UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:	*	
CAROLYN GLOVER, A/K/A CAROLYN SAWYER, AND TOM SAWYER PRODUCTIONS, INC., A/K/A THE TOM SAWYER COMPANY,	*	**Docket No.: 13-0049-DB**
Respondents.	*	

ORDER GRANTING RESPONDENTS' REQUEST FOR RECONSIDERATION OF THE DECISION TO DEBAR CAROLYN GLOVER, aka CAROLYN SAWYER and TOM SAWYER PRODUCTIONS AKA THE TOM SAWYER COMPANY AND DENYING THE GOVERNMENT'S OPPOSITION TO RESPONDENTS' REQUEST FOR RECONSIDERATION OR ALTERNATIVELY GOVERNMENT'S CROSS-MOTION FOR RECONSIDERATION

INTRODUCTION AND BACKGROUND

This matter is before the undersigned on Respondents' filing, through counsel, a *Request for Reconsideration of the Decision to Debar Carolyn Glover, aka Carolyn Sawyer and Tom Sawyer Productions aka The Tom Sawyer Company*. Respondent Glover was debarred for three years in a Determination issued August 14, 2014. The Determination found that Respondent violated HUDAR § 2452.203-70,[1] a regulatory provision that was specifically incorporated into a contract (RCC contract) HUD awarded Respondents in 2007-2008. Additionally, in the Notice of Proposed Debarment issued November 8, 2013, on which the decision to debar Respondent was based, it was alleged that Respondents paid a company (Innovative) owned by two HUD

[1] HUDAR § 2452.203-70 explicitly prohibits the award of contracts to Government employees or a business concern or other organizations owned by government employees. The last sentence of this provision elaborates that "[F]or the purposes of this contract, this prohibition against the use of government employees includes any work performed by the contractor or any of its employees, subcontractors, or consultants."

employees for the employees' efforts in assisting Respondents in securing the RCC contract and another contract (HMDA contract) with HUD. The RCC contract also incorporated by reference FAR § 52.203.03, which put Respondents on notice that the payment of a gratuity with the intent to obtain a contract or favorable treatment under a contract was prohibited. The RCC contract also put Respondents on notice that they were prohibited from awarding contracts to government employees because, as stated above, the contract incorporated by reference HUD Acquisition Regulation (HUDAR) § 2452.203.70.

RESPONDENTS' ARGUMENT

Respondents first acknowledge a twofold purpose of HUDAR § 2452.203-70, and its progenitor, 48 C.F.R. § 3.601(a), that is, "to avoid any conflict of interest that might arise between a Government employee's interests and his duties; and to avoid the appearance of favoritism or preferential treatment by the government towards its employees."

From their analysis of FAR § 3.601 and HUDAR § 2452.203-70, Respondents conclude that neither "regulation is meant to broadly restrain the ability of a government contractor, like The Tom Sawyer Company, to contract with third parties." Respondents argue that, nonetheless, "this is how HUDAR § 2452.203-70 appears to be applied in the Determination based on the Determination's conclusion that by "engaging the services of Innovative, Respondents [violated] a regulatory provision [(HUDAR § 2452.203-70)] in a government contract."

According to Respondents, the "only interpretation" suggested by the Determination is that "once Respondents had a contract with HUD that contained HUDAR § 2452.203-70, Respondents could not utilize the services of *any* entity owned or controlled by a government

employee to perform *any* work at all, regardless of whether that work was related to the HUD contract." (Emphasis in original)

Respondents argue next, invoking HUDAR § 2452.203-70, especially the introductory phrase "[F]or purposes of this contract," that "Respondents did not engage Innovative to perform any work under either of the two HUD contracts at issue, or any other government contract. Thus, Respondents respectfully did not violate HUDAR § 2452.203-70 [and because] this is the only basis cited for debarring Respondents, [the Determination] should be rescinded."

Respondents cite as mitigating factors, Respondents' settlement agreement with the Department of Justice (DOJ) in which they paid $100,000.00 to resolve DOJ's claims against them arising out of the same misconduct alleged in the debarment proceeding; Respondents' clean record since the payments were made to Innovative in 2007-2008; and the number of accolades received by Respondents during the company's 18 years of existence.

