

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

In the Matter of:

**JEFFREY D. BUCK II,
d/b/a THE A. MORGAN BUILDING GROUP,

Respondent.**

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DOCKET NO. DEC-18-04215-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Proposed Debarment dated August 24, 2017 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent JEFFREY D. BUCK II that HUD was proposing his debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a three-year period from the date of final determination of the proposed action. The Notice advised Respondent also that his proposed debarment was in accordance with the regulations at 2 C.F.R. parts 180 and 2424 and was based on his submission of fraudulent Payment and Performance Bonds and other documents in his bid package related to a building renovation project. The Notice continued that Respondent's submission of the bonds and other documents provided cause for his debarment pursuant to 2 C.F.R. §§ 180.900(b) and (d).

A hearing on Respondent's proposed debarment was held in Washington, D.C. on October 16, 2018 before the Debarring Official's Designee, Mortimer F. Coward, Esq. Kenneth D. Myers, Esq. appeared on behalf of the Respondent. Stanley E. Field, Esq. appeared on behalf of HUD.

SUMMARY

I have decided, pursuant to 2 C.F.R. part 180, to debar Respondent 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 one year from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The Notice of Proposed Debarment dated August 24, 2017.
- (2) The Department's Pre-Hearing Brief in Support of a Three-Year Debarment of the Respondent filed May 22, 2018 (including all exhibits and attachments thereto).
- (3) Respondent's Pre-Hearing Brief in Opposition to a Three-Year Debarment filed July 2, 2018.
- (4) Undated correspondence from the Springhetti Insurance Agency introduced by Government counsel at the hearing.
- (5) Affidavit of Robert Springetti submitted by Respondent and filed October 25, 2018.¹

GOVERNMENT COUNSEL'S ARGUMENTS

Government counsel states that Respondent, through the bidding process, was awarded a contract for \$1,433,141 by the Youngstown Metropolitan Housing Authority ("YMHA") to renovate several units of housing. In submitting the bid, Respondent indicated that it was accompanied by a bond for \$500,000.00. On March 29, 2016, four days after Respondent's submission of his winning bid, Respondent executed a bid bond in favor of YMHA for five percent of the bid amount. However, the invitation for bid required the successful bidder to provide a Performance Bond and a Payment Bond for 10 percent of the total bid within 10 days of notification of the award. Respondent previously, on March 24, 2016, had submitted an application through CNA's agent, Springhetti Insurance, for a bid bond on the renovation project. The application listed the bid date as March 29, 2016, the estimated total amount of the bid as \$150,000.00, and the bid bond as five percent. Counsel notes that the bid application was submitted by Respondent the day before he submitted his winning bid, which was 10 times the amount stated in Respondent's bid application.

In further detail regarding the chronology of events in this matter, counsel states that Mr. Springhetti, at Respondent's request, issued, on April 28, 2016, two bonds - a payment and a performance bond- for \$150,000.00 each. Also, with the issuance of appropriate documentation,

¹ The government did not file a response to the affidavit and the record closed November 7, 2018.

CNA acknowledged the bond obligation and Respondent's payment of a \$4,500.00 bond premium. Later, according to Respondent, the bonds were altered by Respondent's secretary by her writing in "one million five hundred thousand dollars" and "(\$1,500,000)." Counsel disputes Respondent's explanation of the discrepancy, arguing that Respondent's "Bid Bond Application shows that he requested a 5% bond for an estimated bid of \$150,000, not [for] \$1,500,000."

Counsel emphasizes Respondent's failure to produce any documentation to support his claim of applying for a bond in excess of \$150,000.00. Counsel also dismisses Respondent's claim that he thought Mr. Springhetti had secured a \$1,500,000 bond, adding that Mr. Springhetti was not Respondent's agent but CNA's. Similarly dismissed and characterized as "false" by Government counsel is Respondent's assertion that the space to write in the amount for the performance bond was blank when it was received. As evidence in support of his position, counsel offers the bonds as issued by CNA clearly showing the amount of \$150,000.00 inserted thereon. Also offered as evidence is a letter from CNA's bond counsel attesting to the fact that Respondent requested and received performance and payment bonds for \$150,000.00.

