

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

In the Matter of:	*	
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	*	
TWIN ASSETS LLC,	*	
OTIS OFORI, and	*	
CURTIS OFORI,	*	DOCKET NO. 16-0007-DB
	*	
	*	
Respondents.	*	
	*	

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Proposed Debarment dated October 15, 2015 ("Notice"¹), the Department of Housing and Urban Development ("HUD") notified Respondents TWIN ASSETS LLC, OTIS OFORI and CURTIS OFORI that HUD was proposing their debarment from future participation in procurement and nonprocurement transactions as participants or principals with HUD and throughout the Executive Branch of the Federal Government for a three-year period from the date of the final determination of this action. The Notice also informed Respondents that the proposed action was in accordance with 2 C.F.R parts 180 and 2424. Additionally, the Notice advised Respondents that there was cause for their debarment, based on their submission of an erroneous certification, pursuant to 2 C. F.R. §§ 180.800(b) and (d).

A hearing on Respondent's proposed debarment and suspension was held in Washington, D.C. on May 10, 2016 before the Debarring Official's Designee, Mortimer F. Coward. Constantinos G. Panagopoulos, Esq., along with Amy Glassman, Esq. and Theodore Flo, Esq. appeared on behalf of Respondents. Brian A. Dupre, Esq., Ana L. Fabregas, Esq., and Jennifer Lake, Esq. appeared for the Government.

¹ Each Respondent was issued a separate, though substantively identical, Notice. Accordingly, reference to "Notice" may include all three Notices except where, for clarity or accuracy, a particular Respondent needs to be identified.

SUMMARY

I have decided, pursuant to 2 CFR part 180, to debar Respondents from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government for a period of eighteen months from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The Notices of Proposed Debarment dated October 15, 2015.
- (2) A letter from Respondents' counsel to the Director of the Compliance Division dated November 30, 2015, responding to the Notice.
- (3) The Government's Brief in Support of Suspension and Three-Year Debarment for Twin Assets LLC, Otis Ofori, and Curtis Ofori filed March 18, 2016 (including all exhibits and attachments thereto) ('Government's Pre-Hearing Brief').
- (4) Respondent's Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB, and 14-0054-DB filed March 30, 2016.
- (5) Respondent's Motion to Refer to a Hearing Officer for Resolution of Factual Issues filed April 8, 2016.
- (6) Respondent's Hearing Statement filed April 8, 2016 (including all exhibits and attachments thereto).
- (7) Respondents' Motion for Leave to File Reply in Support of Their March 30, 2016 Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed April 8, 2016.
- (8) Government's Opposition to Respondent's Motion to Refer to a Hearing Officer for Resolution of Factual Issues dated April 11, 2016.
- (9) Government's Response to Respondent's Motion for Leave to File Reply in Support of Their March 30, 2016 Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed April 12, 2016.
- (10) Order Denying Respondents' Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed April 28, 2016.
- (11) Order Denying Respondent's Motion to Refer to a Hearing Officer for Resolution of Factual Issues filed April 28, 2016.
- (12) Order Granting Respondents' Motion for Leave to File Reply in Support of Their March 30, 2016 Motion to Consolidate Dockets Numbered 16-0006-DB, 16-0007-DB and 14-0054-DB filed April 28, 2016.
- (13) Respondents' Praecipe with exhibits attached filed May 2, 2016.
- (14) Government's Post-Hearing Brief in Support of a Three-Year Debarment for Twin Assets LLC, Otis Ofori, and Curtis Ofori filed May 31, 2016 (including all exhibits and attachments thereto).
- (14) Respondents' Post-Hearing Statement filed April 8, 2016 (including all exhibits and attachments thereto).