Respondents conclude that, based on their "history of providing quality services to the Government [and] their spotless record for the past six years", their debarment is punitive. Accordingly, Respondents request that HUD terminate their debarment.

GOVERNMENT COUNSEL'S ARGUMENTS

The Government opposes Respondents' Request for Reconsideration while requesting, in the event Respondent's request is granted, "Reconsideration of the Determination's rejection of the charge that Respondents payments were made to obtain contracts or favorable treatment."

The Government argues that, because Respondents did not identify any of the specific factors in 2 C.F.R. § 180.875 that allow for reconsideration of a debarment decision, Respondents' reconsideration request must be considered under paragraph (e) "Other reasons the debarring official finds appropriate."

Counsel rejects Respondents' argument that the Debarring Official misapplied HUDAR § 2452.203-70. Similarly rejected is Respondents' assertion that the Debarring Official engaged in an expansive reading, as mentioned *supra*, of the cited regulatory provision. Counsel notes the Determination did not find that Respondent violated HUDAR § 2452.203-70 by engaging a government employee-owned company to perform services for a matter unrelated to Respondent Glover's affiliate, Tom Sawyer Company (TSC). Counsel refers to the conclusion in the Determination that Innovative, the company owned by the two HUD employees, was compensated by TSP for services rendered on the two contracts only (RCC and HMDA contracts) and not for any other contract.

Counsel points out that it is in their Request for Reconsideration that Respondents, for the first time, "argue that TSP never engaged Innovative to assist with the performance of any HUD contract [nor did they] engage Innovative to perform any work under either of the two HUD contracts at issue."

Counsel objects to Respondents' raising this argument, characterizing it as "improper to make it at this time." Respondents cannot claim this new-found argument "constitutes newly discovered evidence…[nor] contradict statements made previously to the Debarring Official." Respondents' raising, in this proceeding for the first time, that "Innovative was not hired for the purpose of performing services under the HUD contracts, "does not satisfy the requirement set

forth in 2 C.F.R. § 180.825 that a respondent's submission must identify (1) *Specific facts that contradict the statements* contained in the Notice of Proposed Debarment." (Emphasis added).

Counsel rejects Respondents' attempts at making "piecemeal arguments" and offering different arguments at different times. Counsel notes that Respondents made two submissions and had an additional opportunity to supplement the record during the debarment proceeding, yet waited until now to raise, through their counsel, an argument that had not been raised heretofore. Counsel reasons that, as in a judicial proceeding, the Debarment Official, in issuing his Determination, "should be able to assume that a litigant has fully stated his position". (Citation omitted). The Debarring Official should not be required to "conjure up questions never squarely presented." (Citation omitted). Accordingly, because of Respondents' failure to assert in the debarment proceeding that the services provided by Innovative were not for the two HUD contracts, the Debarring Official should not consider this new claim in this reconsideration proceeding.

Counsel for the Government also contends that there are no mitigating factors permitting termination of Respondents' debarment. Counsel notes that the mitigating factors raised by Respondents in their Reconsideration request, i.e., the settlement with DOJ and Respondents' clean record since 2007-2008, were considered and addressed in the Determination. Counsel concludes that the three-year debarment imposed in the Determination is consistent with the regulations and HUD's obligation to protect the public interest and the integrity of the procurement programs.

THE GOVERNMENT'S CROSS MOTION FOR RECONSIDERATION

The Government seeks in its Cross Motion for Reconsideration (Cross Motion), in the event Respondents' request to terminate their debarment is granted, that this matter be referred to an Administrative Judge for fact-finding. Specifically, the Government seeks reconsideration of the conclusion in the Determination that the two contracts at issue in this matter (the HMDA and RCC contracts) were not granted to Respondents based on an improper relationship between Respondents and the two HUD employees, the Director of the Office of Small and Disadvantaged Business Units (OSDBU) and her husband.

The Government contends, as it did in the debarment proceeding, that Respondents violated 48 C.F.R. § 52.203.03, which provides that

> (a) The right of the Contractor to proceed may be terminated by written notice, if, after notice and hearing, the agency head or a designee determines that the Contractor, its agent, or another representative-(1) Offered or **gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and (2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract.** (Emphasis added by counsel.)