Additionally, counsel offers several reasons why, in his view, Respondent's explanation regarding the alleged issuance of the \$1,500,000.00 bond is not credible. Respondent's explanation is that the bond forms were blank when they reached his office. For that reason, he believed that the \$1,500,000.00 bond had already been secured but the amount inadvertently had not been written in. Thus, he instructed his secretary to write in the amount. As counsel sees it, Respondent does not explain how or why he believed he had purchased a bond that was ten times the amount of the bond actually purchased and offers no evidence in support thereof. Also, Respondent did not inquire of CNA why he did not receive bonds for \$1.5 million nor does he have a receipt from CNA evidencing purchase of a \$1.5 million bond. Counsel also makes short shrift of Respondent's assertion that there was no need for him to falsify the bond because his company was financially sound. Respondent's further argument that the Letter of Credit his company provided, contrary to Respondent's argument, does not prove that he had the required amount of cash escrow available for the bid.

Counsel alleges further that there are "patent misstatements" in Respondent's explanation for the purchase of the \$150,000.00 bond and not the \$1.5 million bond, when one compares Respondent's affidavit to his June 16, 2016 letter. First, Respondent's statement notwithstanding, he was not required to offer a 10 percent bid bond, only a five percent bid bond. Next, the bid bond

was for five percent of the bid amount, not for \$150,000.00 as Respondent indicated in his application for the bond.² Counsel raises as further contradictions in Respondent's defense his claim that the bond showed the amount as \$150,000 when it was received by his company. Respondent, in his June 16, 2016 letter, then states that, believing it was a typo, it was corrected to read \$1.5 million. Counsel observes that Respondent originally claimed that the bond he received was not blank but was for \$150,000.00, which he then corrected to read \$1.5 million. In Respondent's affidavit, counsel notes, however, Respondent avers that the bond amount was left blank and, at his direction, his secretary inserted the \$1.5 million figure in the blank line. Counsel adds that absent from Respondent's explanations is evidence of his payment or of an attempt to prove that he paid for a \$1.5 million bond. Counsel theorizes that Respondent's change of explanation with respect to the altered bond results from Respondent's recognition that "altering the terms of the bond was more clearly fraudulent than 'adding' terms that were not there."

Counsel argues that Respondent is a participant in a covered transaction by virtue of his bid on the YMHA contract. Accordingly, based on Respondent's misconduct described above, there is cause for his debarment pursuant to 2 C.F.R. §§ 180.800(b) and (d). Counsel also describes Respondent's conduct as serious in noting his failure to accept responsibility for his actions. Counsel concludes that Respondent's violations evidence his lack of present responsibility and warrant a three-year debarment.

RESPONDENT'S ARGUMENTS

Respondent, through counsel, denies that he intentionally falsified the documents at issue in this proceeding, arguing that he fully intended to put the appropriate bond in place. Respondent acknowledges that, as the government charges, on the application with CNA, he indicated that the estimated total of the bid was \$150,000.00 and the Bid Bond percentage as five percent. Respondent argues, however, that "this fact does not and should not carry the ominous implications HUD suggests." Resp. Brief at 3. Respondent's counsel notes that the bid amount of \$150,000.00, equal to 10 percent of the actual bid amount of almost \$1.5 million, was twice as much as the required five percent. Respondent argues that "these discrepancies were [nothing] other than

² See Gov't Ex. 5.

mistakes” and the government has produced no evidence to the contrary nor of fraudulent intent. *Id.* Further, counsel states that at the time the various documents entered into evidence by the government in this proceeding were completed and submitted, Respondent did not know until June 2016 that a bond for \$1.5 million was never issued.

Counsel adds that Respondent had told his agent that the performance bond should be written for \$1.5 million. Counsel adduces as the reason for the error in issuing the bond for \$150,000.00 the agent’s “misinterpret [ing] or misunderstand[ing]” Respondent’s request, thus the agent ordered the bond for the smaller amount. Counsel argues that “the fact that Mr. Buck told his secretary to write in the words ‘\$1.5m’ . . . in the bond form is evidence of this miscommunication, rather than evidence of fraud.” Resp. Brief at 4. Counsel further points out other discrepancies on the bond forms, e.g., blank spaces, declaration that the bond is “signed, sealed and delivered” on April 28, 2016, though it is not signed or sealed, and the contract was dated May 6, 2016, therefore the bond “form could not have been generated and signed on April 28, 2016.”

