THE UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC

In the Matter of:	*	
Clayton Luckie	*	
	*	DOCKET NO.: 20-0022-DB
Respondent.	*	
	*	

DEBARRING OFFICIAL'S DETERMINATION

Introduction

By Notice dated December 27, 2019 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent CLAYTON LUCKIE 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 three years from the date of the final determination of this action. Respondent was advised that his debarment was based on his November 15, 2019, conviction in U.S. District Court for the Southern District of Ohio for mail fraud, in violation of 18 U.S.C. §§ 1341 and 2. The Notice advised Respondent that his conviction is a cause for debarment under 2 U.S.C. § 180.800 (a)(1) and (d). The Notice further advised Respondent that his proposed debarment was in accordance with the procedures set forth in 2 C.F.R. parts 180 and 2424. The Notice stated that because of Respondent's "former participation in contracts paid, in whole or in part, with federal funds" that he had participated or was likely to participate in covered transactions and was therefore subject to the debarment regulations.

Respondent requested a hearing on the proposed debarment, in an undated letter to Tanya Domino, then HUD's Docket Clerk, which was received by HUD on January 6, 2020. On January 16, 2020, Respondent sent an email to Nilda Gallegos, then Debarment Docket Clerk, and requested a continuance for at least one hundred and forty days and sought from HUD the discovery of information from the City of Dayton, Ohio. On September 2, 2021, Rebecca H. Shank, the Debarring Official's Designee in this matter, issued an Order Setting Hearing Date and Submission Deadlines and stated that she would not be requesting documents on behalf of any party. The Government timely submitted a Pre-Hearing Brief in Support of Three-Year Debarment on October 7, 2021, including exhibits. On October 20, 2021, Respondent submitted a response to the Order for Submissions Deadlines, asking for a dismissal for lack of jurisdiction and double jeopardy, and attaching exhibits.

HUD provided an informal video hearing on Respondent's proposed debarment via TEAMS on November 4, 2021, which was continued on November 15, 2021, before the Debarring Official's Designee, Rebecca H. Shank. Respondent appeared *pro se*. Ross A. Fisher, Esq., and Barret R. McVary, Esq. appeared on behalf of HUD. On November 15, 2021, the

Debarring Official's Designee issued an order setting post hearing briefing deadlines for the parties. The Government timely submitted a post hearing brief on December 17, 2021. Respondent was provided until January 7, 2022, to submit a post hearing brief. He did not do so.

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, which consists of the following information:

1. The Notice of Proposed Debarment ("Notice") dated December 27, 2019
2. Respondent's letter in response to the Notice, received on January 6, 2020
3. Respondent's email dated January 16, 2020
4. Government Pre-hearing Brief, submitted October 7, 2021, including the following exhibits:
    - Exhibit 4, Indictment No. 3:18-CR-184, dated December 13, 2018, in the United States District Court for the Southern District of Ohio, Western Division at Dayton, hereafter "Indictment"
    - Exhibit 5, Judgment in a Criminal Case, 3:18-CR-184, dated November 15, 2019, in the United States District Court for the Southern District of Ohio, Western Division at Dayton, hereafter "Judgment"
    - Exhibit 6, Dayton Daily News article, dated November 27, 2019, by Lynn Hulsey, entitled "Clayton Luckie: 'President Trump, I need a pardon'"
    - Exhibit 8, Criminal Case Detail, Franklin County Clerk of Courts, for Case Number 12 CR 005145, against Clayton Luckie
    - Exhibit 9, Federal Bureau of Investigation Press Release, dated January 23, 2013, "Former Ohio State Representative Clayton R. Luckie, II Sentenced to Three Years in Prison"
5. Respondent's Pre-Hearing Submission, received on October 20, 2021
6. Transcriptions of the informal hearings conducted on November 4 and 15, 2021, (Exhibits E and F to the Government's Post Hearing Brief)
7. Government's Post Hearing Brief, submitted December 7, 2021, including the following exhibits:
    - Exhibit G, Demolition Contract for the City of Dayton, Ohio, for $123,680
    - Exhibit H, Demolition Contract for the City of Dayton, Ohio, for $247,587

Applicable Debarment Regulations

An examination of the regulations governing this matter is appropriate. The regulations[1] define a "participant" as "**any person** who submits a proposal for or **who enters into a covered**

[1] In the ensuing discussion, I have marked pertinent sections in bold for emphasis.

transaction, including an agent or representative of a participant." See 2 C.F.R. § 180.980. The regulations define a "**principal**" to mean:

> (a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction: or
> (b) A **consultant or other person, whether or not employed by the participant or paid with Federal funds**, **who**-
> (1) Is in a position to handle Federal funds;
> (2) Is in a position to influence or control the use of those funds; or
> **(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.**

See 2 C.F.R. § 180.995. Section 180.200 describes a "**covered transaction**" as

> "… a **nonprocurement** or **procurement transaction** that is subject to the prohibitions of this part. It may be a transaction at—
>
> (a) The primary tier, between a Federal agency and a person (see appendix to this part); or
> (b) A **lower tier, between a participant in a covered transaction and another person**.