The Government argues that intent is an element of the violation alleged by the Government. A determination of intent should be made by a fact-finder after considering relevant facts such as

> (1) Items of value given or payments made by Respondents to Innovative or to the two HUD Employees; (2) the exact nature of the work performed by Innovative for Respondents; and (3) Innovative's owners' credentials, expertise, and abilities beyond influencing contracting decisions; and (4) the true nature of the relationship between Carolyn Sawyer and the two HUD employees, among others.

Counsel contends that, notwithstanding the "Debarring Official made a preponderance of the evidence determination on this issue, a determination should have been made at a fact-finding hearing."

Accordingly, the Government requests that, if Respondents' Request for Reconsideration is granted, the August 14, 2014 Determination's Conclusion (see #10) ("The evidence is insufficient to prove that the payments made to Innovative were intended to obtain a contract or favorable treatment under a contract") be reconsidered and that the matter be referred for fact finding."[2]

For the reasons discussed below, the Government's invitation to reconsider the August 14, 2014 Determination is declined.

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[2] The Government styled its action a Cross-Motion for Reconsideration. The regulations, of course, confer the right to seek reconsideration on a debarred person. No mention is made of the Governments' right to request a reconsideration of the debarring official's decision. See 2 C.F.R. § 180.875. As such, it is a discretionary dispensation that the debarring official may grant in the pursuit of justice. Arguably, because the Government filed a Motion for Referral in 2013 that was denied, the filing of the subject motion, however styled, seeking to refer an issue for fact-finding, is not, strictly speaking, a motion for reconsideration but a motion to refer for fact-finding. The Government, then, would have had two bites of the apple. Even if the government's styling of its motion is accepted, i.e., a cross-motion for reconsideration, it cannot overcome the well-settled principle that a "motion for reconsideration is not a substitute for appeal." *Fontanez v. Lopez*, 2013 U.S. Dist. LEXIS 7975 (Jan. 17, 2013). In a strict sense, the challenge here, however disguised, has less to do with the putative failure to consider material facts in dispute than with the Determination's legal conclusion with respect to the insufficiency of evidence. *Henderson v. Smucker*, 2001 U.S. Dist. LEXIS (D.C. Cal,. Nov. 20, 2013)

There is the further point that the regulations seem to contemplate a referral for fact-finding before the issuance of the debarring official's decision. It would seem to be an incongruity for the debarring official to issue his decision then allow a party to seek referral to an Administrative Judge *ex post facto*. The possibility of inconsistent decisions would not promote confidence in the debarment system. Also, because the debarment regime does not provide for an appeals process within the agency, a decision by the debarring official is final and administratively unappealable. For all these reasons, a motion to refer must have prospective applicability only, that is, it is not a proper motion to file *after* the debarring official's decision is issued. If a motion to refer could be filed after the debarring official's decision is issued, it could only be done by leave of the debarring official. That the debarring official is the final authority in the debarment system is made very apparent in 2 C.F.R. § 180.845 (c), which provides that "The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous."

DISCUSSION

The Government's Cross Motion

For convenience, we deal first with the Government's cross-motion. As background, a little history here is instructive to provide the proper context to consider the cross-motion. After the issuance of the February 20, 2013 Notice of Proposed Debarment (Notice) to Respondents, the Government, on May 16, 2013, filed a Motion to Refer to a Hearing Officer. That Motion was denied in an Order issued July 2, 2013. In its Motion to Refer, the Government "note[d] that the Respondents' dispute of the factual allegations set forth in the Notices[3] provides a basis to refer this matter to a hearing officer for fact-finding."