GOVERNMENT COUNSEL'S ARGUMENTS

Counsel states that Respondents Otis Ofori and Curtis Ofori (“Ofori Brothers”) submitted a bid around September 23, 2014, on behalf of their company, Twin Assets LLC, in response to a HUD solicitation notice for asset management services. In their bid, Respondents described their Marketing and Management (M & M) experience gained from their employment by Ofori & Associates (O & A)² and also indicated that O & A would be the primary subcontractor if they were awarded the contract. In January 2015, in an Amended Solicitation Notice, HUD requested bidders, and Twin Assets agreed to extend their bids for a further 120 days to May 14, 2015. Included in Respondents’ proposal was a completed Responsibility Matters Certification which, among other things, asked the Offeror whether the Offeror or any of the Offeror’s principals are proposed for debarment. Twin Assets responded in the negative. The Responsibility Matters Certification also included a provision, to which Respondents agreed, that required them to “provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.”

HUD issued a Notice of Proposed Debarment on April 13, 2015 to the Ofori brothers. On August 25, 2015 Respondents were notified that their bid was eliminated. Respondents did not notify the Contracting Officer of their proposed debarment, as required by the Responsibility Matters Certification. However, Respondents reached out to the Contracting Officer on several occasions in an attempt to determine why their bid was unsuccessful. At no time during that period did Respondents inform the Contracting Officer of their proposed debarment. HUD awarded the contract on September 25, 2015 to other Offerors. Respondents were proposed for debarment in a Notice issued on October 15, 2015 for their failure to give the Contracting Officer written notice of their debarment, as proposed in the April 13, 2015 Notice. On October 21, 2015, Respondents informed the Contracting Officer, for the first time, of their proposed debarment.

Counsel argues that Respondent’s failure to give immediate written notice to the Contracting Officer that their certification (because of the Notice of Proposed Debarment issued to them by HUD on April 13, 2015) had become erroneous was willful, thus cause for debarment pursuant to 2 C.F.R. § 180.800(b) and (d). Additionally, counsel notes that Twin Assets, in submitting a proposal in response to the HUD Asset Management Services Solicitation, a covered transaction, became a “participant.” 2 C.F.R. §§ 180.200 and 180.980. The Ofori brothers are also principals or participants, as defined in the relevant regulations. *See, e.g.*, 2 C.F.R. §§ 180.910 and 180.995. Because Respondents were participants or principals in a covered transaction, counsel continues, they are subject to debarment. 2 C.F.R. § 180.150. In this connection, Respondents’ failure to provide immediate written notice of their proposed debarment provides cause for their debarment pursuant to 2 C.F.R. §§ 180.800(b)(1) and (b)(3). Cause for debarment also

² O & A and Respondents’ father, the owner of O & A, had been proposed for debarment in a Notice issued by HUD on July 1, 2014.

exists under 2 C.F.R. § 180.800(d), according to counsel, “[a]s HUD is unable to ‘rely upon the truthfulness of the representations’ made by Respondents.” Gov’t’s Brief at 15.

Counsel finds Respondents’ explanation for their failure to provide notice to the HUD Contracting Officer of the Notice of April 13, 2015 proposing their debarment “troubling,” and their argument that they were too focused on business matters and other HUD proceedings against them as “legally insufficient” to excuse their failure. In like fashion, counsel dismisses Respondents’ argument that, because their bid expired 23 business days after their receipt of the April 13, 2015 Notice of Proposed Debarment, they did not have to provide written notice. As counsel sees it, an “Offeror’s commitment to comply with the requirements of its bid [does not] end prematurely.” Counsel adds that, as a matter of law, Twin Assets was obligated to comply with the Responsibility Matters Certification after May 14, 2015 to the date the contract was awarded, September 23, 2015. As such, Respondents’ suggestion that no duty devolved on them to notify the Contracting Officer of their proposed debarment because their bid had expired in May 2015 is similarly invalid.

Counsel also cites instances of Respondents’ inquiring and raising questions as late as October 14, 2015 seeking information, including a pre-award debriefing, on why their bid was found technically deficient. According to counsel, these actions are inconsistent with Respondents’ stated belief that “they had effectively withdrawn their offer when it ‘expired’ on May 14, 2015.” Counsel notes also that in Respondents’ seeking information from the Contracting Officer, nowhere is it evident in the email exchange that Respondents considered their bid “expired.” To the contrary, Respondents’ conduct evidenced a continued interest in the contract after May 14, 2015, the end of the minimum acceptance period, and even after August 25, 2015, the date they were notified of the bid’s technical deficiencies. In addition, at no time did Respondents indicate that their bid would expire after a particular event or period of time. For these reasons, their Certification was now erroneous.