Counsel also offers, as further evidence of miscommunication, not of forgery, that Respondent’s agent incorrectly filled out the “original” bond forms identically and for \$150,000.00. However, Respondent did not sign the performance bond form for \$150,000.00 but signed the form with the correct amount of \$1.5m. As counsel views it, had Respondent informed his agent that the bond form had the wrong amount and had the form replaced, rather than having his secretary make the changes, the issue before us would not have arisen. Counsel further asserts that “Respondent did not connect the dots of realizing that the proper amount not being correctly filled in meant that the performance bond was not in place.” *Id.* at 6-7. Moreover, no one, not YMHA, the insurance company nor Respondent’s agent inquired of Respondent why, contrary to the paperwork, there was no \$1.5m. bond in place. That inquiry would have alerted Respondent of the problem; instead, YMHA and CNA, and now HUD, have spent more than two years “trying to turn this set of mistakes and misinterpretations and missed communications into a fraud case.” *Id.* at 7.

In this connection, counsel argues that to believe the government’s “version of events” would require believing that Respondent never intended to acquire a bond, thus saving himself \$29,000.00. If true, counsel continues, one would have to believe that that Respondent devised an “elaborate scheme” to include putting the wrong amount of \$500,000.00 on the bid form, purposely requested bonds in the amount of \$150,000.00, then instructed his secretary to write in \$1.5m in the

blank space on the form, then forge his agent's signature, then acquire an old and obsolete seal of Western Surety to "seal" the phony signatures, then obtain and fill out a Power of Attorney form with a wrong amount. As counsel views it, it strains belief that Respondent, a contractor on many HUD-related and other projects for many years, would expose himself to such civil and criminal liability to save a bond premium of \$29,000.00 on a \$1.2m. job (the contract was actually awarded for \$1,231,141.00, not for \$1.5m.). Counsel challenges the government's characterization of Respondent as a forger and defrauder, arguing that "[i]nstead of hiding his actions as a thief would, he actually advertised them." Counsel also asks rhetorically, in his defense of Respondent's actions, why would Respondent, if he wanted to fool HUD, the insurance company, and YMHA "sloppily hand-write" the amount of the bond, or write in \$150,000.00 on a different form as the amount of the bond, or write in \$500,000.00 as the amount of the bond on the Power of Attorney if he wanted to fool the parties that he had a \$1.5m. bond.

Counsel explains the discrepancy at issue here by noting that in March 2016 when Respondent submitted his bid, he was required to post a bond of only \$75,000.00, that is, 5 percent of the \$1.5m. bid, not for \$150,000.00 as he did. Respondent's agent billed him, consistent with their practice, in late April 2016. Respondent then, on May 6, 2016, signed the contract with YMHA for \$1,231,141.00. At that time, Respondent requested a \$1.5m. bond from his agent. Respondent's agent then prepared the necessary paperwork which Respondent signed and sent to YMHA. It was at that time that Respondent's secretary noticed that there was no amount shown for the bond. Respondent's secretary so informed him and he then directed his secretary to write in the amount of \$1.5m.

According to counsel, Respondent assumed that the omission of the bond amount was inadvertent, thus he asked his secretary to write in the amount. All the while, as counsel represents it, Respondent was under the mistaken impression that the bond was being written, so that "the fact that the amount on the form was left blank did not alert him to the fact that no such bond was being written." *Id.* at 9. Counsel adds that these events occurred on the same day that Respondent signed the contract with YMHA. Because this was about a week after Respondent was notified that he was awarded the contract, "it did not strike [Respondent] as unusual that the \$1.5 million bond paperwork had not already been prepared." *Id.*

Counsel next responds to the government's observation that Respondent failed to explain why he had the impression that he had purchased a bond ten times the amount of the bond he

purchased earlier. In response, Respondent's counsel explained that the bid bond and the performance bond are purchased at different times. The bid bond (here for \$150,000.00) is purchased and submitted at the time the bid is submitted. The performance bond (here \$1.5m) is not purchased until the contract is awarded. For that reason, it was only when Respondent was awarded the contract in April 2016 that he ordered the performance bond for \$1.2m on May 6, 2016 from his agent.