The July 2, 2013 Order denying the Governments' Motion to Refer acknowledged that there were factual allegations, *inter alia*, in the Notices, but concluded that "it is not quite clean that all the disputed facts are not resolvable in this forum." As the Government apparently now sees it, the factual allegation that was not correctly resolved was whether there was sufficient evidence to prove that the payments made by Respondents to Innovative "were intended to obtain a contract or favorable treatment under a contract." The Governments' position is that had this matter been referred to an Administrative Judge (AJ) for fact-finding, Respondents' intent [which is] an element of the violation alleged" could have been determined by a fact-finder based on such facts as "(1) items of value given or payments made by Respondents to Innovative." (2) The exact nature of the work performed by Innovative for Respondents; and (3) Innovative' s owners' credentials, expertise, and abilities beyond influencing contracting

[3] Separate Notices of even date were issued to Respondent Glover and TSP.

decision; and (4) the true nature of the relationship between Carolyn Sawyer and Mr. and Mrs. Hayes among others."

As the record shows, this matter was investigated by HUD's Office of Inspector General (OIG). The Justice Department also presumably conducted its own investigation in settling its dispute with Respondent Glover. Mr. Hayes, one of the HUD employees and husband of the OSDBU Director, pleaded guilty to a federal charge of conspiracy to influence a government official. HUD itself, in the prosecution of the debarment charges, produced a voluminous record. HUD's prehearing brief, itself a copious document with its exhibits, was detailed in its exposition of the issues and its treatment of the evidence. The hearing itself was delayed for months at then-Government counsel's request to facilitate counsel's investigation and marshaling of the Government's evidence. Respondent Glover sought Freedom of Information Act (FOIA) information and OIG investigative reports, which she insisted Government counsel had relied on to prepare the government's case. Government counsel's position was that there was nothing more to be produced, in terms of evidentiary material which Government counsel relied on to prosecute the Government's case, to turn over to Respondents. Nonetheless, Government counsel now asserts that if information with respect to the four "relevant facts" cited *supra* was available to counsel now, counsel could, it is implied, persuade a fact-finder to make a determination favorable to the Government of Respondent's intent in making the payments at issue to Innovative.

At the risk of redundancy, it is worth examining individually each of the four "relevant facts" counsel enumerated. First, "Items of value given or payments made by Respondents to Innovative or Mr. or Mrs. Hayes." The Government did not allege until now that "items of value" were given to the Hayes. It is now too late to attempt to raise this allegation. The

payments made were well documented. Except as an exercise in speculation and conjecture, no other payments to Innovative were found, as far as the record goes, either by the OIG or DOJ - investigative bodies with the expertise and resources to do a more thorough job than presumably HUD counsel's resources would allow. The second "relevant fact" is "the exact nature of the work performed by Innovative for Respondents." Respondents' testimony at the hearing and in their submissions on this issue, was that Innovative provided technical assistance.[4] The Government argued that the work performed by Innovative was "minimal."

Respondents' admission, including their unrebutted assertion that the amount paid to Innovative was consistent with industry practice, fairly settled the issue of work performed. It is worth repeating that the Government dismissed Respondents' claim of Innovative's work, characterizing it as "minimal," a clear indication that the Government was satisfied with the evidence it unearthed on this issue. The Government does not even make a proffer or reference to newly discovered evidence in support of its search for the "exact nature of the work performed." See 2 C.F.R. § 180.880 (a). "Relevant fact" #3- "Innovative's owners' credentials, expertise and abilities beyond influencing contracting decisions." Innovative's owners were employees of HUD. They both functioned in executive capacities as program directors. Presumably then-counsel had access to information in their personnel records that identified their credentials and their abilities. This issue was never raised in the debarment proceeding and may not be raised now. The Government fails in its effort here because it has been long held that "[m]otions for reargument or reconsideration may not be used as a means to argue new facts or

[4] Respondents apparently are disputing now, in their Request for Reconsideration, their prior testimony. That matter will be addressed *infra*.

issues that inexcusably were not presented . . . in the matter previously decided." *Johnson v. Temple University*, 2014 U.S. Dist. LEXIS 96997 (July 17, 2014).

Notwithstanding the calumnious ring to the last phrase in Relevant Fact #3- the Hayes' "abilities beyond influencing contracting decisions," the Government at no time in the debarment proceeding questioned the Hayes' abilities. For the reasons stated *supra*, it is too late now to raise this issue, which, apparently, the Government attorney at the hearing did not think was relevant or material or appropriate, and probably viewed it as an un-clever indulgence and useless fishing expedition.