The regulation explains with particularity the types of contracts for goods or services that are within the definition of a covered transaction under these Nonprocurement Common Rule regulations, identified as 2 C.F.R. Part 180, as compared to those contracts that are governed by the Federal Acquisition Regulation (FAR). Specifically, section 180.220(b)(1) is applicable to this matter.

> 2 C.F.R. §180.220 Are any procurement contracts included as **covered transactions**?
> (a) Covered transactions under this part—
> (1) Do not include any procurement contracts awarded directly by a Federal agency; but
> (2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions.
> (b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:
> (1) **The contract is awarded by a participant in a nonprocurement transaction** that is covered under §180.210, **and the amount of the contract is expected to equal or exceed $25,000.**
> (2) The contract requires the consent of an official of a Federal agency. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for Federally-required audit services.
(c) **A subcontract also is a covered transaction if, —**
(1) It is **awarded by a participant** in a procurement transaction under a nonprocurement transaction of a Federal agency that extends the coverage of paragraph (b)(1) of this section to additional tiers of contracts (see the diagram in the appendix to this part showing that optional lower tier coverage); and
(2) **The value of the subcontract is expected to equal or exceed $25,000.**
[70 FR 51865, Aug. 31, 2005, as amended at 71 FR 66432, Nov. 15, 2006.]

HUD's regulations further describe the contracts and subcontracts that are covered transactions:

> 2 C.F.R. §2424.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are **covered transactions**?
>
> In addition to the contracts covered under 2 CFR 180.220(b) of the OMB guidance, this part applies to **any contract, regardless of tier, that is awarded by a contractor, subcontractor, supplier, consultant, or its agent or representative in any transaction**, if the contract is to be funded or provided by HUD under a covered nonprocurement transaction **and the amount of the contract is expected to equal or exceed $25,000**. This **extends the coverage of the HUD nonprocurement suspension and debarment requirements to all lower tiers of subcontracts under covered nonprocurement transactions,** as permitted under the OMB guidance at 2 CFR 180.220(c) (see optional lower-tier coverage in the figure in the appendix to 2 CFR part 180).

2 C.F.R. §2424.220. See also:

> 2 C.F.R. § 2424.30 What policies and procedures must I follow?
>
> The HUD policies and procedures that you must follow are the policies and procedures specified in each applicable section of the OMB guidance in subparts A through I of 2 CFR part 180, as that section is supplemented by the section in this part with the same section number. **The contracts that are covered transactions, for example, are specified by section 220 of the OMB guidance (i.e., 2 CFR 180.220), as supplemented by section 220 in this part (i.e., § 2424.220).** For any section of OMB guidance in subparts A through I of 2 CFR 180 that has no corresponding section in this part, HUD policies and procedures are those in the OMB guidance.

Government Counsel's Arguments

The Government argued that the Respondent was subject to debarment procedures because he was or may reasonably be expected to be involved in a covered transaction. The Government's Pre-Hearing Brief included as exhibits copies of the Indictment and the Judgment reflecting Respondent's guilty plea to Count One of the Indictment. Count One of the Indictment had charged Respondent with using the United States Postal Service to obtain a package containing magnetic signs with the name of "Corporation A" which he used to carry out a scheme to defraud the City of Dayton, Ohio. Paragraph 7 b. of the Indictment explained:

> "Rather than Corporation A performing actual, bona fide demolition or construction work on a particular project as contemplated in a government contract, defendant CLAYTON

> LUCKIE understood and agreed that Corporation B would perform these services itself. To create the false and fraudulent appearance that Corporation A was working at a particular demolition or construction site, defendant CLAYTON LUCKIE ordered large magnetic signs emblazoned with the name of Corporation A. Defendant CLAYTON LUCKIE intended to affix these signs to Corporation B's trucks to provide the false appearance that Corporation A—not Corporation B—was performing demolition and construction work on the project and to deceive the City of Dayton in the event that its representatives visited the job site."

Indictment, at pages 5-6.

Paragraph 7.e. of Count One of the Indictment further stated:

> "Based, in part, on defendant CLAYTON LUCKIE'S false and fraudulent pretenses, representations, and promises, and the non-disclosure and concealment of material facts, the City of Dayton issued funds, and awarded contracts, totaling over thousands of dollars."