Counsel expresses bafflement at what may have happened between the time Respondent requested the bond and "the final destination" because the bond for \$1.5m was not received nor processed by CNA. Respondent, according to counsel, had no knowledge of this until June 20, 2016 when YMHA advised him of the cancellation of the contract. In response to the Government's query why no documentation exists of Respondent's paying for the bond, counsel notes that it was not unusual for Respondent to be billed between 30 and 60 days after receiving the bond. Consequently, the nonreceipt of a bill between May 6, 2016 and June 20, 2016 gave Respondent "no reason to believe that the larger bond was not in place and . . . no reason to question [his agent] about it." *Id.* at 10.

In refuting the Government's challenge to Respondent's declaration and testimony that he had enough money in the Letter of Credit (\$250,000.00) to cover the 20 percent needed to secure the performance bond of \$1.5m., counsel notes that the contract awarded was for \$1,231,141.00, not for \$1.5m. As such, Respondent needed not \$300,00.00 (20% of \$1.5m.) but \$246,228.20 (20 % of \$1,231,141.00).

Counsel questions YMHA's canceling of the contract in light of the Public Bid Specifications it issued in seeking bids on the contract at issue here. Among the Specifications was a provision that would have allowed Respondent up to ten days to respond and furnish YMHA with any missing documents YMHA needed to avoid defaulting on the contract. YMHA, however, once it discovered that there was no bond in place canceled the contract. It is counsel's position that had YMHA given Respondent the opportunity to cure the problem of the missing bond, Respondent would have explained that it was attributable to a miscommunication between his and his agent's office. Instead, YMHA assumed there was fraudulent intent on Respondent's part and unilaterally canceled the contract.

In summarizing his case, counsel argues that HUD wants to punish Respondent for defending himself, citing Government counsel's comments on Respondent's explanations for his

actions and the circumstances addressed here. Counsel argues that Respondent's responses have been consistent through the process. "HUD, on the other hand, has presented no evidence of [Respondent's] allegedly fraudulent motives . . . and has attempted to bolster its case by theorizing and hypothesizing about the logic behind his explanations."

Counsel reviews the applicable regulations and case law and concludes that HUD has not met its burden of proof. In particular, the alleged infirmities in HUD's case militate against a conclusion that Respondent should be debarred. Counsel argues that the evidence in the last two years since this matter arose proves that Respondent is presently responsible and trustworthy. As a preliminary matter, counsel contends that if his client's conduct was as egregious as HUD charges, why did HUD not suspend him. HUD's inaction, as Respondent sees it, "undercuts its own argument as to [Respondent's] lack of trustworthiness." More critically, however, proof of Respondent's present responsibility is readily established by an examination of the relevant evidence from that period. As detailed by counsel (in an uncontested attachment (Attachment A) to Respondent's pre-hearing brief, in 2016 Respondent performed three contracts for the Akron Metropolitan Housing Authority (AMHA) (it is unclear from the record which, if any, of these contracts were let after the instant dispute arose); in 2017, Respondent performed two contracts for AMHA; in 2018, Respondent completed four contracts for AMHA, two contracts for Stark Metro Housing Authority, and one contract for Portage Metropolitan Housing Authority. Additionally, Respondent completed several contracts for non-HUD-funded entities ranging from a low of \$2,945.00 to a high of \$2.35m. Counsel summarizes this information as "evidence of [Respondent's] 'present professional conduct' . . . [and] illustrates that public agencies continue to have faith and trust in [Respondent] and his company." *Id.* at 17.

In conclusion, counsel dismisses the government's attempt to prove intentional misconduct by Respondent as "speculation [which] is not a proper substitute for evidence." Counsel asserts that nothing in Respondent's past dealings with insurance companies or public or private agencies "would lead a fact-finder to conclude that [Respondent's] dealings are intentionally or willfully fraudulent." *Id.* at 21.