The simple fact is that because the attorney who represented the Government at the hearing thought that Innovative's assistance to Respondents was "minimal", its principals' abilities would seem of little value in determining the issue of "favorable treatment" as charged. In short, whether the Hayes' abilities were stratospheric or abysmal would have been of little or no count. It is the fact of the payments made by Respondents to the Hayes more so than the relationship between the amount of money received by the Hayes and their abilities or lack thereof.

Relevant Fact #4- "The true nature of the relationship between Carolyn Sawyer and Mr. and Mrs. Hayes." Again, it is not readily apparent what more facts could have been ferreted out if the matter had been referred to an Administrative Judge for fact-finding. Assuming *arguendo*, nevertheless, that it was determined that the Hayes and Respondent Glover had developed a relationship that went beyond and deeper than that found in the Determination, it is not apparent what incremental value that would have had to the Government's efforts in proving that Respondents were given favorable treatment in the award of the two contracts at issue. "A motion for reconsideration that simply rehashes previous arguments gives [the debarring official]

no reason to change" his Determination. *See Bacha v. Gonzales*, 2005 U.S. App. LEXIS 13046 (7TH Cir. June 1, 2005). The amount paid to the Hayes, as calculated by Government counsel, represented two percent of the value, approximately $36,000.00, of the contracts. Respondents argued, without contradiction, that the two percent represented the industry average for the assistance rendered by Innovative.

In brief, the issue raised in this case has less to do with how much was paid than with the fact that Government employees were paid. Government counsel believes that intent can be divined from the "circumstances surrounding the transaction in question and the weighing of evidence." There is no disagreement here, which is precisely why the Determination concluded that the evidence was insufficient to prove that the payments made to Innovative were intended to obtain a contract or favorable treatment under a contract. Nothing in the Government's Cross Motion traverses this conclusion. The Government's position, distilled to its core, is that "a preponderance of evidence determination on [this] issue. . .should have been made at a fact - finding hearing." The Government does not dispute that the Determination's conclusion was supported by facts - therefore, facts were found. *See, e.g.,* Conclusion #9, which effectively addresses each of the four "relevant facts" identified in the Cross-Motion. As has been held, the fact that, as here, the Government "may disagree with [the Determination's] application of the facts to the law. . .is not 'a manifest showing of a failure to consider material facts'." *Henderson v. Smucker*, 2013 U.S. Dist. LEXIS 166061 (D.C. Cal. Nov. 20, 2013) (citation omitted).

If the Government's rationale and arguments on this issue were accepted, it would lead logically and inexorably to the conclusion that the Government initiated the debarment action against Respondents on an inchoate set of facts, not on "adequate evidence" 2 C.F.R. 180.900 or "principles of fundamental fairness." 2 C.F.R. 180.610. That is the ineluctable conclusion if the

Government is only now seeking to develop information/evidence on the four so-called "Relevant Facts." If these four relevant facts undergirded or formed the gravamen of the Government's charges, the Government's failure to develop them to its advantage, assuming there is/was evidence beyond that presented to support the charges, not surprisingly presaged the result reached in the Determination. As intimated earlier, the answers to these "relevant facts" existed either in the available HUD records or in the exhibits accompanying or referenced in Government counsel's submissions. It need not be added that the purpose of referring a matter to an Administrative Judge is to find facts, not to help *develop* facts that were easily susceptible of discovery by, or readily available to, the maker of the motion to refer.

In short, the vice in the Government's reasoning is its syllogistic approach, that is, any payment to a Government employee for a contract in which a fellow Government employee, both of whom are friends, was involved in the award of the contract evidences an intent by the receiving Government employee to influence the award of the contract. The Hayes and Respondent Glover were friends and as OSDBU Director Ms. Hayes had a role in the award of the contract to Ms. Glover who then paid Ms. Hayes through Ms. Hayes Company, Innovative. Ergo, the payments were intended to influence Ms. Hayes role in the award of the contract to Ms. Glover. The facts, however, do not support the Government's undeveloped syllogism and are not so neatly arrayed. Indeed, as explicated in the Determination, the facts do not support the Government's position, notwithstanding any implications of improper influence in the Government's Motion.

