



Board of Contract Appeals

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of: :
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 EDWARD BLAKE, : HUDBCA No. 90-5284-D56
 : Docket No. 90-1481-DB
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 Respondent :
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For the Respondent:

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DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

October 24, 1991

Statement of the Case

Edward Blake ("Blake"), Respondent in this case, was notified by a letter dated April 16, 1990, that the U.S. Department of Housing and Urban Development (HUD or "Government") intended to debar him from participation in primary and lower-tier covered transactions as a participant at HUD and throughout the executive branch of the Federal Government for a period of two years, including entering into any procurement contracts. The cited causes for the proposed debarment are based on Blake's alleged role as an associate broker and representative of Topley Realty Company (TRC) in TRC's performance of two HUD Area Management Broker contracts. HUD contends that Blake's conduct as a participant and principal in HUD programs constitutes cause for debarment under 24 C.F.R. §§24.305(b), (d), (e) and (f).

Blake made a timely request for a hearing in accordance with 24 C.F.R. §§ 24.313 and 24.314. This determination is based on the hearing record.

Findings of Fact

1. Edward Blake is a licensed real estate broker in Pennsylvania. From 1982 until about October, 1990, he worked for TRC. He had no ownership interest in TRC and held no offices in it other than that of an employee. Leonard Topley (Topley) was the president of TRC. Blake took direction from Topley in the performance of his duties at TRC. (Tr. III at 32-33, 73-74; Joint Exhibit 1.)

2. On December 18, 1985, TRC was awarded HUD Contract No. [REDACTED] for Area Management Broker (AMB) services in Westermoreland County, Pennsylvania. On March 25, 1986, TRC was awarded HUD Contract No. [REDACTED] for AMB services in East Pittsburgh and East Allegheny County, Pennsylvania. Both contracts required TRC to obtain initial services for all HUD-owned or HUD-held (custodial) properties that were added to the inventory of properties covered by the contracts. Initial services included removal of all trash and debris, "securing the properties against unauthorized entry and damage by the elements at the outset and thereafter as needed," and mowing grass and trimming shrubbery. Both contracts also required that TRC maintain procurement records, conduct inspections of all properties covered by the contracts "no less often than every two weeks," arrange for continuing maintenance of buildings and ground properties, and document inspections or repair and maintenance work on HUD Form 9519 to assure satisfactory compliance with repair and maintenance contracts. TRC was to sell the non-custodial properties as quickly as possible, after they were initially serviced. (J.E. 1 and 2.)

3. TRC had the contractual authority to procure repair and maintenance services valued at \$200 or less without obtaining prior approval from HUD. For services or supplies valued in excess of \$200, TRC was to obtain bids for the services, but HUD awarded such services or supply contracts, not TRC. Under Article 12(c) of the contracts, TRC was not required to obtain competitive quotations for purchases of \$500 or less,

...provided the price paid is reasonable, such purchases are distributed among all qualifying contractors or suppliers, and a basis exists upon which to determine the reasonableness of price. All other broker purchases shall be on a competitive basis to the maximum practicable extent and the broker shall maintain records of such solicitations and purchases. (J.E. 1 and 2.)

4. HUD had obtained the bids and awarded the contract for lawn and shrubbery maintenance for the properties in TRC's two contracts. Due to serious problems with inadequate performance by the lawn and shrubbery maintenance contractor starting in August, 1986, the HUD contracting officer, Dennis McGrath, terminated that contract in October, 1986. McGrath believed that grass cutting needs would be minimal in the fall and made a decision not to re-bid the lawn and shrubbery maintenance contract until the following spring. McGrath told TRC to use its \$200 procurement authority to contract for shrubbery and lawn maintenance services as needed to "mop up." However, it is not clear when he directed TRC to do so or to whom he gave that direction within TRC. Ordinarily, splitting up lawn maintenance service procurement contracts to meet the \$200 procurement authority limit of TRC would constitute a violation of the contract. McGrath's order constructively changed TRC's contract with HUD at least temporarily. (Tr. II at 67-75; J.E. 1 and 2.)