Accordingly, counsel requests that the proposed debarment be dismissed or Respondent not be debarred for three years.

FINDINGS OF FACT

1. Respondent submitted a successful bid for a renovation project with YMHA.
2. Respondent's bid was for approximately \$1.5m.
3. YMHA required bidders to submit a bid bond of five percent of the bid amount.
4. Respondent was awarded the contract for approximately \$1.2m.
5. As the winning bidder, Respondent was required to post a performance bond and a payment bond for the amount of the contract.
6. Respondent purchased a bond for \$150,000.00 of coverage, not for \$1.5 million.
7. In a March 24, 2016 bid application with CNA (the bid date was March 29, 2016), Respondent listed the estimated total amount of the bid as \$150,000.00
8. Respondent submitted the application the day before he submitted his winning bid for \$1.5m.
9. The winning bidder was required to purchase a payment bond and a performance bond for one hundred percent of the bid within 10 days of notification of its successful bid.
10. The bonds purchased by Respondent were for \$150,000.00, not for his bid amount of \$1.5m.
11. The bonds were represented to YMHA as having been purchased from CNA.
12. CNA later informed YMHA that the company did not issue the bonds in dispute here.
13. YMHA, in response to CNA's notifying the housing authority that the bonds were not issued by CNA, canceled the renovation contract with Respondent.
14. Respondent, faced with the cancellation of the contract, informed YMHA that it was his impression that his CNA agent had issued a \$1.5m. bond.
15. Later, in the ensuing investigation of the matter, Respondent stated that, on the bond forms he received from CNA, the lines on which the amount of the bond would be shown were blank.
16. Respondent instructed his secretary to write in the bid amount of \$1.5m.
17. The bonds that CNA wrote were issued in response to Respondent's application for coverage of \$150,000.00 and his payment of \$4,500.00 for the bonds.
18. CNA later indicated, per CNA bond counsel's letter of June 29, 2016, that the matter "will be referred to CNA Corporate Investigations for future handling."

19. A comparison between the “original” and “altered” bond forms shows that both the “original” payment bond form and performance bond form indicate that the amount of coverage was \$150,000.00 and both are dated April 28, 2016. All signature lines are blank. The Power of Attorney form is signed by the Vice President of Western Surety Co. and dated April 28, 2016. Respondent’s signature is affixed to both the “altered” Performance Bond Form and the “altered” Payment Bond Form and they are dated April 28, 2016 (or April 20, 2016; the uncertainty arises because the print is blurred. Nonetheless, because there is no apparent prejudice to either party in recognizing April 28, as opposed to April 20, as the signature date, the former date is recognized as the signature date.)
20. The “altered” forms, though indicating a signature date of April 28, 2016, recite that the coverage applies to a contract entered into on May 6, 2016.
21. The “original” Power of Attorney form is “altered” to the extent a signature line, though not the putative original signature, is missing.
22. There is no evidence, and the government produced none, that the issue of altered documents was investigated by any law enforcement agency or other entity.
23. Respondent was not charged with any crime related to his conduct in this matter.
24. During and since the time this matter arose, both private and government entities have continued to enter into contracts with Respondent.

CONCLUSIONS

1. Respondent, as a contractor on several HUD-assisted projects, is subject to the debarment regulations as a “person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction.” 2 C.F.R. § 180.120(a). See also 2 C.F.R. §§ 180.150, 180.970, and 180.980.
2. There is no disputing that Respondent bid on and was awarded the contract at issue in this proceeding. Further, there is no dispute that the Performance and Payment Bond forms were altered. Similarly uncontroverted is the fact that there exist forms that show Respondent applied for bonds for \$150,000 00 of coverage.
3. Also uncontested and, in fact, admitted by Respondent, is the charge that Respondent

caused the figure of \$1.5m., representing the amount of his bid, to be inserted on the bond forms.