RESPONDENTS' REQUEST FOR RECONSIDERATION

A. Respondents Engaged Innovative to Perform Work for a Fee.

Respondents interpret language in the Determination as "broadly restrain[ing] the

ability of a government contractor, like Tom Sawyer Company, to contract with third parties." Respondents advance this interpretation because, as they see it, "this is how HUD 2452.703-70 appears to be applied in the Determination," noting "[s]pecifically, the Determination concludes that by engaging the services of Innovative, Respondents [violated] a regulatory provision [(HUDAR § 2452.203-70)] in a government contract."

The Determination at issue addressed only the matter of Tom Sawyer's actions. The Determination never purported to be promulgating a rule to govern the conduct of other contractors. To the extent the Determination has broad applicability, it would reach only situations analogous to Tom Sawyer's. That result, however, would not be unique to this Determination. Nevertheless, the Determination was specifically limited in its language, holding Respondents' conduct actionable because they violated "a core provision of the contracts that they were awarded..." Respondents' attempt to refine and bolster their interpretation by stating what they describe as the "essence" of the Determination, which is, "that once Respondents had a contract with HUD that contained HUDAR § 2452.203-70, Respondents could not utilize the services of *any* (emphasis in original) entity owned or controlled by a government employee to perform *any* (emphasis in original) work at all, *regardless of whether that work was related to the HUD contract.*" (Emphasis added). Respondents see this as "the only interpretation of the Determination that could include the services Innovative provided to Tom Sawyer, services described by HUD counsel as "minimal."

Respondents' reducing their argument to its "essence" is no more helpful to Respondents' cause than the first pedagogical iteration which set up the bogeyman of no broad restraint in HUDAR § 2452.203.70. To the contrary, Respondents seem to be without restraint and unbridled in characterizing what "the Debarment suggests." Nothing in the challenged Conclusion could

lead a disinterested reader to agree with the "essence" of the Determination as asserted by Respondents and cited *supra.*

It is of little help also to Respondents to seize on Government counsel's description of the services provided by Innovative as "minimal" to attempt to validate Respondents' "essence" interpretation of the Determination. As a reading of the Determination would make plain, the Determination did not credit Government counsel's description of Innovative' s services to Respondents as minimal. In fact, the Determination eschewed making a finding on the issue of services provided and the level of appropriate payment therefor because neither party presented evidence on that issue.[5]

Respondents now claim, a claim not heretofore raised, that Respondents never engaged Innovative to assist with the performance of any HUD contract. First, as a procedural matter, accepting for the sake of argument the validity of this claim, it should have been raised at the hearing. Raising it now, in a motion or request for reconsideration, when, presumably, Respondents knew this or could have known this, is not the proper action and must be rejected. Thus, it has been held that "Motions for Reconsideration have a limited appropriateness, because opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." 1995 HUD ALJ LEXIS 41 (January 17, 1995), citing *Quaker v. Gulf,* 123 F.R.D. 282, 288 (D.C. III. 1988). And "standards of 'clear error' or 'manifest injustice' preclude reconsideration of arguments made previously or arguments that a party merely failed to raise earlier." *Id., citing Backlund v. Barnhart,* 778 F.2d 1386, 1388 (9th Cir. 1985).

[5] For clarification, it is useful to add that while the level of services and the amount paid therefor were factors to be considered, the threshold question for resolution was whether the parties' relationship influenced the award of the contracts. Because that question was answered in the negative, there was little reason to engage in a detailed analysis of other factors, though they were not ignored.

Even were this new claim to be accepted for consideration, the available evidence in the administrative record challenges its credibility. Respondent Glover herself writes that she did not knowingly make payments to the two HUD employees. Respondents also argued that the fee paid to Innovative was "structured to provide ongoing consulting and not pay for play payment." *See* Determination at 17. These and other statements made by Respondent Glover are more in the nature of an acknowledgment than of a denial that Respondents "engage[d] Innovative to perform. . . work under. . .the two contracts at issue." *See* Respondents' Request for Reconsideration at 3.