Indictment, at page 7.

The Government's Pre-Hearing Brief argued that Respondent had received federal funds as part of the fraudulent scheme involving a "Disadvantaged Business Enterprise" (DBE or DB) program, set up the City of Dayton, Ohio and funded, in part, by Department of Transportation federal funds. The Government argued that:

> "This arrangement was a lower-tier covered transaction because the contract was between the City of Dayton, which had received funds pursuant to the Disadvantaged Business Enterprise program from the federal government, and the Non-DB with whom Respondent was in a joint venture to leverage the DB's DBE designation to increase the likelihood of winning a government contract supported with federal funds."

Government Pre-Hearing Brief at page 8, citing 2 C.F.R. 180.200; 2 C.F.R. 180.970 and 180.210; and Exhibit 4 at pages 4-7.

The Government's Pre-Hearing Brief included information relating to Mr. Luckie's prior criminal convictions. The Government provided a 2013 FBI press release relating to Mr. Luckie being a former Ohio State Representative who was sentenced to three years in prison after pleading guilty to eight felonies and one misdemeanor. Mr. Luckie pleaded guilty to one count of money laundering, one count of grand theft, six counts of election falsification (one for each year he was in office) and one count of failure to disclose on state ethics disclosure statements.

The Government argued that within months of his release from prison in 2016, Respondent engaged in the fraudulent conduct that is the basis for this debarment. The Government further argued that Respondent showed no remorse for his actions. It included Exhibit 6, a copy of a newspaper article where Respondent was quoted as asking former President Trump for a pardon and claimed that he did nothing wrong.

At the informal hearing on November 15, 2021, Government counsel introduced two government contracts that the City of Dayton, Ohio, had entered with companies for demolition work in 2015 and 2016. These two contracts involved a nuisance abatement program, in residential and commercial buildings, using HUD's CDBG funds. The information cover sheet

for the bidders noted that the contracts had a 10 % HUD Section 3 participation requirement. The Government offered these contracts again in the Government's Post Hearing Brief as Exhibits G and H. Notably, the amounts of these demolition contracts were for $123,680 (Exhibit G) and $247,587 (Exhibit H).

Respondent's Arguments

Respondent Clayton Luckie challenged the jurisdiction of HUD to take this debarment action. Respondent noted that HUD had not produced the contract with the City of Dayton underlying the fraudulent activities described in the Indictment. He produced voluminous pages of references to a DBE program at the Dayton airport and argued that any DBE contract would require the identification of all DBE participants as part of the initial contract. Respondent stated that he had not signed any contract. He further noted that he could not have been added as a party or subcontractor to a contract with the City of Dayton for demolition work after a contract had been entered. Respondent claimed that he had no role in bidding for the government contract, that he signed no paperwork for the contract, and that he did not sign a paper to be a subcontractor.

In his pre-hearing brief, Respondent described the City of Dayton's rules for contract bids and the process for minority owned businesses to submit certifications to the City prior to contract award. He stated that "[t]his project was a section 3 project not an [sic] DBE project nor did I give him any certification paperwork to represent to the city that I was a certified DBE MBE WBE SBE and SEC 3."

During the informal hearing, Respondent also said that: "This was a Section 3 project. Not a DBE project." He argued that he pled guilty to the underlying charges because he had an 11-year-old daughter and wanted the matter resolved. He also said "that as a Black Man" he did not think that he could obtain justice in the criminal justice system. He noted that he was not currently working, but rather, due to his diabetes, he had filed for disability. Respondent argued that "disbarment over $2,000.00 for a not upfront contractor [*sic*] does not seem fair at all."

Findings of Fact

After carefully reviewing and considering the information in the administrative record, I find, by a preponderance of the evidence, that the following facts apply to this matter:

1. Clayton Luckie is a former representative of the Ohio state legislature, serving from 2006 through December 31, 2012. He has also served as a member of his local School Board for 12 years.
2. In an unrelated criminal proceeding in 2013, Mr. Luckie pled guilty in Franklin County, Ohio, State Court, to one count of money laundering, one count of grand theft, six counts of election falsification, and one count of failure to disclose on state ethics disclosure statements. For this, he was sentenced to three years in prison. As part of the plea agreement, Mr. Luckie was to make restitution in the amount of $11,893 to the State of Ohio Treasury, for the salary he received as a state representative following his indictment on October 10, 2012, through the end of his term, on December 31, 2012. Mr. Luckie was not ordered to make restitution for the alleged $130,000 in misused campaign contributions. His

last restitution payment (of $25.00) was made on October 16, 2016, leaving a restitution balance of $7,656.

