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

The United States Department of Housing and Urban Development, Plaintiff, vs. Anthony Gurino, Defendant.	HUDALJ 95-5058-PF Decided: March 29, 1996

Charles G. Fiore, Esquire
For the Respondent

Dane M. Narode, Esquire
For the Department

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION

Statement of the Case

On June 29, 1995, the Plaintiff, the U.S. Department of Housing and Urban Development ("HUD" or "the Department") issued a Complaint seeking civil penalties totalling $125,000 against Defendant Anthony Gurino, pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-12 ("the Act"), and HUD's implementing regulations, 24 C.F.R. Part 28. The Department alleges that Defendant caused 25 false statements to be submitted to HUD and is seeking the maximum statutory civil penalty of $5,000 for each statement. Plaintiff alleges that in submitting bids for HUD-funded projects, Defendant, who was prohibited from participating in HUD-funded projects, failed to identify himself as a prospective participant in the projects.

Defendant timely filed an Answer to the Complaint and requested a hearing. On October 30, 1995, I granted the Department's Motion for Partial Summary Judgment.[1] The hearing was held on November 7, 1995. The parties were to submit post-hearing briefs by January 3, 1996. Defendant chose not to file a brief, but rather relied upon the defenses raised in his Answer to the Complaint, and arguments asserted in filings and at hearing. Defendant's Facsimile Transmission (Jan. 3, 1996). I granted HUD's unopposed Motion for an Extension to File its Post-Hearing Brief until February 2, 1996, due to the partial Federal government shutdown and inclement weather. HUD filed its post-hearing brief on January 29, 1996. This matter is ripe for decision.

Findings of Fact

1. Around 1969, Defendant incorporated ARC Plumbing and Heating ("ARC"), New York, New York. Mr. Gurino was the sole shareholder of the company which provided plumbing services to the New York City Housing Authority ("NYCHA"). G. Ex. 27, ¶ 1; Tr. 37.[2] Around May 1986, the City of New York debarred ARC from city contracts for three years until May 29, 1989. G. Ex. 27, ¶¶ 2 and 5.

2. Mr. Gurino was subsequently convicted of obstruction of justice. G. Ex. 27, ¶ 2.

3. In June 1986, two ARC employees, Augusto Aufiero and Patrick Borello, founded Hi Tech Mechanical ("Hi Tech") and became its principal officers. Hi Tech took over ARC's contracts with NYCHA. In 1987, Hi Tech was also debarred from participating in NYCHA contracts until May 1989, after having been found by New York City to be ARC's "alter ego." G. Ex. 27, ¶¶ 3-5.

4. In February 1988, HUD's New York Regional Office imposed a Limited Denial of Participation upon ARC based upon its felony conviction for offering a false instrument for filing, *i.e.*, an application to New York City for registration as a responsible and eligible bidder. G. S.J. Exs. C at 3 and E at 4. In June 1988, HUD suspended and proposed to debar ARC based on the conviction. *See In the Matter of*

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[1]HUD filed the Motion based on a Statement of Facts signed by Defendant in support of his guilty plea to conspiracy and money laundering charges.

[2]The following reference abbreviations are used in this decision: "G. Ex." for HUD's hearing exhibits, "G. S.J. Ex." for the exhibits to the Government's Brief in Support of its Motion for Partial Summary Judgment (Sep. 27, 1995), and "Tr." for transcript.

ARC Plumbing and Heating Corp., HUDBCA 88-1273-DB (Feb. 2, 1990). The proposed debarment was granted and ARC was debarred from participation in HUD programs for three years from February 29, 1988, until February 28, 1991. *Id.*; Tr. 37-38.

5. In May 1988, HUD suspended Anthony Gurino from all participation, direct or indirect, in any HUD program, including any program funded, guaranteed, or insured by HUD. On June 14, 1991, HUD debarred the Defendant from such participation in HUD programs until May 5, 1993. G. Ex. 27, ¶ 6; G. S.J. Ex. E at 4; Tr. 38.

6. By letter dated July 22, 1993, HUD again suspended Defendant and proposed an indefinite debarment of Mr. Gurino and his affiliates. The indefinite debarment was granted. *In the Matter of Anthony J. Gurino, et al.*, HUDALJ 93-2071-DB (Apr. 7, 1994) (hereinafter *Gurino Indefinite Debarment*).