5. In October, 1986, TRC received an overall satisfactory performance rating from McGrath on the two AMB contracts, a conclusion concurred in by Anthony Romitti, Chief of the Property Disposition Section of HUD's Pittsburgh Office. (Tr. I at 33; Tr. III at 10, 14.)

6. In October and November, 1986, TRC was audited by the HUD Office of Inspector General. The auditor, [REDACTED] Piller, interviewed both Topley and Blake as part of his audit. The purpose of the audit was to determine whether TRC was inspecting, securing, and maintaining properties in its AMB contract inventory. Both McGrath and Romitti had indicated to Piller that TRC's contract performance was satisfactory. Piller did not know why TRC was audited in October, 1986. Piller inspected 17 properties and reviewed the files for those properties at TRC. Piller found no documentation of biweekly inspections. He found that 13 of the 17 properties were either not secured or not properly maintained. Piller concluded in his audit report that the HUD Pittsburgh office was not complying with HUD's standards for monitoring the performance of AMB's. Piller's audit report recommended that TRC perform and document biweekly property inspections on HUD Form 9519A, that TRC secure the cited properties, and that HUD determine that repairs and security measures were taken. Piller also recommended that TRC procure a new lawn maintenance contract, unaware that HUD had reserved that duty for itself. Topley personally responded to the audit report, stating in writing that all of the deficiencies mentioned in the report would be corrected. (Tr. I at 35-36; Tr. II at 135-136; Tr. III at 5-8; J.E. 4; Exh. G-6.)

7. James Cassidy, a development specialist in the HUD Pittsburgh Office, was detailed to manage and control the resolution of the audit findings. As part of his detail, he was also assigned some realty specialist duties such as performing property inspections and communicating with AMB's such as TRC on a day-to-day basis. Inspections of all of the properties in TRC's inventory were conducted on January 13-15, 1987, using two inspection teams. Cassidy did some of the inspections on a team with McGrath and Nancy Noland. Cassidy then prepared a written review of all of the inspections performed by both teams. To Cassidy, the written inspection review highlighted what he considered health and safety hazards first, security issues second, and all other deficiencies third. Cassidy also prepared a matrix for TRC, putting all of the problems found during the 3-day inspection on it. Topley responded to the inspection review and matrix, writing that everything would be corrected. Based on Topley's response, Cassidy expected that steps were being taken by TRC to address the deficiencies noted in the review. (Exh. G-8, G-9; Tr. I at 40-47, 49-50, 70.)

8. Cassidy was distressed by what he saw during the 3-day inspection of TRC's properties. He particularly remembered a property with a stairway in bad condition, another with handrails missing from a stairway and from a fire escape, and a property with a serious roof leak. He was also distressed by what he considered TRC's failure to properly secure properties. Cassidy did not have prior experience with property inspections and was unfamiliar with many of the neighborhoods in which the problems were found, particularly the neighborhoods with security problems. He was unaware that in certain neighborhoods there would be break-ins within hours after a property was resecured, and that squatters would move into properties and fill them with debris. (Tr. I at 47-48, 77, 29-92; Tr. II at 65-67.)

9. In late February, 1987, Cassidy reviewed TRC's files and administrative procedures. Cassidy found 35 inspection reports in the TRC files dated January 2, 1987. Because he considered it unlikely that 35 property inspections had been completed on the same day, he questioned Blake on the matter. Blake insisted that he had performed all 35 inspections in one day. Cassidy found only a few inspection reports on the prescribed HUD form in the files for February. He was apparently unaware that Blake was not using the HUD forms because Topley had not told him to do so. Blake made inspection notes for all properties on a yellow pad, and filed them together in a separate file. (Tr. I at 51-55; Tr. III at 75-76.)