Counsel takes issue with Respondents’ characterization of the language in the Responsibility Matters Certification,³ for example, “immediate” and “at any time prior to contract award” as “vague and ambiguous.” In rejecting Respondent’s interpretation of the cited language, counsel intones “[t]hat it is implausible for Respondents to have read a certification that requires immediate notice and claim that they understood that certification to require notice only “in the event of an actual contract award.” As counsel views it, Respondents’ view of the certification, as characterized here, forces the conclusion that “they are either lacking in credibility or lacking in competence.”⁴ Counsel notes in passing that, in their bid, Respondents fully described their professional experience and experience in government contracting. As such, Respondents’ claimed experience would be at odds with their professed understanding of the disputed “simple

³ “The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.”

⁴ Gov’t’s Brief at 24.

requirement of the Responsibility Matters Certification and with their duty to “read and understand the documents submitted to HUD.”⁵

In reviewing the mitigating and aggravating factors under 2 C.F.R. §180.860, Counsel notes that Respondents’ actions had the potential to cause harm to HUD in light of the fact that Respondents were bidding on a five-year contract worth over \$698 million. Other aggravating factors raised by counsel were (1) Respondents’ failure to correct their certification for over six months, thus showing a “disregard for the reliance HUD places on such certifications”; (2) Respondents’ creation of Twin Assets as a ploy because, in reality, it would be the employees and resources of Ofori & Associates,⁶ the experienced HUD contractor, operating under the aegis of Twin Assets, that would be performing almost all the services required by the contract. However, Ofori & Associates could not bid on the contract because, at the time of the solicitation, Ofori & Associates were proposed for debarment; (3) Respondents’ failure to accept responsibility for their actions, instead offering contradictory explanations and blaming HUD for not ensuring that the certification remained accurate; (4) the wrongdoing was pervasive in the company owned by the Ofori brothers; (5) Respondents have taken no effective action to ensure that the wrongdoing does not recur; (6) the principals in Twin Assets were the two Ofori brothers and they committed and tolerated the wrongdoing; (7) Respondents brought the wrongdoing to the attention of the Contracting Officer six months after the April 13, 2015 Notice had been issued; (8) Respondents’ statements would indicate that they had no standards of conduct and internal control systems in place at the time of their wrongdoing; and (9) Respondents did not take courses as promised that would have helped to improve their understanding and knowledge of government contract regulations.

Counsel concludes that Respondents’ failure to disclose their proposed debarment to the Contracting Officer and all the other factors discussed here provide cause for Respondents’ debarment and demonstrate that they are not currently responsible. Accordingly, a three-year debarment is warranted.

RESPONDENTS’ ARGUMENTS

Respondents assert very vigorously that the instant action is but a continuation of HUD’s “relentless attack” and “calculated effort” to destroy the Ofori family and their businesses. Respondents point to the other actions HUD has brought against them for the history of, and in support of their claim of, HUD’s “selective dealings and calculated missives” against them and their family.⁷

According to Respondents, when the Responsibility Matters Certification was made in September 2015, it was truthful and remained so until it became “not only

⁵ *Id.* at 25.

⁶ Ofori & Associates is owned by Charles Ofori, the father of the Ofori brothers.

⁷ Respondents note that their filings in the two other actions are incorporated into Respondents’ Hearing Statement in the instant matter.

impractical but unnecessary to supplement” it. Moreover, the language of the “Certification is vague and ambiguous” and the word “immediate” in the Certification is not defined, notwithstanding HUD’s position that the Certification is “specific and unambiguous.”⁸ Respondents argue that the language of the Certification is more nuanced than the language in the case on which HUD relies to support HUD’s position.