7. In 1989, Hi Tech merged with Endres Plumbing while also becoming a wholly owned subsidiary of Atratech. Messrs. Borello and Aufiero became the president and secretary, respectively, of Atratech. Vincent Sorena, a personal friend of Mr. Gurino's, became Atratech's chief executive officer. G. Ex. 27, ¶ 7.

8. In 1989, the Atratech-Hi Tech-Endres entity ("Atratech") hired Anthony Gurino as "Chief Consultant." G. Ex. 27, ¶ 8. As Chief Consultant, Mr. Gurino, along with Messrs. Borello, Aufiero, and Sorena, controlled the day-to-day operations of Atratech. Mr. Gurino's duties included supervisory authority over most employees, reviewing authority of expenditures, approval authority of invoices, involvement in coordination and estimation of jobs, and responsibility for the basic structuring of the company. G. Ex. 27, ¶ 8.

9. From 1989 through 1992, Atratech submitted bids for 25 NYCHA plumbing contracts. The contracts were funded through HUD's Comprehensive Improvement Assistance Program ("CIAP"). G. Exs. 1A-1Y, and 27 at ¶¶ 9-10; Tr. 18, 32-33, 45-46. As part of its bids, Atratech submitted 25 HUD-2530 forms, *i.e.*, 25 Previous Participation Certifications ("PPCs"). G. Exs. 1A-1Y and 27 at ¶ 11; Tr. 43-44.

10. The PPCs contained a certification stating, *inter alia*, that "all statements made. . . are true, complete and correct [and that a]ll the names of parties, known. . . to be principals in this project. . . are listed." G. Exs. 1A-1Y. In addition, the PPCs required listing "all known principals and affiliates (people, businesses and organizations) proposing to participate in the project." *Id.*

11. Mr. Gurino was not listed on any of the 25 PPCs. G. Exs. 1A-1Y.

12. NYCHA required the submission of Business Entity Questionnaires ("BEQs") as part of the bidding process. The BEQs required the identification of consultants. G. Ex. 27, ¶ 10. Mr. Gurino was not listed on any of the 25 BEQs. *Id.* at ¶ 12.

13. NYCHA/HUD contracts costing approximately $22 million were awarded to Atratech. G. Ex. 27, ¶ 13; Tr. 18.

14. Atratech performed approximately $8 million worth of work on the contracts for which it received compensation from HUD. After Mr. Gurino's involvement with Atratech was discovered by HUD, the Department withheld all but $8 million of the approximately $22 million payments on the contracts. Tr. 33-34. HUD did not suffer any monetary losses because of Atratech's work. Tr. 49-50.

15. From 1989-1992, Defendant conspired with Messrs. Borello, Aufiero, and Sorena to commit an offense against the Federal government by placing and causing "to be placed in [the mail] pre-award contracting documents and certifications. . . relating to NYCHA/HUD contracts. . . ." G. Ex. 27, ¶¶ 16 and 19. Moreover, Defendant conducted a financial transaction with the proceeds from the NYCHA/HUD contracts, and transferred a portion of those proceeds to a horse farm in Florida. The transactions were designed to conceal the nature, location, source, ownership, and control of such proceeds. *Id.*

16. HUD's Office of Inspector General ("IG") investigated, among others, Mr. Gurino, the Atratech entity, and ARC.[3] Tr. 16-18, 40-41. The investigation included extensive interviews of NYCHA officials, service of several subpoenas at the direction of the U.S. Department of Justice, and obtaining and compiling bank and other records. Tr. 17, 19-20.

17. Mr. McGowan, a special agent for the HUD IG, spent approximately 650 hours on the investigation of the Atratech entity. Tr. 34. In addition, eight other HUD agents and three NYCHA agents worked on the investigation. The investigation also encompassed a criminal case, with participation from an Internal Revenue Service agent, a Special Agent from the state of Florida, employees from the U.S. Department of Justice, and personnel from a Florida county sheriff's department. Tr. 34-36.

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[3]During an investigation of a horse farm in Florida, agents for the U.S. Department of Justice's Organized Crime Drug Enforcement Task Force contacted HUD after they found several documents relating to HUD-funded NYCHA contracts. HUD's Regional Inspector General suspected contract fraud when these documents identified Mr. Gurino and ARC, both debarred, as possibly involved in HUD contracts. Tr. 15-18, 40-41.