10. Cassidy set up a meeting with TRC to go over progress made on resolution of the audit findings. Prior to this meeting, Cassidy went back to check on the properties that he believed had contained health and safety hazards to see if they had been corrected. He found that none of the corrections or repairs on those properties had been made. At the meeting, held on February 27, 1987, Blake represented TRC. Blake stated to McGrath and Cassidy that the repair work for most of the problems noted in the inspection review had been "ordered." Blake also pointed out that some of the properties had been sold by TRC, and were no longer in TRC's inventory. To Blake, the majority of HUD's complaints seemed to involve "high grass and a few broken windows." In fact, the deficiencies noted were more serious than characterized by Blake. (Tr. I at 54-57; Tr. III at 47-48; Exh. G-11.)

11. Blake believed that the repair work had been "ordered" by TRC because he had prepared Form 477A repair bid requests for the repair work indicated in the HUD audit report on February 13, 1987. Blake prepared the forms in longhand and gave them to Topley, at Topley's direction. Blake understood from Topley that Topley did not want Blake to process the Form 477A's because Topley wanted to take care of the matter himself. Blake assumed that Topley had the Form 477A's typed and sent out in February, 1987. Blake had no indications to the contrary. Because Blake believed that Topley had taken care of ordering the repairs, Blake represented to HUD at the February 27, 1987, meeting that the repairs had been ordered. (Tr. III at 48-49, 64-67.)

12. Cassidy went to the TRC offices a number of times, starting in the beginning of March, 1987, to monitor TRC's performance more closely. He reviewed TRC's files and found that the Form 477A's for repair work had not been typed or sent out, and that the files were in a general state of disarray. (Tr. I at 57.)

13. In late March, 1987, Cassidy became aware that TRC was awarding repair contracts to two companies owned by Blake's son, Jeff Blake. Those companies were Victoria Construction and T.J. Construction. Cassidy checked into the matter and found that T.J. Construction and Victoria had been awarded 35 repair contracts by TRC between June, 1986 and March, 1987. Both McGrath and Topley were aware of Jeff Blake's relationship to Blake. Blake had told McGrath of the relationship in the spring of 1986. McGrath asked Blake whether he had an ownership interest in his son's companies. Blake assured McGrath that he did not. Cassidy considered it an "apparent conflict of interest" for TRC to be awarding repair contracts to companies owned by Blake's son. McGrath did not agree with Cassidy's conclusion. (Tr. I at 29-30, 58-66; Tr. III at 81-82.)

14. The combined value of all of the contracts awarded by TRC to T.J. Construction and Victoria Construction was about \$8,000. McGrath stated that the bid prices of T.J. Construction and Victoria were never unreasonable or otherwise questionable. Both companies were on HUD's approved contractor list to be solicited by AMB's to obtain repair work. McGrath testified, and I so find, that if Victoria Construction or T.J. Construction was the low bidder on a job, TRC would have to award the contract to that company, no matter who owned it. Many of the bid solicitation forms were signed by Blake, although Topley signed some of them. HUD approved the ones for values in excess of \$200. (Tr. I at 71-74; Tr. II at 79, 89, 94; Exh. G-34.)

15. McGrath encountered one notable problem with unsatisfactory work performed by T.J. Construction that had been certified by Blake as acceptable. HUD had approved the award of the contract to T.J. Construction for debris removal for \$1090 at a property located at [REDACTED] Hill Street, Wilkenburg, Pennsylvania. Blake certified that he inspected the work and that it was done satisfactorily. In fact, because of inclement weather, Blake did not actually inspect the work before certifying that it was acceptable. He approved the work, sight unseen, upon a telephone assurance from his son. Later, McGrath received a telephone call from the Wilkenburg code enforcement office that debris was stacked up in front of the Hill Street property and had to be removed. McGrath notified Blake by a rapid reply letter of the problem. Blake investigated why any debris was left at the Hill Street property after his son had assured him that the job had been fully performed. Blake found that most of the debris had been placed at the property curb by workers doing construction work on a property located next door to the Hill Street property after T. J. Construction had removed all but one partial truckload of the debris for which it was responsible. All of the remaining debris was promptly removed from the property after McGrath notified Blake of the problem. (Tr. II at 35-39, 96; Tr. III at 51-52, 82-85; Exh. G-34.)