3. Mr. Luckie pled guilty to Count One of the Indictment. In his guilty plea, Mr. Luckie admitted to the facts alleged in Count One of that Indictment: That he ordered magnetic signs with the name of "Corporation A," through the United State Postal Service, which he used to carry out a scheme to defraud the City of Dayton, Ohio; that he placed these signs on Corporation B's trucks to provide the false appearance that Corporation A—not Corporation B—was performing demolition and construction work on the project and to deceive the City of Dayton in case its representatives visited the job site; that due to his fraudulent representations, and the non-disclosure and concealment of material facts, the "City of Dayton issued funds, and awarded contracts, totaling over thousands of dollars."
4. On November 15, 2019, Mr. Luckie was convicted of mail fraud, in violation of 18 U.S.C. §§ 1341, and for aiding and abetting the mail fraud, in violation of 18 U.S.C. §2. Mr. Luckie was sentenced to 120 days incarceration, four months of home detention, and three years of supervised release. He was also ordered to pay $100 and perform 100 hours of community service.
5. Mr. Luckie has served his prison sentence for the mail fraud conviction.
6. Mr. Luckie has completed his 100 community service hours by providing yard work (clearing weeds) with the Community Development Corporation in his neighborhood on Aviation Hall of Fame Trails.
7. No contract for demolition work between Corporation B and the City of Dayton, Ohio, involved in the fraudulent scheme outlined in the Indictment, was produced. The amount of that contract is not known.
8. The Government submitted two examples of contracts that the City of Dayton, Ohio, entered on November 20, 2015 (for $123,680) and August 2, 2016 (for $247,87) for demolition services involving residential and commercial structures. The first page of each of these contracts had parentheticals stating: "10% HUD Section 3 Participation" and "Federal CDBG Funds" (CDBG is an acronym for HUD's Community Development Block Grant program). Thus, I find that HUD has provided grant funds to the City of Dayton, Ohio (non-procurement transactions), which, in turn, has created procurement contracts with contractors for demolition services. These sample contracts meet the definition of a covered transaction because they exceed $25,000 and come within the definition of a lower tier procurement contract in a non-procurement transaction.
9. Contrary to the facts upon which he had pleaded guilty, in his brief and in the informal hearing, Mr. Luckie claimed that he received partial payment for recycling work he performed. Mr. Luckie said he submitted an invoice for $12,000 for four months work but only "received $2,000 from Mike for this job…. and it was over 3 years ago."
10. It is now nearly five years since the issues occurred giving rise to Mr. Luckie's criminal conviction.
11. Mr. Luckie also claimed in the informal hearing that his use of magnetic signs on another entity's truck was for advertising not for fraudulent purposes. He claimed he only used the signs on a truck for one recycling job. This statement contradicts the facts under which he pled guilty.

12. In his pre-hearing brief and at the informal hearing, Mr. Luckie described the City of Dayton's rules for contract bids and the process for minority owned businesses to submit certifications to the City prior to contract award. He was well informed of the City's rules and requirements for subcontractors to register with the City prior to any contract bid being submitted by the contractor. In his statements during the informal hearing, Mr. Luckie acknowledged his skills and aptitude for project management. He said that he was better suited to run the project and he could do it more efficiently to make money in the recycling component of the demolition work than "Mike" was.
13. In his pre-hearing brief Mr. Luckie further stated that "[t]his project was a section 3 project not an [sic] DBE project nor did I give him any certification paperwork to represent to the city that I was a certified DBE MBE WBE SBE and SEC 3." There is nothing in the record to show that Mr. Luckie submitted any subcontractor certification paperwork on the underlying contract.
14. At the informal hearing, Mr. Luckie stated that he was remorseful. He said he would never "do it again," which I interpreted as meaning he would not enter a verbal agreement with a contractor doing work for the City of Dayton. He then elaborated that if he were to get involved in any contracts in the future he would follow the rules, get certified, and have everything put down in writing.
15. The Government submitted a newspaper article from the Dayton Daily News article, dated November 27, 2019, where Mr. Luckie is quoted as saying he did nothing wrong, when asked about his conviction.
16. Mr. Luckie is also quoted as saying that he might run for political office again, although he discredited this statement during the informal hearing. Based on the record, it is reasonable to conclude that Mr. Luckie could run for political office in the future.
17. At the informal hearing, when asked if he considered himself to be presently responsible to do business with the federal government, Mr. Luckie responded: "No, I do not." He then stated that due to his conviction, he did not think that he could practically get work anywhere, especially on matters involving federal funds.
18. Mr. Luckie said he is currently unemployed and has applied for disability due to his diabetes.
19. When asked why he pleaded guilty, he responded that he has an 11-year-old daughter, and he did not want to put her through a trial. At another point, Mr. Luckie commented that "as a Black man" he did not think he could have gotten a fair trial in the justice system. He later said he realized after his plea that certain facts were not true, such as the nature of the underlying contract between the City of Dayton and the contractor providing demolition services.