18. During the investigation, Mr. Gurino refused to cooperate with the Federal government. Tr. 36-37. When asked to assist in identifying and prosecuting others, Mr. Gurino refused. *Id.*

19. On February 8, 1993, Mr. Gurino pleaded guilty to one count of money laundering and one count of conspiracy. G. Ex. 26. The plea agreement states that (with the exception of terms concerning a specified forfeiture of real property) it "does not prohibit the United States from pursuing any and all available civil and administrative penalties and remedies against [D]efendant. . . ." G. Ex. 26, ¶ 15.

Discussion

The Program Fraud Civil Remedies Act ("the Act") provides that when a person "makes. . . or submits, or causes to be made. . . or submitted. . . a written statement that. . . the person knows or has reason to know. . . omits a material fact" and such omission renders the statement false, that person is subject to "in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such statement." 31 U.S.C. § 3802(a)(2). However, the penalty may be assessed only if the person had a duty to include such fact and the statement contained a certification of the truthfulness of the statement. *Id.* A statement is any document submitted "with respect to. . . a contract[,] bid or proposal." 31 U.S.C. § 3801(a)(9).

1. Defendant made false statements.

The PPCs are "false statements" because they were submitted as part of the bidding process and because they omit a material fact, *i.e.*, they do not identify Mr. Gurino as a principal. *See* 31 U.S.C. §§ 3801(a)(9), 3802(a)(2); 24 C.F.R. § 24.105(p); and Finding of Fact Nos. 9 and 11. Indeed, Mr. Gurino was a principal at Atratech because he was a consultant. HUD's regulations concerning participation in HUD funded projects, as well as the debarment regulations define consultants as principals. 24 C.F.R. §§ 24.105(p)(13), 200.215(e)(1); *see also Gurino Indefinite Debarment* at 5. Moreover, Defendant admits that the PPC instructions define principals to include consultants. G. Ex. 27, ¶ 11.

The failure to identify Mr. Gurino as a principal is material, because the involvement of Mr. Gurino, a debarred contractor, in the company directly affected Atratech's eligibility for award of the contracts. *See* 24 C.F.R. §§ 24.200, 24.205. Defendant, himself, acknowledges that had his involvement in Atratech been known to HUD, Atratech would not have been awarded the contracts. G. Ex. 27, ¶ 15; *see also* Tr. 51; *Gurino Indefinite Debarment* at 7.

Defendant contends that he did not make or submit the PPCs or cause them to be made or submitted. Rather he asserts that Messrs. Borello, Aufiero, and Sorena are responsible. His argument is wholly without merit. Mr. Gurino admitted to being a co-conspirator in criminal offenses against the Federal government with Messrs. Borello, Aufiero, and Sorena. Along with these individuals, Defendant "did place and cause to be placed in [the mail], pre-award contracting documents and certifications. . . ." Finding of Fact Nos. 15 and 19; Order granting HUD's Motion for Partial Summary Judgment (Oct. 30, 1995) at 3-5.[4]

Defendant also asserts that the PPCs were not "false" because the government had knowledge of Mr. Gurino's involvement in Atratech at the time it was bidding on the NYCHA contracts. Mr. Gurino carries the burden of proof on this issue because he raised it as a defense in his Answer. He failed, however, to offer any evidence to meet his burden. In any event, the record demonstrates that the government did not have such knowledge. Mr. McGowan, the HUD investigator, furnished unrebutted testimony that neither NYCHA employees nor HUD personnel knew of Mr. Gurino's involvement in Atratech.[5] Tr. 42-43, 50-51.

2. Imposition of civil penalties is warranted.

A penalty may be assessed provided that the false statements contained a certification and that Defendant had a duty to disclose his participation in Atratech. 31 U.S.C. § 3802(a)(2)(B) and (C). Both conditions have been met.

The PPCs contained a certification. Finding of Fact No. 10; *see also* 24 C.F.R. § 200.219. Moreover, Defendant had a duty to disclose his role at Atratech based on a requirement of the PPCs, as well as HUD regulations. The PPCs require the identification of all principals and HUD regulations require all principals to sign, certify, and file each PPC. Finding of Fact No. 10; 24 C.F.R. §§ 200.217(a), 200.218. Because Mr. Gurino was a principal, he had a duty, but failed, to identify himself as such on the PPCs. Thus, imposition of civil penalties is warranted.

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[4]Moreover, obviously Mr. Gurino, himself, could not sign or submit the PPCs, because such activity would disclose the very facts that Defendant and his co-conspirators intended to conceal.