As Respondents see it, the facts in this case raise the issue of “whether it was reasonable for Respondents to presume that supplementing was neither required nor necessary unless there was the actual contract award – namely, ‘any time prior to contract award.’” Also, HUD had no intention to award the contract to Twin Assets because its bid was “technically unacceptable” and HUD would not evaluate it. More particularly, because, as HUD has pointed out, “Twin Assets was not previously or currently involved in federal government contracting. Nor can Twin Assets reasonably be expected to be a participant in a covered transaction in light of HUD’s explicit denial and finding that the Twin Assets Bid was ‘technically unacceptable.’”

Respondents continue that their “honest mistake is even more reasonable because HUD failed to reach out to [them] for any additional disclosures concerning the status of the . . . Bid after the January 14, 2015 request for extension of the offer.” Respondents reject HUD’s charge that their failure to supplement their Certification was willful and knowing, arguing that the “terms and provisions of the Responsibility Matters Certification are vague and ambiguous as to supplementation requirements in the absence of an actual contract award.” Respondents’ Hearing Statement at 10,11.

Respondents allege that HUD applied a double-standard to them in this matter and mischaracterizes their arguments and then claims by HUD’s stating that “‘rather than providing [HUD] with a benign reason for Respondents’ breach of their duties, [Respondents] demonstrate’ that Respondents are not trustworthy.” Respondents note that, notwithstanding HUD’s mischaracterizing their “position to suggest that they were too busy to attend to existing businesses,” hence their present predicament, HUD ignores the reality that “an entity or individual must exert significant resources to defend against the litany of claims, unfounded motions, voluminous discovery requests, and other demands purposefully brought on by HUD.” *Id.* at 12. Respondents add here that the cases relied upon by HUD are Limited Denial of Participation (LDP) cases and suggest that “imposition of debarment is punitive and improper.”

Respondents challenge HUD’s claim that Twin Assets continued to be an Offeror after May 2015 as being contrary to the facts. After the expiration of Twin Assets Bid on May 14, 2015, Respondents argue, HUD did not request an extension. Accordingly, it was reasonable for Respondents to conclude that they were no longer an offeror nor bound by the obligations of their bid.⁹

⁸ See Respondents’ Hearing Statement at 10; see also n.3 *supra* for the language of the Certification.

⁹ Respondents distinguish *Nat’l Med. Staffing*, 1994 DOT BCA LEXIS 33, at *22, a case cited by HUD in its brief, as being inapposite with respect to establishing that Respondents had a continuing obligation to comply with the terms of their bid. In *Nat’l Med.*, as stated by Respondents, “Respondent had a duty under the contract to notify the contracting officer of any change in status prior to award [and] by the time of

In reviewing the factors in 2 C.F.R. §180.860 as they impact their actions in this matter, Respondents, *inter alia*, argue that no person or entity was harmed as a result of their failure to supplement the Certification for a bid that was not accepted nor could be accepted and that expired 23 business days after the April 13, 2015 Notices of Proposed Debarment were issued. Moreover, HUD has produced no facts to demonstrate that Respondents' actions caused or could have caused harm or potential harm to any person.

Respondents point out, in mitigation, that there was only one act of wrongdoing – their failure to deem it necessary to supplement the Certification. Also, notwithstanding HUD's improper action in referring to the other debarment actions against Respondents, which Respondents are contesting, there is no pattern or prior history of wrongdoing. Additionally, there was no plan to carry out any wrongdoing – the failure to supplement the Certification resulted from Respondents' interpreting the certification provision different from HUD's. Respondents assert that, despite HUD's claim that they reject personal and corporate responsibility, they "have unequivocally accepted responsibility for the events that transpired," which resulted from an "inadvertent and honest mistake." *Id.* at 18.

Respondents conclude that the proposed three-year debarment is punitive and does not protect the governmental interests. Further, in the cases cited by HUD to support debarment, an LDP was imposed, not debarment. For that reason, it would be punitive and improper to debar Respondents for three years.

