agreed to by him. Schmidt and Sabow clearly believe that he did agree to it and they rely on the draw check of April 12, 1979, in which Chudnow included sufficient funds to cover fringe benefits for February, 1979. I find Schmidt and Sabow's continuing reliance on such an ephemeral "agreement" ludicrous in light of the fact that the April check was the only draw check Chudnow ever sent to cover fringe benefits after the alleged oral agreement was reached. Nonetheless, even if such an oral agreement had been made, once Chudnow decided to not continue it, TCI still and always had a contractual and legal obligation to pay its workers in accordance with Federal law because of the "Supplementary Conditions of Contract." This it has not done.

TCI's continuing refusal to pay fringe benefits for work on Fernwood Court has meant that workers' pension funds and health insurance funds are threatened with default. This is a particularly serious situation and shows a most egregious lack of responsibility on the part of Schmidt and Sabow, who have taken corporate responsibility for the refusal to pay in accordance with Federal law and the "Supplementary Conditions" of their contract with Chudnow Construction.

I therefore find that TCI, Robert Schmidt, Jr. and Robert L. Sabow have violated a law relating to the performance of obligations incurred pursuant to a grant of financial assistance. 24 C.F.R. §24.13(a)(2)(i) and §24.18(a)(2)(ii) and (iv). Good and adequate cause has been proven by the Government to justify a temporary denial of participation. Such cause will continue so long as the delinquent fringe benefits are not paid.

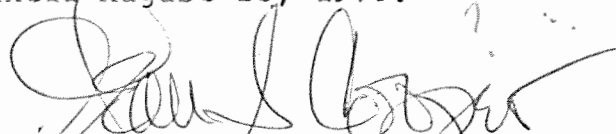
TDC is an "affiliate" of TCI within the meaning of the departmental regulation (24 C.F.R. §24.4(d)) because the same individuals who are the managing directors and officers of TCI are also the officers and managing directors of TDC. Schmidt and Sabow, or for that matter, TDC, could have corrected the offensive conduct of TCI at any and all times since they have been aware of it. At the very least, Schmidt and Sabow have been making TCI corporate decisions since May, 1979 and were aware of the ongoing non-payment of fringe benefits from that time, if not earlier. In fact, Schmidt and Sabow are TDC and TCI. To exempt TDC from the temporary denial of participation simply because it has not had the HUD contracts begs the question. TDC is an affiliate within the meaning of the regulation and thus subject to the sanction.

CONCLUSIONS OF LAW

1. TCI had a contractual and legal obligation to pay wages and fringe benefits in accordance with the Davis-Bacon Act because of the incorporation of the "Supplementary Conditions of the Contract for Construction" into its contract with Chudnow Construction.
2. TCI violated the provisions of the Davis-Bacon Act by refusing to pay fringe benefits for March, April, and May, 1979 due and owing on behalf of its employees who worked on the Fernwood Court project during that period.
3. TCI's obligation to pay fringe benefits is not relieved by the provision in the Supplementary Conditions that the contractor is not relieved of responsibility if a subcontractor violates the provisions of the Davis-Bacon Act.
4. TDC is an affiliate of TCI.
5. Robert L. Sabow and Robert Schmidt, Jr. are contractors or grantees within the meaning of 24 C.F.R. Part 24 (1979).

CONCLUSION

Based on the record considered as a whole, the temporary denial of participation of Robert L. Sabow, Robert Schmidt, Jr. and Trebor Development Corporation is supported by the evidence and is in the public interest. It shall remain in effect as to all appellants until August 23, 1979.



Jean S. Cooper
Administrative Judge
HUD Board of Contract Appeals

Date: July 29, 1980.