16. Cassidy had inspected debris removal work performed by Victoria Construction at a property located at Steel Street, McKeesport, Pennsylvania, and found it to be unsatisfactory. He and McGrath also considered securing work done by Victoria Construction at a property located at [REDACTED] Atcheson Street, McKeesport, Pennsylvania, to be unsatisfactory because a piece of "flimsy composite pegboard" had been used by Victoria to secure a window on that property. Blake had signed both the purchase order for that work and the certification that the work had been done acceptably. The only other certification of acceptable work made by Blake for work performed by Victoria Construction with which McGrath belatedly disagreed was for securing work on a property located at [REDACTED] Hiland Avenue. A purchase order had been awarded by HUD to Victoria for \$1100 for securing the property. On September 21, 1987, Blake had certified the work as

acceptably performed. Three months later, during a HUD inspection of the property on January 13, 1987, it was found that the property had a number of broken or open windows. McGrath based his opinion solely on what was found by HUD at the January inspection. He was unaware of the condition of the property when Blake certified the work as acceptable. Blake solicited no more bids from Jeff Blake's companies after he became aware that HUD was not fully satisfied with the work performed by those companies. (Tr. II at 33-34; Tr. III at 78; Exh. G-33.)

17. McGrath believed that TRC was not "rotating" contractors sufficiently to give all available sources a chance to bid on contract repair and maintenance work. He also believed that TRC failed to document its attempts to "rotate" work among contractors. The list prepared by HUD of all contractors interested in such work in the locality covered such a wide geographic area that it made contacting many of the contractors listed all but useless. Contractors not located in the immediate vicinity would simply not bid on low-paying or small contracts, and it was a waste of time for TRC to even contact them, particularly when time was of the essence to obtain resecuring work or repair of a health hazard. Of the 30-50 contractors on the list given to TRC for 1986-1987, only a few, including J.R. Construction and Victoria, would agree to bid on small jobs. TRC had actually found a number of new contractors that HUD had added to the list because the ones already on the list were either uninterested in the work offered or were specialists who only performed specific types of work, such as plumbing or electrical repairs. McGrath admitted on cross-examination that all AMB's were experiencing the same bidding patterns as TRC, and that TRC had actually brought more new contractors into the program than any other AMB. The TRC staff documented the contractors that it called or spoke to by listing in the files the names of the contractors called, the date they were called, and their response. Based on an examination of the records and testimony offered in evidence, I find that not only did TRC do its best to "rotate" contractors within realistic limits, but adequately documented that rotation. (Tr. II at 9-14, 96-106; Tr. III at 41-44, 68, 78-80.)

18. Blake's duties at TRC in regard to the two AMB contacts were as assigned by Topley. When the contracts were first awarded to TRC in 1984, Topley had a discussion with Blake, telling him generally what the contracts required. At that time, inspections were only required to be performed once a month. Topley never discussed contract requirements with Blake after 1984, and Blake had never seen a copy of the contracts. Topley, on behalf of TRC, attended the training sessions that HUD held for AMB's, and he did not tell Blake what was said at those training sessions or show him any materials that may have been distributed by HUD. At TRC, bids for contract repair work would be solicited by the TRC secretaries at the general direction of

Blake or Topley. When bidders responded, their bids would be received by Topley. If Topley wanted Blake to handle those bids, he would put them on Blake's desk. Blake was not responsible for the entire inventory covered by the two contracts, nor was he solely responsible for any given task under the contracts. When the contracts changed to require two inspections a month for each property, Topley instructed Blake to do twice-monthly inspections. Blake did not record the inspections on HUD Form 477A because Topley did not tell him about the form or direct him to use it. Blake recorded his inspection notes for all properties he inspected on a yellow pad and filed those notes in a separate file for that purpose. However even after HUD personnel brought the HUD inspection form to Blake's attention after January, 1987, he used it only sporadically. (Tr. III at 37, 52, 60-65, 67-68, 75-77.)