FINDINGS OF FACT

- (1) Respondents Curtis and Otis Ofori submitted a bid dated September 23, 2014 on behalf of their Respondent company, Twin Assets LLC, in response to a HUD Solicitation Notice.
- (2) In Respondents' bid was included a Responsibility Matters Certification, which, among other things, required Respondents to certify whether or not they were proposed for debarment.
- (3) Respondents certified then that they were not proposed for debarment.
- (4) The Certification also required Respondents to "provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances."
- (5) HUD later issued an Amended Solicitation Notice in January 2015, extending the bid period for a further 120 days to May 14, 2015.
- (6) On April 13, 2015, HUD issued Respondents a Notice of Proposed Debarment.
- (7) On August 25, 2015, HUD notified Respondent that their bid was eliminated.

contract award, [respondent's] appeal had been denied." In the case at bar, however, Respondents assert that they "were not awarded the contract, and so, supplementing the Responsibility Matters Certification was neither necessary nor practical."

- (8) On September 25, 2015, HUD awarded the contract to Offerors other than Respondents.
- (9) On October 15, 2015, HUD issued the Notice of Proposed Debarment that initiated the instant action.
- (10) On October 21, 2015, Respondents informed the Contracting Officer of their proposed debarment.
- (11) Respondents acknowledge now that their interpretation of the cited language above from the Certification was mistaken and erroneous.
- (12) Respondents express remorse for the erroneous certification.

CONCLUSIONS

Based on the above Findings of Fact, I have made the following conclusions:

- (1) Respondents were participants or principals in a covered transaction based on the Ofori brothers' previous experience in performing HUD contract work and, along with Twin Assets LLC, on their submission of a bid to perform a HUD contract. See 2 CFR §§ 180.150, 180.200, 180.970 and 180.995.
- (2) Respondents are subject to the debarment regulations as persons who have been, are, or may reasonably be expected to be, a participant or principal in a covered transaction. 2 CFR § 180.120.
- (3) It is helpful to settle first Respondents' argument that the language of the Certification is "vague and ambiguous" and that the term "immediate" is undefined. We treat the latter term first because its common usage and acceptance leave little room for disagreement. "Immediate" is defined, for example, as "occurring at once," "acting or taking place without the interposition of another agency or other," "of or near the present time," etc. *Webster's II New Collegiate Dictionary*, 1995 ed., p. 552. Of course, context, too, helps to add clarity and minimize ambiguity. Here, the Certification demands that the "offeror provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certificate was erroneous when submitted or has become erroneous by reason of changed circumstances." If the language is read without the phrase "at any time prior to contract award," there can be no doubt that the Certification compels an act "occurring at once."
- (4) If we were to apply the above analysis to Respondents' actions, it would lead to the ineluctable conclusion that Respondents did not act with the immediacy that the Certification demands. If we follow Respondents' timetable, that is, Twin Assets' bid expired at the end of the 120-day extension – May 14, 2015 – and the Notice of Proposed Debarment was received April 14, 2015, Respondents had over 30 days to notify the Contracting Officer that they were proposed for debarment. Respondents, however, did not notify the Contracting Officer until October 21, 2015, six days after receipt of the October 15, 2015 Notice. Respondents, however, reject this analysis because, as indicated above, of the alleged ambiguity caused by the phrase "at any time prior to contract award."