[5]Defendant unsuccessfully attempted to address this issue prior to hearing. A mere one week before hearing, Defendant requested 16 subpoenas and moved for a continuance to serve the subpoenas and conduct discovery on the issue of whether NYCHA employees knew of Mr. Gurino's participation in Atratech. I denied Defendant's request and motion because it was untimely and because although Defendant raised this issue in his July 26th Answer, he failed to seek discovery on the issue until one week prior to a hearing that had been scheduled for months. *See* 24 C.F.R. § 28.45(c); Order (Nov. 2, 1995).

Defendant raises various arguments in his Answer to contest liability under the Act. He asserts that this action constitutes double jeopardy. Assuming *arguendo* that double jeopardy is applicable here, Defendant waived any such rights. *See United States v. Broce*, 488 U.S. 563 (1989). The plea agreement signed by Defendant states that the government is entitled to pursue "any and all available civil and administrative penalties." G. Ex. 26, ¶ 15. Thus, he cannot now assert double jeopardy. *See United States v. Cordoba*, 71 F.3d 1543, 1546-47 (10th Cir. 1995); *Montoya v. New Mexico*, 55 F.3d 1496, 1499 (10th Cir. 1995).[6] Also, Defendant contends that a penalty is inappropriate because HUD did not suffer any loss; rather the Department benefitted from Atratech's performance of the contracts. Although HUD's loss or benefit may be a factor in determining the amount of the penalty, *see* 24 C.F.R. § 28.61(b)(5) and (6), a government loss is not a prerequisite for imposition of a penalty. *See* 31 U.S.C. § 3802. Defendant also asserts the he did not receive reasonable notice of the violation. HUD, however, notified him by service of the Complaint. In addition, although Defendant maintains that HUD selectively prosecuted him, he offers no evidence to support this contention. Finally, Defendant argues generally that the Act and HUD's implementing regulations are constitutionally vague. These issues are inappropriate for this forum. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 936 n.4 (2d Cir. 1976).

Defendant claims that this action is barred by the statute of limitations. HUD failed to address this issue. The Act and regulations establish a six year statute of limitations from the date of service of the notice of hearing. 31 U.S.C. § 3808(a); 24 C.F.R. § 28.93(a). In this case, two false statements were made to HUD more than six years prior to service of the notice of hearing on August 25, 1995. The PPCs for the St. Nicholas Houses (Project # PL 883532-CIAP7) and the Gowanus Houses (Project # PL 883525-CIAP7) were made to HUD on or around June 13, 1989, and July 6, 1989, respectively. G. Exs. 1E and 1Y; Tr. 45-47. Thus imposition of a civil penalty for 23 of the 25 false statements is appropriate.

3. Substantial civil penalties are appropriate.

HUD requests imposition of the maximum amount of civil penalties possible - $5,000 for each of the false statements. *See* 31 U.S.C. § 3802(a)(2). Based on consideration of the regulatory factors for determining the amount of civil penalties, I find that a penalty of $4,000 for each of the 23 false statements, or a total of $92,000, is appropriate.

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[6] I also note that the Act provides for a civil penalty "in addition to any other remedy that may be prescribed by law." 31 U.S.C. § 3802(a)(2).

HUD's regulations set forth the following factors[7] for consideration in determining the amount of the civil penalty:

(1) the number of false statements;
(2) the amount of money involved;
(3) the time period over which the false statements were made;
(4) the degree of defendant's culpability;
(5) whether the defendant attempted to conceal the misconduct;
(6) the complexity of the transaction and the defendant's sophistication, including prior participation in similar transactions;
(7) whether the defendant has engaged in a pattern of similar misconduct;
(8) whether the defendant cooperated in or obstructed the investigation;
(9) whether the defendant assisted in prosecuting other wrongdoers;
(10) whether the defendant has been found in a criminal, civil, or administrative proceeding to have engaged in similar misconduct, or to have dealt dishonestly with the Federal or state government;
(11) the government's loss, including investigative costs;
(12) the amount of the penalty compared to the amount of the government's loss;
(13) the potential or actual impact of the wrongdoing on the public confidence in government programs; and
(14) the need to deter the defendant and others.

24 C.F.R. § 28.61(b).

As part of a scheme to win government contracts, Defendant made a significant number of false statements, involving a large sum of money (*i.e.*, for contracts totalling approximately $22 million), over an extended period of time. Defendant's culpability is great. He cannot shift the blame to others and disassociate himself from his fraudulent activities. *See supra* p. 6.