19. When Blake would inspect properties in TRC's AMB inventory, he followed general guidelines given to him by Topley in 1984. Those were to check the properties to make sure that the grass was cut and to determine that nobody was stealing or breaking into the properties. Blake's most important assigned duty at TRC, related to the contracts was to sell the properties. Blake did not consider broken or cracked windows to be unsecure so long as the panes of glass were not falling out of their frames. He also did not consider broken windows unsecured if they could not be entered easily by vandals or if weather elements could not enter the premises to cause accumulations of snow or rain. If Blake found a major safety hazard during his inspections, he recorded it on his yellow pad or brought it to Topley's attention. Topley would then notify HUD and obtain bids for the repair, as directed by HUD. TRC performed this contractual duty to the satisfaction of McGrath. (Tr. II at 86-87, 117, 133, 142; Tr. III at 34-35, 38-40, 59, 77, 86-87.)

20. In December, 1986, Blake was having a family problem that adversely affected his work. During December, 1986, Blake was primarily absorbed with solving his family problem. After January, 1987, the problem was resolved. Although Topley had told Blake to take as much time as he needed to deal with the problem, Topley apparently did not make sure that someone else was performing contract work when Blake could not. The result was that contract performance suffered during that period, the very time when HUD was becoming increasingly demanding about TRC's performance. At the January, 1987, meeting with HUD, Blake stated that his family problem caused him to "slack off" on contract performance. Blake did not want TRC to lose its contracts because of his personal problem, and he verbally accepted responsibility for all of TRC's performance problems, although they were actually the responsibility of TRC and Topley, not Blake. (Tr. III at 69, 72-74; Tr. II at 46.)

21. The repair bid forms that Blake believed had been sent

out by Topley in February, 1987, were not sent out until late March, 1987, and the actual repairs had not been started. On March 26, 1987, HUD held a meeting to determine what progress TRC had made to correct its contract performance problems. Paul Steimer, Director of Housing Management; McGrath, and Cassidy attended for HUD. After the meeting, Steimer decided that TRC had failed to perform its AMB contracts. McGrath concurred in that evaluation because no progress had been made by TRC from January through March, 1987, to resolve the problems discovered in the audit report and the subsequent property and office inspections. (Tr. II at 160-161; Exh. G-11.)

22. McGrath, as contracting officer, issued a "show cause" (cure) letter to TRC dated May 12, 1987, that listed contract performance problems and demanded an explanation why the AMB contracts should not be terminated for default. Topley responded to McGrath's letter, but he did not rebut the findings listed. Essentially, he concurred in the findings. (Exhs. G-12 and G-13.)

23. By letter dated May 31, 1987, McGrath issued a final decision terminating TRC's two AMB contracts for default. (Exh. G-14.)

24. In July 1987, John Pusana, Manager of the HUD Pittsburgh office, imposed Temporary Denials of Participation ("TDP") on TRC, Topley, and Blake for their roles in the failure of TRC to adequately perform the two contracts. Neither McGrath nor Cassidy personally believed that any sanction was necessary beyond terminating the contracts for defaults. Anthony Romitti, Chief of the HUD Pittsburgh Property Disposition Section, recommended the TDP's that were imposed in 1987. Neither Blake, Topley, nor TRC requested a hearing on the TDPs, which terminated automatically after twelve months. (Stipulation; Tr. I at 37, 144, Tr. II at 26-28.)

25. Blake is no longer employed at TRC. He is presently renting business space from Topley and acting as a real estate broker. (Tr. III at 73-74.)