4. The change was necessary to comport with YMHA Invitation for Bid, i.e., the \$150,000.00 bond that Respondent applied for would not suffice.
5. It is also uncontroverted that Western Surety Company never authorized Performance and Payment bonds for \$1.5m.
6. Nonetheless, however, Payment and Performance bonds for \$1.5m., allegedly issued by Western Surety, were presented as if authorized by Western Surety.
7. It is incontestable that the bonds were illegally "altered" to reflect a penal sum of \$1.5m.
8. The issue for resolution, then, is whether, as charged by the government, the illegal alteration is attributable to Respondent.
9. It is well to acknowledge here that the government has presented a well-reasoned case based on the circumstantial and documentary evidence available.
10. The government, for example, concludes that Respondent had to be the party responsible for the alteration of the documents. The evidence, though persuasive, is not absolutely conclusive with respect to this allegation if only because Respondent denies altering the bond forms and other documents. Undoubtedly, however, Respondent had a motive and interest in altering the documents.
11. Respondent's counter, among other defenses, to this charge is that he had already won the contract and to the extent there were deficiencies in his bid, he had ten days to cure them.³ Additionally, Respondent rejects the government's charge that his motive for purchasing a bond for \$150,000.00 versus a bond for \$1.5m. was the savings that would be derived therefrom. If only as a theoretical matter, the government propounds an undeniable fact (i.e., Respondent stood to benefit from the savings realized from the smaller premium payable on a \$150,000.00 bond). Similar to the other disputed facts resolve in the government's favor, this charge was accorded its proper weight in reaching today's decision.

³ The Invitation for Bid does provide for a 10-day correction period. The invocation of that provision, however, cannot serve as a defense to an allegation of the commission of an improper or illegal act such as charged here. That provision contemplates, at best, allowing the correction of clerical or demonstrably innocent acts to the extent they do not result in a substantive change to a bid.

12. In presenting its case, the government noted that at no time did Respondent pay for a \$1.5m. bond. Respondent's response was that he was under the impression that his agent had applied for a \$1.5m. bond. This, along with the government's observations of Respondent's seemingly contradictory statements, (that is, first, he (Respondent) received a bond for \$150,000.00, but then Respondent later claimed that on the form the bond amount was left blank) vitiated his defense. Respondent explained the contradiction by noting that the "mix-up" resulted from an apparent miscommunication between him and his agent or from inadvertence.
13. Respondent charges that to believe the government's version of events and treatment of the disputed facts would require believing that Respondent engaged in an "elaborate scheme" to achieve his desired result. We disagree. This case at its core was not spawned from an "elaborate scheme," but from a simple decision, not from an inadvertent act, to apply for a bond that would not provide adequate coverage consistent with Respondent's bid. Thereafter, the actions taken by Respondent were designed to mitigate the fall-out from the original decision.
14. The specific charge stated in the August 24, 2017 Notice concerns Respondent's "submission of fraudulent Performance and Payment Bonds and other pertinent documents as part of [his] bid package." The Notice continues that Respondent's "actions are evidence of serious irresponsibility and are cause for debarment under . . . 2 C.F.R. § 180.800(b) and (d)." We agree.
15. We note, in passing, that the pertinent sections of 2 C.F.R. § 180.800(b) relied on by the government to hold Respondent accountable require "willful" conduct on Respondent's part. Counsel for Respondent dismissed the willfulness element as an issue, inferring that the government did not specifically prove willfulness. The government's proof of willfulness is fairly demonstrated from the evidence it offered, summarized above, to establish Respondent's culpability in submitting the documents at issue in this matter. For example, the government argued that the alteration of the disputed documents, the purchase of a bond for an amount equal to one tenth of the bid amount, etc. was deliberate and conscious on Respondent's part, i.e., willful.
16. The regulation at 2 C.F.R. § 180.850(a) provides that "[i]n any debarment action, the Federal agency must establish the cause for debarment by a preponderance of the

evidence.” “Preponderance of the evidence”, as defined in 2 C.F.R. § 180.990, “means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.” As intimated above, the government relied mostly on circumstantial evidence to prove its case. This observation is not intended to suggest that the government’s case was only viable if it offered direct evidence to support or prove its allegations against Respondent. It is raised here, however, as we assay the evidence in light of the required evidentiary standard.