Discussion and Conclusions

Debarment is an administrative action taken by a federal agency's Debarring Official to protect Federal procurement and nonprocurement program activities from individuals and entities that, because of waste, fraud, abuse, general misconduct, noncompliance, or poor performance threaten the integrity of Federal procurement and nonprocurement activities. Federal nonprocurement debarment regulations apply to persons who have participated in, are, or

who reasonably may be expected to be participants or principals in covered transactions under federal assistance, loan, and benefit programs. 2 C.F.R §180.150. Debarment is applied as a protective remedy, not as a punishment. 2 C.F.R. §180.125.

Cause for Debarment

Respondent was convicted of mail fraud, in violation of 18 U.S.C. § 1341 and for aiding and abetting in the furtherance of mail fraud, in violation of 18 U.S.C. § 2. He knowingly pled guilty to this crime, which the Indictment described as involving a "disadvantaged business" contract with the City of Dayton. Now, during these proceedings, Respondent challenges the facts to which he pled guilty. He claims that the contract in dispute involved HUD's Section 3 requirements, not a "DBE" contract. He provided voluminous material concerning the City of Dayton's DBE program at the airport, which I deem irrelevant to this matter, as it was not related to the underlying conviction.

In debarment proceedings based on a conviction, the applicable regulations do not provide Respondent an opportunity to challenge the facts upon which the proposed debarment was based. See 2 C.F.R. § 180.830(a)(1). Factual assertions that are inconsistent with facts established by a criminal plea have little relevance in a debarment proceeding. See *Agan v. Pierce*, 576 F. Supp. 257 (N.D. Ga. 1983). Respondent's guilty plea to Count One of the Indictment sets forth the facts that establish a cause for his debarment.

Respondent's conviction involved his use of magnetic signs, which he obtained using the U. S. mails, and which created the false appearance that Corporation A was working on a particular demolition project for the City of Dayton, Ohio, when it was not. Thus, his conviction involved the commission of a criminal offense while obtaining, attempting to obtain, or performing of a public agreement or transaction within the meaning of 2 C.F.R. § 180.800(a)(1). When a cause for debarment is based on a respondent's conviction, the Government has met the standard of proof. See 2 C.F.R. § 180.850(b).[2]

Participant or Principal in a Covered Transaction

Mr. Luckie has argued that he was not a participant or a principal in a covered transaction under the applicable debarment regulations. He repeatedly stated that he should not be debarred as he was not a party to any demolition contracts with the City of Dayton, Ohio and that he had not registered as a certified subcontractor. He also argued that the debarment should be dismissed because he did not receive any federal funds. He claimed that he was not paid by the

[2] The Notice also claimed that cause for debarment existed under 2 C.F.R. § 180.800(d), for "a cause of so serious or compelling a nature that it affects your [Respondent's] present responsibility." The Government's pleading, however, omitted the term "any other cause" which is a part of the phrasing of § 180.800(d). Here, Respondent's wrongdoing was based on the conviction. There is no "other" cause presented. Thus, I will not consider this alternative argument for cause.

City of Dayton and any payment he received was in reimbursement for the recycled property he recovered and not a payment from demolition contract funds. We note that the Government never argued that Mr. Luckie was a party to the contract with Dayton nor that he received payment from Dayton. However, in its pre-hearing brief the Government summarily concluded that federal funds were involved in the contract at issue under the fraudulent scheme. Contrary to the Government's statements, it is not clear that federal funds were involved in the underlying contract that the City of Dayton entered for demolition services.

The Government argued that Respondent was a participant within the meaning of 2 C.F.R. 180.980 because he admitted to being in a "joint venture" with a corporation that received federal funds pursuant to a contract with the City of Dayton under a federal grant. (Government's Pre-Hearing Brief at page 8.) The Government concluded that the arrangement was a lower tier covered transaction because the contract was between the City of Dayton, which had received federal funds pursuant to a grant program, and the non-disadvantaged business entity, with whom Respondent was in a joint venture. (Government's Pre-Hearing Brief at page 8.) But this conclusion was unsubstantiated because the amount of the contract was not presented in this proceeding.

In the Post-Hearing brief, the government's counsel responded to the Debarring Official's Designee's question concerning whether 2 C.F.R. § 180.220 imposed a jurisdictional predicate necessary for the imposition of a debarment. Specifically, as the Indictment did not describe the amount of the contract at issue under the fraudulent scheme, the question was posed as to whether the contract amount needed to be known to determine if it came within the lower tier description of a contract "expected to equal or exceed $ 25,000." See § 180.220 (b)(1) and (c)(2).