Discussion

HUD is proposing the two-year debarment of Edward Blake, based on his alleged responsibility for TRC's failure to acceptably perform its two AMB contracts. That failure has already resulted in termination of TRC's contracts for default and the imposition of one-year TDP's on Blake, Topley, and TRC in 1987. Now, HUD proposes this additional sanction against Blake, citing 24 C.F.R. §§ 24. 305(b), (d), (e) and (f) as grounds for Blake's debarment.

The purpose of debarment is to assure the Government that it only does business with "responsible" persons and entities. 24

C.F.R. § 24.115(a). The term "responsible," as used in the context of suspension and debarment, is a term of art which includes both the ability to perform a contract satisfactorily and the honesty and integrity of the participant. 48 Comp. Gen. 769 (1969). Even if cause for debarment is established by a preponderance of the evidence, existence of a cause alone does not automatically require that a debarment be imposed. The test for whether a debarment is warranted is present responsibility, although a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.D.C. 1980). In deciding whether to debar a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§ 24.115(d), 24.314(a) and 24.320(a). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

The Government may only debar participants, principals and their affiliates, as defined in 24 C.F.R. § 24.105. Real estate agents and brokers are specifically defined as principals. 24 C.F.R. § 24.105(p)(11). Because Blake was a real estate broker who participated in the past in covered transactions (the AMB contracts), he may also be reasonably expected to do so in the future. I find that he is a principal subject to debarment by the Federal Government, if cause for debarment is established.

The Government cites 24 C.F.R. § 24.305(b) as the first cause for Blake's debarment, based upon his alleged responsibility for TRC's contract default. To establish that cause for debarment, the Government must prove by a preponderance of the evidence that Blake was responsible for:

- (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as
 - (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
 - (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
 - (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

This record is devoid of any evidence that Blake willfully acted in clear violation of the two AMB contracts, or that he had a history of failure to perform. Therefore, I cannot find that

Blake willfully acted in clear violation of, or had a history of failure to perform, a public agreement so serious as to affect the integrity of an agency program, in violation of 24 C.F.R. § 24.305(b). The AMB contracts were not Blake's contracts; they were his employer's contracts. His responsibilities for contract performance were not only far less than the Government mistakenly believed, but were at the direction of Topley, his employer. Topley apparently did not even consider it necessary to show Blake the contracts, or to send him to the contractor training programs run by HUD. Thus, Topley assumed all of the responsibility for how TRC would perform the two contracts. At the very time when HUD was giving TRC its last chance to cure its default, Topley took over performance of the contracts and was solely responsible for TRC's failure to make the performance corrections that Topley had assured HUD would be made. The clear failure of contract performance by TRC and its owner cannot be imputed to Blake. Had HUD looked more closely into the matter of who controlled TRC's contract performance before it attempted to impose yet another sanction on Blake, it would, or should, have come to this same conclusion.

HUD contends that Blake failed to inspect contract properties every two weeks and that he also failed to document those inspections. The record supports a finding that Blake inspected the properties in TRC's contract inventory more often than every two weeks. However, he did not document them on the form prescribed for that purpose by HUD. Until sometime in January, 1987, Blake was not even aware that he had to document inspections on a HUD form. After that time, when he was made aware of the HUD inspection form by Cassidy, he used it only sporadically, for reasons not explained on the record. However, the use of the HUD inspection form is not required by the contract, and even if it were, I could not find that a failure to use it contributed to a contract violation so serious as to affect the integrity of an agency program. Blake made the required inspections, and he documented his inspections on a yellow pad. That may have constituted a technical violation of a contract provision, but it is not sufficiently serious to justify the imposition of an administrative sanction.