- (5) At the outset, it should be acknowledged that the Certification may not be free of ambiguity, hence the dispute that now embroils us. However, if read closely, it is very clear that the disputed phrase is not meant to qualify “immediate.” It cannot be read to mean that an offeror who knows that its certification has become erroneous has up to the date of, or the day before, the award is made to notify the Contracting Officer of its ineligibility. If that were so, it obviously would be very disruptive of the process. For example, a n offeror may be chosen who is proposed for debarment. If HUD discovers this after the award of the contract, HUD would then be faced with the possibility of having to rescind the offer and select another bidder. Accordingly, the only meaning that can be ascribed to the disputed phrase is that as soon as, i.e., immediately, an offeror knows that its certification “has become erroneous by reason of changed circumstances,” it is obligated to inform the Contracting officer. This Respondents did not do. This analysis implicitly rejects Respondents’ attempt to interpose different dates or events as material to determining when they should have informed the Contracting Officer.
- (6) The rejection of Respondents’ attempt as described here does not mean that Respondents willfully ignored their obligation to inform the Contracting Officer of their changed circumstances, as Government counsel argued. Government counsel makes much of Respondents’ email communication with the Contracting Officer, their attempt to get a pre-award debriefing on why their bid was found technically deficient, their making inquiries and asking questions about their rejected bid as late as October 14, 2015, etc. In truth, however, it seems counterintuitive for Respondents blatantly to ignore their obligation to inform the Contracting Officer while seeking the Contracting Officer’s attention. Presumably, the Contracting Officer would have been aware of Respondents’ ineligible status before he/she was formally notified. In short, Respondents’ public attempts to salvage their bid after their debarment was proposed on April 13, 2015 are at odds with a person who knows that his proposed debarment eviscerated his chances of being awarded the contract¹⁰. It may very well be, as

¹⁰ Government counsel sets forth an apparent rationale that explains, as he sees it, Respondents’ failure to inform the Contracting Officer immediately of their proposed debarment. As described by Government counsel, Respondents indulged a stratagem in forming Twin Assets because Ofori & Associates, the company owned by the father of the Ofori brothers, could not bid on the contract because O&A and the father had been proposed for debarment. That is all true. The apparent intended deception morphed into a conspiracy of silence on the part of the Respondents so that when the Ofori brothers “were proposed for debarment in April 2015 and the Responsibility Matters Certification became false, Respondents opted not to supplement the certification as required by the terms of the Solicitation Notice and by regulation.” Gov’t Brief at 30. Unfortunately, counsel proves too much here. In the lead-in sentence to the quoted language, counsel states that “Respondents’ plan was that the Asset Management Services contract would be performed as if O & A were still the contractor, using the same assets and employees, but in the name of Twin Assets – an entity [along with its principals] that had not been proposed for debarment.” Hence, when the Ofori brothers “were proposed for debarment and the Certification became false, Respondents opted not to supplement the certification.” *Id.* The vice in counsel’s argument is that, as he liberally informs us, the Twin Assets bid described in detail the intended participation of O & A’s former employees, their assets, etc. in managing the contract if it was awarded to Twin Assets. *Id.* at 28-30. Because all this information was explicitly detailed in Respondents’ bid, it is difficult to see the implied nefariousness in “Respondents’ plan.” *Id.*, at 30. It would have required also a clairvoyance not immediately apparent in the record on the part of Respondents to know that they would later be proposed

Government counsel speculated in his brief, that Respondents were “lacking in competence.” If that were so, it may arguably negative the necessary element of intent to prove willfulness.