In brief, not only does the denial come too late, but it lacks credibility. The payments to Innovative, and the reasons therefor, tell a different story, and the payments themselves cannot be ignored.

B. Mitigating Factors

The Determination considered certain mitigating factors, including Respondent Glover's clean record since 2007-2008 when the contracts at issue were awarded, her settlement with DOJ over her business relationship with the Hayes, etc. Respondents now raise these same factors in mitigation of Respondent Glover's actions. A review of the discussion with respect to the mitigating factors suggests that all the factors were not properly considered nor given their proper weight, and thus did not affect the period of debarment imposed. Indeed, the Determination concluded that the aggravating factors on balance outweighed the mitigating factors. For the reasons discussed *infra* that conclusion, because it did not carefully consider all the mitigating factors, resulted in the imposition of a relatively lengthy period of debarment that may be considered punitive - - a result prohibited under 2 C.F.R. § 180.125 (c).

The touchstone for determining whether a person should be "exclude[d] from Federal programs" is whether that person is presently responsible. *See, e.g., In the Matter of Keith L. Bosak,* 1995 HUD ALJ LEXIS (April 21, 1995) ("The primary test for debarment is present responsibility.") A determination of "present responsibility" rests on several factors, including those specifically identified as mitigating factors, pursuant to 2 C.F.R. § 180.860 and "(s) Other factors that are appropriate to the circumstances of a particular case." *Id.* at *(s)*. It is well settled also that "[i]n the context of debarment proceedings, responsibility is a term of art that encompasses integrity, honesty and the general ability to conduct business lawfully." *In the Matter of Gary M. Wasson*, 2004 HUD ALJ LEXIS 31 (August 5, 2004). And "[d]etermining responsibility requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent." *In the Matter of Carolyn June Glenn Shackelford*, 2002 HUD ALJ LEXIS 28.

Respondents continued to do business with HUD, according to the record, as late as 2011, some four years after the award of the contracts that gave rise to the instant dispute. After careful review, I have decided that this factor, along with the other mitigating factors mentioned before, and consistent with the authorities cited above, militates against the imposition of a three-year debarment, and requires consideration of a lesser term, without disturbing the Determination's conclusion that Respondents' actions violated HUDAR § 2452.203.70. The conclusion reached here today recognizes that while Respondents have shown a level of responsibility with respect to assuaging concerns over "the risk of doing business" with them, *In the Matter of Carl W. Seitz*, 1992 HUD BCA LEXIS 3 (April 13, 1992), the "period of debarment should be long enough to demonstrate that the government takes the conduct at issue seriously, and that it will refrain from doing business with debarred [persons] until they have had

sufficient time to reflect on the cause for their debarment and to conform their conduct to the standard of present responsibility." *In re Richard Widler*, HUD ALJ 92-1766-DB, 1992 HUD ALJ LEXIS 59 (June 18, 1992).

Accordingly, I have determined, for the reasons discussed here, that a debarment for a lesser period than the three-year period imposed in the Determination of August 14, 2014 achieves a more just and appropriate result.

CONCLUSION

For all the foregoing reasons, it is hereby ORDERED that Respondents' *Request for Reconsideration of the Decision to Debar Carolyn Glover, aka Carolyn Sawyer and Tom Sawyer Productions aka The Tom Sawyer Company* be GRANTED in part and DENIED in part. The Determination issued August 14, 2014 is modified to reduce Respondents' period of debarment from three years to 18 months. And it is further

ORDERED that the *Government's Opposition to Respondents' Request for Reconsideration or Alternatively Government's Cross-Motion for Reconsideration* be DENIED.

7/21/16
Date

Craig T. Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2016, a true copy of the ORDER GRANTING RESPONDENTS' REQUEST FOR RECONSIDERATION OF THE DECISION TO DEBAR CAROLYN GLOVER, aka CAROLYN SAWYER and TOM SAWYER PRODUCTIONS AKA THE TOM SAWYER COMPANY AND DENYING THE GOVERNMENT'S OPPOSITION TO RESPONDENTS' REQUEST FOR RECONSIDERATION OR ALTERNATIVELY GOVERNMENT'S CROSS-MOTION FOR RECONSIDERATION was served in the manner indicated.

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