The Government argued that the purpose of 2 C.F.R. § 180.220 was prospective, "with a role limited to ensuring that an already excluded party not be a participant or a principal on a transaction that qualifies as a covered transaction." (Government Post Hearing Brief at page 9.) This argument, however, belies the use of the term "covered transaction" in the very definitions of participant and principal. Moreover, the term "covered transaction" is used in the regulatory provision that describes those against whom an exclusionary action may be taken. See, 2 C.F.R. §180.150, which states: "Against whom may a Federal agency take an exclusion action? Given a cause that justifies an exclusion under this part, a Federal agency may exclude any person who **has been**, **is**, or **may reasonably be expected to be** a participant or principal in a **covered transaction**." It makes no sense to say that the definition of a covered transaction, as set out in 2 C.F.R. § 180.220, applies only prospectively, given this context of considering if a person has been, is, or may reasonably be expected to be in a participant or principal in a covered transaction. HUD's supplement to the OMB guidance further supports this view. Title 2 C.F.R. §2424.220 expanded the definition of "covered transaction" to extend the coverage of the HUD nonprocurement suspension and debarment requirements to all lower tiers of subcontracts under covered nonprocurement transactions, namely, to contracts equal to or exceeding $25,000. We thus conclude that the definition of "covered transaction" at 2 C.F.R. § 180.220, and HUD's rules at 180.2420, contain a lower tier contract threshold of $25,000, that applies wherever the term "covered transaction" is considered, not just prospectively.

In this case we have no proof that that the contract met the threshold of $25,000 to come within the definition of a lower tier covered transaction. Although the Government did provide examples of demolition contracts in Dayton that involved hundreds of thousands of dollars in HUD funds, which exceed the $25,000 threshold, those contracts were not submitted as the actual contract in the underlying criminal offense.

Mr. Luckie described the contract as a Section 3 project—which is a HUD requirement in grant programs that a certain percentage of work be performed by low-income workers. Ironically, in making this statement Mr. Luckie has acknowledged the likely presence of HUD funds backing the City's contract in the matter under which he was convicted. Despite the facts stated in the Indictment, we find it is more likely than not that the underlying contract for demolition work was a contract funded with HUD's CDBG grant funds, which would have a certain percentage goal for Section 3 (low-income workers or businesses) participation. Under the record before me, however, the Government failed to establish that the contract equaled or exceeded $25,000. The Government failed to prove that Mr. Luckie **has been** a participant in **a covered transaction** because the amount of the contract between the City of Dayton and Corporation B is not known.

This does not end the analysis, however, as the Government **has established** that Mr. Luckie **may reasonably be expected to be a participant or principal in a covered transaction going forward**. As he noted in the informal hearing, Respondent possesses substantial expertise on the contracting practices of the City of Dayton. Following his release from prison in 2016, Respondent had promoted himself as a "consultant" and offered advice to contractors with the City of Dayton on how to meet the terms of those contracts, be they demolition or recycling projects. He further demonstrated substantial knowledge of the City of Dayton, Ohio's contracting requirements and minority or disadvantaged business programs. It is reasonable to conclude that Mr. Luckie could be a consultant or project manager for demolition and recycling projects in the future. He also has sufficient experience and expertise to be considered a consultant on contracting requirements within the Dayton area. As a result of Respondent's prior role as a state legislator, his extensive understanding of the City of Dayton's processes for contracting, the likelihood of future opportunities for HUD funding for demolition projects in Dayton, and Respondent's own actions in the instant matter as a "consultant" to a demolition company and a recycler of materials from demolition projects, I conclude that he **may reasonably be expected to be** a participant or principal in a covered transaction going forward.

Lastly, Mr. Luckie argued that he was paid for recycling work and not from federal funds for demolition work. There is no requirement that Mr. Luckie to have been paid by federal funds for his conviction to be a cause for debarment. *See Kurt Kane Hayden, Julie Hayden, and Hayden Environmental, 2015 EPADEBAR LEXIS 3, EPA Debarment Case Nos. 12-0324-00, 12-0324-01, and 12-0324-02, decided May 14, 2015 ("Hayden EPA Debarment").* In the Hayden EPA Debarment, the Debarring Official found that the government need not show that federal funds were involved in the Respondent's underlying conviction, which was based on a fraudulent claim to the State of California for payment for environmental services. The Debarring Official noted that past participation in a covered transaction was not required so long as the agency