- (7) In brief, while there is no doubt that Respondents did not honor their obligation enshrined in the Responsibility Matters Certification to provide immediate written notice to the Contracting Officer of their proposed debarment, the Government has failed to carry its burden of proving willfulness in Respondents’ delinquency by a preponderance of the evidence. *See* 2 C.F.R. §180.850. For that reason, Respondents will not be debarred, as pressed by the Government, pursuant to 2 C.F.R. §§ 180.800(b)(1) and (b)(3).
- (8) It needs no citation to authority to establish that the Certification that Respondents were obligated to honor is materially important in the government contracting process. Consequently, it is of little help to Respondents whether their delinquency is attributable to incompetence or to distraction caused by their need “to defend [themselves] against HUD’s specious claims and the unending barrage of HUD’s motions, filings, and discovery requests in the First Debarment Action or exert additional time and resources at combing the minutiae of every perfunctory commitment owed to HUD,” as Respondents fretfully observed. *See* Respondents’ Hearing Statement at 2. Respondents voluntarily submitted their bid, that is, they were under no duress to respond to the Solicitation Notice, or to agree to the Amended Solicitation Notice or any extension of their bid, whether expressly or impliedly. So, Respondents cannot be heard to complain about the demands on their time, even if those demands were extravagant, in Respondents’ view. Stripped of all the excuses, the simple truth is that Respondents did not, as previously observed, do what they were obligated to do, that is, immediately inform the contracting officer of their proposed debarment. Their failure to do so demonstrates a carelessness and negligence that directly impugns their present responsibility and provides cause for their debarment.
- (9) Respondents’ negligence, rather than an intentional disregard for, or willfulness in, avoiding their responsibility, seems evident from their conduct during the time at issue here. As alluded to above, Respondents remained completely engaged in the after-bid process, seemingly more intent on Respondents’ determining how to be better prepared in the future to be successful in the bidding process.¹¹ Respondents’ engagement is inconsistent with the notion of a bidder trying to meet with the HUD Contracting Officer who would have been privy to the information that was adverse to Respondents. Rather, Respondents’ conduct is more consistent with an inattention to matters that may not have advanced their success in the award of a contract rather than with an intentional disregard for the obligation to correct an erroneous Certification. For all these reasons, I conclude that Respondents’ conduct was negligent, not willful.

for debarment, thus making their plan necessary. Briefly stated, it is not only that the Government’s conclusion falls short because it is based on a *non sequitur*, but it adds nothing to the evidence adduced with respect to the willfulness argument.

¹¹ *See, inter alia*, Gov’t Brief, Ex.20 in which Respondents ask the Contracting Officer – “Can you please let us know what compelling reason you believe justifies delaying Twin Assets debriefing until after award? We really just want to know how to get better, so in the future we can be up for an award.”

- (10) Respondents also make much of the email comments from two HUD directors who commented unfavorably on Respondents and their character. Respondents argue that those unfortunate comments evince a bias against Respondents and partly explain why this debarment action was initiated. As stated in the companion case in which this allegation was addressed,¹² the regrettable and unapproved comments from those two employees played no role in HUD's filing this action against Respondents. This debarment action was pursued strictly on the merits of the record before this tribunal, not based on any calumnious remarks from any source.
- (11) I find also no support in the record that the failure to correct the erroneous Certification resulted from an inadvertent mistake, as urged by Respondents. The negligence of Respondents described here refutes any suggestion that Respondents were mistaken in not timely notifying the Contracting Officer of their proposed debarment. Clearly, from Respondents' view, as events now show, it was a mistake not to have acted in conformity with the strict language of the Certification. That, however, is not fairly described in legal contemplation as a mistake.¹³
- (12) The regulation at 2 C.F.R. §180.125 paragraph (a) provides that "[t]o protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons." Paragraph (b) limits the application of the debarment regulations to "exclude from Federal programs persons who are not presently responsible." And paragraph (c) cautions that "[a]n exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment." Under 2 C.F.R. § 180.865 (a), a respondent's "period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based."
- (13) In mediating the competing interests the above-cited regulations were enacted to serve, the courts have held that "a finding of present lack of responsibility can be based upon past acts." *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957). Accordingly, Respondents' negligent conduct at issue here justifies a finding that they are not presently responsible, thus leading to their exclusion.
- (14) A finding that a respondent lacks present responsibility then requires a determination of what period of debarment, if any, is appropriate. This determination requires not only a recognition of the "seriousness of the cause(s)" that may justify debarment but that concomitantly consideration be given to the aggravating and mitigating factors present in each case.
- (15) It is not to be doubted that the failure of an offeror immediately to notify the Contracting Officer of his proposed debarment provides a "cause of so serious or compelling a nature that it affects [Respondents'] present responsibility," 2 C.F.R. § 180.800(d), and requires a period of debarment "long enough to demonstrate that the government takes the conduct at issue seriously and that it will refrain from

¹² *Ofori & Associates and Charles N. Ofori*, HUD Docket No.16-0006-DB (Dec 16, 2016).