In a similar vein, the factual record in this case does not support an administrative sanction against Blake for the alleged failures of TRC to adequately secure properties. Blake did approve one securing job performed by Victoria that was considered unsatisfactory by both McGrath and Cassidy: the use of "flimsy" paneling to secure a window. An administrative sanction is an entirely inappropriate response to this inspection dispute. A rapid reply letter or a telephone call is how minor and isolated contract performance problems are solved, not imposition of administrative sanctions. A rapid reply letter from McGrath to TRC immediately solved the more serious problem posed by the debris removal incident recounted at Finding of Fact No. 15. If

TRC and Blake, personally, had refused to comply with a directive from McGrath to correct the inadequate securing, a sanction may have been justified. However, that did not occur, and there is no evidence that Blake ever personally refused to cooperate with any directive from McGrath, who was the contracting officer with administrative authority over TRC's contract performance. Although Blake's idea of adequate securing, which he did not believe included replacing or securing cracked, or inaccessible windows, is more than a little absurd, that type of dispute should also be resolved through normal contract procedures, not administrative sanctions. In any event, the record does not establish that the cracked windows Cassidy found in January had been cracked when Blake approved the securing work many months before, although resecuring work was clearly needed for the cracked windows by January. Nonetheless, this relatively minor contract performance problem became a major contract performance issue when Leonard Topley, not Blake, took over total responsibility for all of the problems noted by HUD in its January inspection. It was Topley who failed to respond to HUD's legitimate request for performance correction.

Blake is also personally charged by HUD with failing to adequately document the rotation of contractors or to assure competition and reasonableness of price in awarding contracts for repair. This charge is unsupported by the record in this case not only as to Blake personally but as to TRC. In fact, prices were reasonable, as admitted by McGrath, and TRC actually improved rotation and competition among contractors by bringing a number of new contractors into the HUD program. Documentation was in every file of who was called and what their bids or responses were to each solicitation. It is indefensible that HUD seeks to sanction Blake personally for a contractual responsibility which was carried out in accordance with the contract by TRC and all of its employees, including Blake.

I do not find that TRC, or Blake personally, steered contracts to Victoria or T.J. Construction, thereby avoiding contractual obligations to rotate contractors or to assure competition. Both companies were listed as sources for repair work on HUD contracts, and HUD awarded many of the contracts at issue to these two companies. There was nothing improper about using Jeff Blake's companies to do repair work, so long as there was adequate rotation of contractors and competition as to price. The record supports a finding that such was the case. Victoria and T.J. Construction received contracts because they were the low bidder or the only bidders willing to perform particular small jobs, a conclusion concurred in by McGrath. Blake's one serious contract violation was to approve one job involving debris removal, sight unseen. However, when McGrath sent the rapid reply letter to TRC, Blake responded to it immediately and solved the problem. There is no history of such contract performance errors by Blake, nor was the error so serious or

incorrectable that it would merit an administrative sanction.

Indeed, the record in this case against Blake in no way supports an administrative sanction of even one day. McGrath and Cassidy considered termination of TRC's two contracts to be a fully adequate resolution of the contract performance problems found by HUD. I agree. TRC defaulted on its performance of the two contracts. The terminations were entirely appropriate, and supported by compelling evidence of performance failure that worsened to the point of absolute default between February and May, 1987, the very period of time when Topley personally took over contract "performance". The debacle that resulted was not Blake's doing.

HUD has cited 24 C.F.R. §§ 24.305(d)(e) and (f) as additional grounds for Blake's debarment. Section 24.305(d) lists as a ground for debarment:

Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

(1) These causes include but are not limited to:

- (i) Failure to comply with title VIII of the Civil Rights Act of 1988 or Executive Order 11063, HUD's Affirmative Fair Housing Marketing regulations or an Affirmative Fair Housing Plan;
- (ii) Violation of title VI of the Civil Rights Act of 1964, section 100 of the Housing and Community Development Act of 1973, section 504 of the Rehabilitation Act of 1973, or the Age Discrimination Act of 1975;
- (iii) Violation of any law, regulation, or agreement relating to conflict of interest;
- (iv) Violation of any nondiscrimination provision included in any agreement or contract.

