UNITED STATES OF AMERICA

before the

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In the Matter of:	
RALPH A. CAPUTO	Docket No. 79-674-DB
Appellant	

DETERMINATION

Statement of the Case

By letter dated September 14, 1979, Ralph A. Caputo, appellant herein, was notified that the Department of Housing and Urban Development, hereinafter HUD, intended to debar him and any business concerns in which he has a substantial interest from participation in all Departmental programs for a period of three years. Appellant was suspended pending resolution of the debarment action. The grounds for debarment are based on appellant's having allegedly falsely certified to an "Application and Certificate for Payment" made pursuant to a contract between R.A.C. Company, Inc., of which appellant was President and sole Director, and the Lowell Housing Authority, Lowell, Massachusetts. Appellant filed a timely request for a hearing pursuant to 24 C.F.R. §24.7 and subsequently elected to have the matter determined on the written record. Briefs and reply briefs were filed on behalf of appellant and HUD in support of their respective positions. This matter was initially assigned to Administrative Law Judge James W. Mast, but was thereafter transferred to Administrative Judge B. Paul Cotter, Jr., and then to Administrative Judge Edward Terhune Miller and, on January 12, 1981, pursuant to Secretarial delegation, was reassigned to the undersigned Administrative Law Judge.

Applicable Regulations

The Departmental regulations applicable to debarment, 24 C.F.R. Part 24 (January 27, 1977), provide, in pertinent part, as follows:

> §24.4(f) "Contractors or grantees," Individuals ... that receive HUD funds indirectly through non-Federal sources ...." 1/

1/ This is exactly the same definition contained in the predecessor 24 C.F.R. Part 24, dated December 22, 1971. (See 24 C.F.R. §24.4(g) dated December 22, 1971.)

§24.6 "Causes and conditions applicable to determination of debarment. Subject to the following conditions, the department may debar a contractor or grantee in the public interest for any of the following causes:

* * *

(a)(4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment." 2/

Findings of Fact

1. The Lowell Housing Authority, Lowell, Massachusetts (hereinafter "LHA"), is a "public housing agency" as defined in the United States Housing Act of 1937.

2. The R.A.C. Company, Inc., hereinafter "RAC," was incorporated on April 3, 1974, by Ralph A. Caputo, appellant herein, for the purpose of carrying on the business of construction work. At all times mentioned herein, appellant was the President, Treasurer, Clerk and sole Director of the firm. (Government Exhibit 2.)

3. On August 24, 1974, LHA entered into a construction contract with RAC for elevator modernization work on Bishop Markham Village Project (hereinafter "Project") (Project No. Lowell, Mass 1-3). (Appellant's Exhibit 1.)

4. The funding source of the contract was a grant of approximately $5,500,000.00 for the modernization of the Project awarded by the United States Department of Housing and Urban Development to the LHA, pursuant to an annual contributions contract between these agencies. (Government Exhibit 5.)

5. As adjusted by Change Orders, the contract amount was $306,650.53. (Government Exhibit 3, Change Order No. 5.)

2/ This language is virtually identical to the language in the predecessor Part 24 in effect at the time of the false certification which took place in August, 1975. The predecessor Part 24 provided in 24 C.F.R. §24.9(a)(4) (effective December 22, 1971) as follows: "Any other cause of such serious compelling nature, affecting responsibility, as may be determined in writing by the Secretary of his duly authorized representative to warrant debarment."

6. RAC entered into subcontracts with, among others, City Elevator Company, Inc., Melrose, Massachusetts (hereinafter "City Elevator"), for elevator work in the amount of $148,500.00 (Appellant's Exhibit 13), Winthrop Electrical Company, Inc., East Boston, Massachusetts (hereinafter "Winthrop Electrical"), for electrical work in the amount of $15,600.00 (Appellant's Exhibit 14), and two subcontracts with Quinn Brothers, Inc. of Peabody, Essex, Massachusetts (hereinafter "Quinn Brothers"), for ornamental iron and miscellaneous metal work in amounts of $6,700.00 and $18,000.00, for a total of $24,700.00. (Appellant's Exhibits 10 and 11) The City Elevator contract price was increased by $2,614.45 pursuant to Change Order Nos. 3 and 5 to the prime contract between the LHA and RAC. (Government Exhibit 3.) The Winthrop Electrical contract was increased by $9,078.08 pursuant to Change Order No. 4 to the prime contract between the LHA and RAC. (Government Exhibit 3.) RAC contends that the $18,000.00 subcontract with Quinn Brothers was adjusted to $16,000.00 (Appellant's Exhibit 12.), although there is no evidence of any Change Order having been made to the prime contract between RAC and LHA reflecting such adjustment.