¹³ "A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. *Black's Law Dictionary*, rev. 4th ed. (1968) p.1152.

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 the Matter of Richard Duane Widler*, HUD ALJ 91-1706-DB (June 18, 1992).

- (16) Respondents have been proposed for debarment since October 2015. Admittedly, the receipt of a proposal to debar notice may have a sobering effect on a respondent if only because of what it may portend. Nonetheless, a proposal to debar pursuant to HUD regulations is not an exclusion. 2 C.F.R. § 180.940. Thus, a proposal to debar does not result in the same legal detriment or deprivation as does a debarment or suspension. For that reason, the period during which Respondents were under a proposal to debar will not be considered in any period of debarment to be imposed. Respondents, I believe, have not had sufficient time to “reflect on the cause for [their] debarment and to conform [their] conduct to the standard of present responsibility.” *Widler, supra*. Accordingly, a period of debarment must be imposed, but it should not be so excessive in light of all the factors present in this case that the period of exclusion imposed would violate the regulatory admonition that persons not be excluded “for the purposes of punishment.” 2 C.F.R. § 180.1215(c).
- (17) Pursuant to 2 C.F.R. §180.860, the debarring official may consider certain aggravating and mitigating factors in determining whether to debar a respondent and the length of the debarment period. As aggravating factors, I considered, among others, (1) the harm that could have been done to the integrity of HUD’s programs by HUD’s relying on an erroneous certification which could have led, all things being equal, to Respondents being awarded a contract so that HUD unwittingly would be doing business with an entity proposed for debarment and (2) the fact that Respondents, from all appearances and from the record evidence, seemed to prioritize the need to determine why their bid was unsuccessful rather than to satisfy timely their legal obligations with respect to their erroneous certification. As mitigating factors, I considered Respondents’ expressions of remorse for their failure to satisfy their obligation to correct the erroneous certification and Respondents’ acknowledging now their mistaken interpretation of their obligation to correct the certification.
- (18) In considering the mitigating and aggravating factors, the relative seriousness of the violation at issue here, and the evidence as a whole, I am unpersuaded that the record supports the proposed three-year debarment. *See* 2 C.F.R. §§ 180.845(a) and 180.865(a) and (b). More pointedly, the Government’s evidence does not meet the preponderance of the evidence test, as required by 2 C.F.R. § 180.850, to prove that Respondents acted willfully in not timely notifying the Contracting Officer of their proposed debarment.
- (19) The Government generally relied on Limited Denial of Participation (LDP) cases to support its contention that the seriousness of Respondents’ wrongdoing warranted a three-year debarment. As noted in the recent decision in the companion case, *see* n.12 *supra*, the Government there, as here, mainly relied on LDP cases to support the proposed debarment. As further noted there, the sanctions in LDP cases are less severe than in debarment cases. While, arguably, the precedents in LDP cases don’t have to be slavishly followed, they, nonetheless, provide useful guidance in

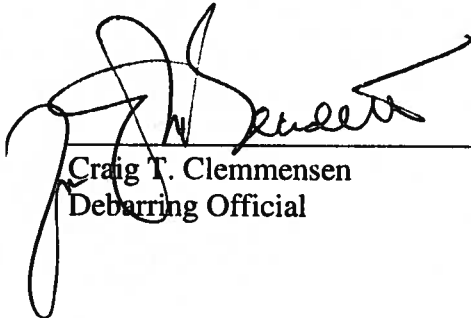
determining an appropriate period of debarment that should be imposed in this matter.

- (20) Accordingly, based on all the foregoing, Respondents are debarred, pursuant to 2 C.F.R. § 180.800(d), for eighteen months from the date of issuance of this Determination.
- (21) HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs. *See generally*, 2 CFR § 180.125.
- (22) HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act responsibly.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR §§ 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondents for a period of eighteen months from the date of issuance of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: 1-3-2017



Craig T. Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2017 a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.


Tanya Domino
Debarment Docket Clerk

HAND-CARRIED

Mortimer F. Coward, Esq.
Debarring Official's Designee

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