17. Respondent’s counsel, for example, makes much of the fact of the apparent abandonment of the investigation by YMHA and the insurance company of fraud, forged signatures, forged corporate seals, and forged or altered Powers of Attorney.⁴ The issue is raised here because a definitive conclusion with respect to identifying the culpable party would have mooted the dispute regarding the adequacy of the government’s evidence. We are left, therefore, to determine whether the quantum of evidence presented by the government meets the “preponderance” test.
18. We conclude that the evidence presented by Respondent was insufficiently credible and that the government’s evidence soundly met the “preponderance” test of 2 C.F.R. § 180.850(a). Respondent’s actions detailed above clearly show that he “[v]iolated the terms of a public agreement or transaction [i.e., the Invitation for Bid] so serious as to affect the integrity of an agency program [here, HUD’s public housing program].” Specifically, Respondent’s actions in connection with the bid process, as detailed above, clearly evidence a “willful failure to perform in accordance with the terms of one or more public agreements or transactions.” See 2 C.F.R. § 180.800(b)(1).
19. The courts have repeatedly held that “[d]ebarments and suspensions are serious sanctions that should only be utilized for the purpose of protecting the public interest and may not be used as punishment.” *In the Matter of Lisa Burns*, 2011 HUD ALJ LEXIS 24 (December 29, 2011). Also, the test for determining whether a proposed

⁴ The parties could offer no reason why none of the three entities YMHA, Western Surety, and HUD, pursued the investigation of Respondent and his company with respect to these allegations.

sanction is warranted is present responsibility, which may be inferred from past acts. *Schlesinger v. Gates*, 249 F. 2d111, (D.C. Cir.1957).

20. Pursuant to 2 C.F.R. § 180.860, the Debarring Official may consider the aggravating and mitigating factors present in each case. Among the possible mitigating factors, I considered the fact that Respondent has been a contractor working on HUD-assisted properties for many years. There is no evidence in the record of prior misconduct by Respondent during that time. Most critically, I viewed very favorably the fact that, notwithstanding Respondent's present predicament, he continues to be awarded contracts by other housing authorities and private entities.
21. As aggravating factors, I considered, *inter alia*, the harm that Respondent's actions could have caused to the bidding process and the financial exposure, especially to YMHA and HUD, if problems arose during the renovation process. Also viewed as an aggravating factor was the recognition that the scheme described here could not have been initiated and carried out without Respondent's involvement.
22. In considering whether to debar a respondent, and what period of debarment is appropriate, in addition to the mitigating and aggravating factors, 2 C.F.R. § 180.125(c), in pertinent part, provides that "An 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 purpose of punishment." In offering guidance on how long a debarment may last, 2 C.F.R. § 180.865(a) states that "your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment."
23. The seriousness of Respondent's wrongdoing cannot be overstated. For that reason, a period of debarment is necessary, not only for the protection of the public interest but to ensure that Respondent can conform his conduct for an appropriate time to the standards of a person who is presently responsible.
24. In applying the standards and the test enunciated in *Schlesinger, supra*, a balancing of the interests implicated in that decision and in the regulations is necessary. As indicated above, Respondent has continued to be awarded contracts during the period

since his misconduct was discovered. Thus, Respondent has had more than two years to prove that he is presently responsible. On the other hand, Respondent committed a serious act, as described above. In the usual case, the seriousness of Respondent's misconduct would result in debarment, as proposed by the government in the case at bar. In determining a fair result, we are guided also by the proscription in 2 C.F.R. § 180.125(b) that a "Federal agency may not exclude a person . . . for the purpose of punishment."

25. Nonetheless, 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 C.F.R. § 180.125.
26. 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 C.F.R. §§ 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for one year from the date of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 C.F.R. chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: _____

3/1/19



Craig T. Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2019, a true copy of the DEBARRING OFFICIAL'S DETERMINATION in the matter of Docket Number DEC-18-04215-DB was served in the manner indicated.



Tanya L. Domino
Debarment Docket Clerk

HAND CARRIED

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

ELECTRONIC MAIL AND FIRST-CLASS MAIL

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ELECTRONIC MAIL AND HAND CARRIED

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