could show that the person or entity "may reasonably be expected to be a participant or principal (or serve as an agent or representative for a participant)" in a future covered transaction. Hayden EPA Debarment at *10. In the Hayden EPA Debarment, the Respondents were found to have substantial business experience working in an industry that receives federal funding. The Debarring Official concluded that it was reasonable to expect that Respondents may seek to enter transactions with the federal government or be participants or principals in covered transactions in the future. Similarly, in this case, the Government does not have to demonstrate that the contract involved in Mr. Luckie's conviction had federal funding, or even the amount of that contract, for this debarment action to proceed. The Government has established cause for debarment based on Mr. Luckie's conviction. It also has shown that Mr. Luckie may reasonably be expected to be a participant or principal in a covered transaction in the future. Accordingly, Mr. Luckie's motion to dismiss this matter for lack of jurisdiction is denied.

Respondent's Present Responsibility

Having determined that a cause for debarment exists, the burden then shifts to Respondent to demonstrate "to the satisfaction of the debarring official" that he is presently responsible, and debarment is unnecessary. 2 C.F.R. § 180.855(b). In determining whether debarment is appropriate, and if so, the length of debarment, I may consider the mitigating and aggravating factors set forth at 2 C.F.R. § 180.860 and discussed below.

1. 2 C.F.R. §180.860 (a) - The actual or potential harm or impact that results or may result from the wrongdoing.

The actual amount of harm that resulted from Mr. Luckie's wrongdoing is unknown. The Indictment noted that the underlying contract was worth "thousands of dollars." Mr. Luckie's conduct undermined the goals of the City of Dayton's contract, and likely caused reputational harm to the City of Dayton. In most cases of convictions for fraud, a convicted party is ordered to pay restitution, however, no restitution was ordered in Mr. Luckie's criminal case. This is an aggravating factor.

2. 2 C.F.R §180.860(b) - The frequency of incidents and/or duration of the wrongdoing.

The Indictment stated that the fraudulent scheme took place between June 2016 and January 2017. Mr. Luckie obtained one set of magnetic signs, which he claimed he used only once. These incidents occurred over five years ago. Therefore, I give this factor neutral value.

3. 2 C.F.R §180.860 (c) -- Whether there is a pattern or prior history of wrongdoing.

Mr. Luckie has a prior history of wrongdoing. In 2013, Mr. Luckie pled guilty in Franklin County, Ohio, State Court, to one count of money laundering, one count of grand theft, six counts of election falsification, and one count of failure to disclose on state ethics disclosure statements. As part of the plea agreement, Mr. Luckie was to make restitution in the amount of $11,893 to the State of Ohio Treasury, for the salary he received as a state representative following his indictment on October 10, 2012, through the end of his term, on December 31,

2012. Mr. Luckie was not ordered to make restitution for the alleged $130,000 in misused campaign contributions. His last restitution payment (of $25.00) was made on October 16, 2016, leaving a restitution balance of $7,656. For this, he was sentenced and served three years in prison. This is an aggravating factor.

4. 2 C.F.R. §180.860 (d) -- Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

There is no evidence in the record of prior exclusionary actions against Mr. Luckie. This is a minor mitigating factor.

5. 2 C.F.R. §180.860 (e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

There is no evidence in the record of any administrative agreements involving Mr. Luckie. This is a minor mitigating factor.

6. 2 C.F.R. §180.860 (f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

Respondent pleaded guilty to the facts stated in Count One of the Indictment, which included his obtaining magnetic signs with the intent to deceive City of Dayton representatives that his business was performing demolition and construction work on the project. A part of Count One described his preparing false documents, including invoices, but these charges were dismissed, so those claims are disregarded here. Mr. Luckie admitted that he undertook project management to recycle materials recovered from the demolition site and that he offered advice to make more money on the recycling part of the job. This is an aggravating factor.

7. 2 C.F.R. §180.860(g) -- Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

While Mr. Luckie pled guilty, he has offered mixed messages on whether his conduct was wrong. He said he pled guilty because he did not think he could obtain justice as a "Black Man," and he did not want to go through a trial because of the harm that could have on his 11-year-old daughter. Mr. Luckie has consistently stated that the contract at issue involved HUD's Section 3 requirements, contradicting his guilty plea to a scheme to defraud a city of Dayton contract involving disadvantaged businesses. Thus, he has pled guilty to a set of facts that he does not now agree with. This is not the action of a responsible person. During the informal hearing he said that he was remorseful and that he would "never do it again." Yet, the Government provided a newspaper article soon after Mr. Luckie's sentencing where he claims to have done nothing wrong. Overall, this is an aggravating factor.