None of the charges against Blake fall within the types of violations specifically listed at 24 C.F.R. § 24.305(d)(1). It is important to note that Blake was not charged with violation of any law, regulation, or agreement relating to conflict of interest in regard to TRC awarding contracts to Victoria or T.J. Construction. Furthermore, there was no conflict of interest, whether charged or not. As to the construction of regulatory language, the fact that such "causes so serious" are "not limited to" the enumerated causes at § 305(d)(1) does not mean that they include any cause at all. The doctrine of ejusdem generis requires that the general provision of a statute or regulation will be controlled by subsequent language more specific in scope,

and that general words will not be given a meaning totally unrelated to the more specific terms of the statute or regulation. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 600-601 (1963). Trinity Services, Inc. v. Marshall, 593 F.2d 1250, 1258 (D.C. Cir. 1978). Section 305(d) of 24 C.F.R. Part 24 has been specifically construed by this Board and the United States District Court for the Western District of Missouri to exclude violations not substantially similar or analogous to the specific violations set out at (d)(1) of the regulation. Sellers v. Kemp, 749 F. Supp. 1001 (W.D. Mo. 1990); In the Matter of Wayne Sellers, HUDBCA No. 89-4260-D8 (August 2, 1989). There is not a single court case that HUD can point to that construes this regulatory provision differently. Even if HUD had proven that Blake was responsible for the acts of TRC underlying the charges in this case, I cannot find that such acts fall within the limited and limiting examples of 24 C.F.R. §24.305 (d)(1). The Government has failed through both its pleading and proof to establish a ground for debarment pursuant to 24 C.F.R. §24.305(d).

24 C.F.R. § 24.305(e) states that debarment of a contractor may be imposed for any of the causes in paragraphs (a)(b), and (d) of Section 24.305, and it defines "agreement" to include "contracts or subcontracts". It is, therefore, only a clarification section. In this case, it was clear at all times that charges against Blake were based on the two AMB contracts. This is not a separate ground for debarment in more than a technical sense, and the record in this case does not demonstrate a violation of this ground for debarment.

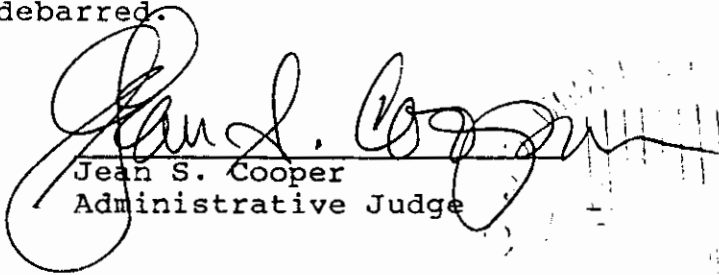
Section 24.305(f) addresses debarment for "material violations of a statutory or regulatory provision or program requirement applicable to a public agreement." The record is devoid of evidence of violation of a statutory or regulatory provision. The remaining issue in this case is what constitutes a "program requirement applicable to a public agreement." In the absence of a regulatory or statutory requirement, it must be presumed that a "program requirement" can be found in a pertinent HUD publication such as a handbook, or the public agreement itself. Blake's failure to use the approved HUD inspection form, could arguably constitute a violation of a program requirement, if HUD had established it as a requirement, rather than a recommendation. However, it would not constitute a material program requirement, so long as the inspections were being made and documented in some form, which they were.

Since HUD had already imposed a TDP on Blake in 1987, it now appears that the proposed debarment of Blake was made for punitive purposes, not to protect the public. This constitutes a violation of 24 C.F.R. § 24.115(b) by HUD. Although HUD can argue that Blake should have demanded to see the contracts even if Topley did not give them to him, this begs the point. HUD had

a legitimate contract performance problem that it blamed on the wrong person, and then made worse by imposing a TDP on him, followed by yet another proposed sanction years after the contracts were terminated. I find this to be abusive, punitive, and it wasted the taxpayers' money.

Conclusion

For the foregoing reasons, it is my determination that Edward Blake shall not be debarred.


Jean S. Cooper
Administrative Judge