Defendant succeeded in his attempt to conceal his participation in the contracts and Atratech. The scheme, although not extremely complex required a certain degree of sophistication. Defendant's sophistication was based, in part, on his prior dealings with HUD and government funded contracts. In addition, he engaged in similar fraudulent

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[7]The factors are set out in the order they are discussed in this Decision, not in the order set forth in the regulation. *See* 24 C.F.R. § 28.61(b). Although there are 16 factors, two have not been considered in determining the amount of the penalty - (1) where the misconduct of employees is imputed to the defendant, the extent to which the defendant's practices fostered the misconduct, and (2) the degree to which the defendant has involved others in the malfeasance. The first factor is not relevant, and there is no information concerning the second.

conduct with NYCHA by failing to disclose his role in Atratech in the BEQs. Also Defendant's refusal to cooperate in the investigation or prosecution of others mandates a severe penalty.

A large penalty is also warranted because Defendant has been found in other criminal and administrative proceedings, to have engaged in similar misconduct. In 1986, Defendant was convicted of obstruction of justice, and in 1993, he pleaded guilty to money laundering and conspiracy charges. Defendant's company, ARC, was debarred by the City of New York in May of 1986. Soon thereafter, Defendant's two employees formed another company, Hi Tech, to work on the very contracts that ARC had been debarred from participating in. Hi Tech, too, was debarred by New York City because it was found to be ARC's "alter ego." From February 1988 through February 1991, ARC was suspended and debarred from participating in HUD contracts. From May of 1988 until May of 1993, HUD suspended and debarred Defendant from participation in HUD contracts. Finally, in July of 1993, Defendant was again suspended by HUD, and he was debarred indefinitely in April of 1994. The convictions, debarments, and suspensions were based on Defendant's dishonest dealings and his lack of responsibility to do business with the government.

The only factors compelling consideration of a lesser penalty are those addressing the amount of the government's loss and a comparison of the loss with the penalty. Defendant argues that any penalty should be a minimum one because the government did not lose money on the contracts and they were satisfactorily performed. In addition, Defendant asserts that because Atratech was the low bidder, the company promoted competition, thus the government received yet another benefit. While it is true that the government did not suffer a monetary loss from Atratech's performance on the contracts, it incurred costs from the investigation of Defendant's scheme. As concerns Defendant's second point relating to the competitive bidding process, the record is silent as to any benefit HUD received. *See* Tr. 47-48.

In any event, although HUD did not suffer monetary loss, the potential or actual impact of the wrongdoing on the public confidence in government programs must be assessed. Public confidence in HUD's administration of its programs would surely erode if schemes such as those perpetrated by Defendant receive only a proverbial slap on the wrist. This is particularly true given that Defendant's history demonstrates that he is not easily dissuaded from wrongdoing by even severe government sanctions (*i.e.*, debarments and suspensions).

Defendant continued to participate in HUD contracts in blatant disregard for the sanctions proscribing such participation. Defendant was suspended or debarred at the time that he was a principal at Atratech while Atratech was bidding on and performing

government contracts. Yet the debarments and suspensions failed to prevent his surreptitious participation in the NYCHA/HUD contracts. Thus, a significant penalty is necessary to deter him, as well as others, from similarly disregarding HUD's efforts to deal only with responsible contractors. Accordingly, after consideration of the deterrence benefits, as well as the other regulatory factors, I conclude that a penalty of $4,000 for each of the 23 statements, or a total of $92,000 is appropriate under the facts of this case.

DETERMINATION AND ORDER

Defendant Anthony Gurino caused 23 PPCs to be made and submitted. The PPCs are false statements that violate 24 C.F.R. § 28.5. Accordingly, Defendant is liable for civil penalties pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-12. After consideration of mitigating factors advanced by Defendant, as well as consideration of other factors set forth in 24 C.F.R. § 28.61, I find that a civil penalty of $92,000 is warranted. Therefore, it is hereby

ORDERED that on the date this Decision becomes final, Anthony Gurino is liable to the United States for a civil penalty of $92,000.

NOTICE

Defendant has the right:

(1) to file a motion for reconsideration with this tribunal within twenty (20) days of receipt of this Decision in accordance with 24 C.F.R. § 28.75, or;

(2) to file a notice of appeal with the Secretary of HUD within thirty (30) days of issuance of this Decision or within thirty (30) days after a determination on a motion for reconsideration, pursuant to 31 U.S.C. § 3803(i) and in accordance with 24 C.F.R. § 28.77.

William C. Cregar

WILLIAM C. CREGAR
Administrative Law Judge