8. 2 C.F.R. §180.860 (h) -- Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

Mr. Luckie's criminal sentence in 2019 involved no fine nor restitution, other than a $100 court fee, which he paid. There was no evidence submitted that he was asked to reimburse the Government for any investigative or administrative costs incurred. The docket for the 2013 convictions revealed an outstanding restitution balance of $7,656, which involved a repayment of his salary as a state legislature, not for any alleged misuse of campaign funds. As this factor looks at the improper activity in the debarment matter and not past crimes, I view this as a neutral factor.

9. 2 C.F.R. §180.860 (i) -- Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

The newspaper article following his conviction noted that Mr. Luckie was the first of several indicted persons to enter into a plea agreement. He cooperated in the informal hearing, which consisted of more than two hours of presentation and discussion, by volunteering that the contract at issue was subject to HUD's Section 3 requirements. Mr. Luckie's presentation at the informal hearing provided my designee with a clearer understanding of what likely took place in the arrangement that resulted in Mr. Luckie's conviction. This as a mitigating factor.

10. 2 C.F.R. §180.860 (j) -- Whether the wrongdoing was pervasive within your organization.

Mr. Luckie acted on his own and there was no evidence that Corporation A was even aware of his actions. I find this to be neither a mitigating nor aggravating factor.

11. 2 C.F.R. §180.860 (k) -- The kind of positions held by the individuals involved in the wrongdoing.

Mr. Luckie described himself as providing consulting services. He further described doing project management oversight of the demolition and recycling work. He acted as a partner or joint venture partner with the entity that received the contract from the City of Dayton. He played an active role in the wrongdoing. This is an aggravating factor.

12. 2 C.F.R. §180.860 (l) -- Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

Mr. Luckie did not provide any evidence that he has taken corrective action. In the informal hearing he did say that if he were to get into the business again, he would require appropriate

paperwork be done and he would "follow the rules." I find this to be neither a mitigating nor aggravating factor.

13. 2 C.F.R. §180.860 (m) -- Whether your principals tolerated the offense.

Mr. Luckie complained that "Mike"- presumably the person with whom he entered the fraudulent scheme —had turned him in to gain favor on other criminal matters that he was facing. I find this to be neither a mitigating nor aggravating factor.

14. 2 C.F.R. §180.860 (n) -- Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

Mr. Luckie did not bring the fraudulent scheme to the government's attention. This is an aggravating factor.

15. 2 C.F.R. §180.860 (o) --Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

Mr. Luckie did not provide the debarring official with any investigative report concerning the circumstances surrounding the cause for debarment, but, under the circumstances, it would not have been expected of him. I find this to be neither a mitigating nor aggravating factor.

16. 2 C.F.R. §180.860 (p) -- Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

This factor does not apply as Mr. Luckie was the individual who took the action subject to the debarment.

17. 2 C.F.R. §180.860 (q) -- Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

This factor does not apply as Mr. Luckie was the individual who took the action subject to the debarment.

18. 2 C.F.R. §180.860 (r) -- Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

This factor does not apply as Mr. Luckie was the individual who took the action subject to the debarment.

19. 2 C.F.R. §180.860 (s)--Other factors that are appropriate to the circumstances of a particular case.

Mr. Luckie timely appealed his debarment in January 2020. On January 16, 2020, he requested a delay of 140 days for the informal hearing date. It is not known why HUD did not

immediately respond to his request for a delay in these proceedings. In mid-March 2020, the COVID-19 pandemic required HUD personnel to work from home under mandatory telework. The Department did not issue a scheduling order for this matter until September 2, 2021. The delay in HUD's response to Mr. Luckie's extension request is a mitigating factor.

Determination

Based on the foregoing, I find that Respondent is not presently responsible. Therefore, debarment is necessary. I have considered the Government's recommendation of a debarment period for three years in this case and weighed all the aggravating and mitigating factors. The regulation provides that debarment should generally not exceed three years but the Debarring Official, in his discretion, may impose a longer or shorter period of debarment as circumstances warrant. 2 C.F.R. § 180.865(a). Mr. Luckie was convicted for knowingly committing fraud in a contract involving "disadvantaged businesses." Subsequent information provided creditable proof that the contract was not a "DBE" contract but rather one involving HUD's Section 3 program requirements. In debarment proceedings based on a conviction, the applicable regulations do not provide Respondent with an opportunity to challenge the facts upon which the proposed debarment was based. 2 C.F.R. § 180.830 (a)(1). However, I have accorded some mitigation credit to his explanation of the circumstances leading to his guilty plea and that he provided some recycling services for the payment he received. After careful consideration of the record, including the delays caused by HUD, I have concluded that a term of debarment of one year is necessary to protect the interests of the government and the public.

Therefore, I have determined, in accordance with 2 C.F.R. §§180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent Clayton Luckie 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 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: 3/15/2022

[redacted]

Craig T. Clemmensen
Debarring Official