7. Payment by the LHA to RAC for the work covered by their construction contract was made in installments, based upon the submission to the LHA by RAC of "Application and Certificate for Payment" forms. (Government Exhibit 4.) The amount applied for on each payment application was computed by reference to the scheduled value of the work completed during the period covered by the application, less a ten percent (10%) retainage withheld by the LHA. (Government Exhibit 4, Documents "B" - "N.")

8. During the period between October 3, 1974, and June 27, 1975, RAC submitted twelve (12) payment applications for a total amount of $266,261.00 (Government Exhibit 4, Documents "B" - "M."), including a direct payment request of $6,560.00. (Government Exhibit 4, Document "Z.")

9. In accordance with said payment applications, the LHA paid RAC $259,701.00 (Government Exhibit 4, Documents "O" - "Z."), the difference between $266,261.00 and the $6,560.00 direct payment request. This amount was paid by the LHA and received by RAC prior to August 1, 1975. (Government Exhibit 4, Documents "O" - "Z.")

10. The $259,701.00 paid by the LHA to RAC reflected, in part, applications by RAC for payments to subcontractors City Elevator, Winthrop Electrical, and Quinn Brothers as follows: (Government Exhibit 4)

City Elevator	Application No.	Amount
	6	$ 14,850.00
	7	37,125.00
	8	7,425.00
	9	4,850.00
	10	37,125.00
	11R	7,425.00
	12	29,700.00
	Sub-Total	$148,500.00
	Less Retainage	14,850.00
	Total	$133,650.00

Winthrop Electrical	Application No.	Amount
	6	$ 2,340.00
	9	2,340.00
	11R	1,560.00
	12	9,360.00
	Sub-Total	$ 15,600.00
	Less Retainage	1,560.00
	Total	$ 14,040.00

Quinn Brothers	Application No.	Amount
	1	$ 3,000.00
	3	5,000.00
	5	7,000.00
	6	1,000.00
	7	2,000.00
	8	6,025.00
	12	2,675.00
	Sub-Total	$ 26,700.00
	Less Retainage	2,670.00
	Total	$ 24,030.00

11. In August 1975, RAC submitted to the LHA Application No. 13 (Government Exhibit 4, Document "N"), in which it applied for $36,146.00. This application contained a signed sworn statement of appellant dated August 1, 1975 in which he certified as follows:

> [RAC] certifies that the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by him for Work for which previous Certificates for Payment were issued and payment received from the Owner, and that the current payment shown herein is now due. (emphasis added.) (Government Exhibit 4, Document "N.")

12. In previous applications, RAC had applied for, and received from the LHA prior to August 1, 1975, $133,650.00 for payment to

subcontractor City Elevator, $14,040.00 for payment to subcontractor Winthrop Electrical, and $24,030.00 for payment to subcontractor Quinn Brothers. However, as of August 1, 1975, the date of appellant's certification, City Elevator had only been paid $101,237.00 (Government Exhibit 6.), Winthrop Electrical had only been paid $4,212.00 (Government Exhibit 8.) and Quinn Brothers had only been paid $18,312.00 (Government Exhibit 1.)

13. RAC applied for and received from the LHA prior to August 1, 1975, $171,720.00 for payments to be made to City Elevator, Winthrop Electric and Quinn Brothers.

14. As of August 1, 1975, RAC had paid City Elevator, Winthrop Electric and Quinn Brothers the total amount of $123,761.00.

15. As of August 1, 1975, RAC had paid City Elevator, Winthrop Electric and Quinn Brothers $47,959.00 less than the amounts for which previous Certificates for Payment were issued and payments made by the LHA to RAC.

Conclusions of Law

1. Appellant is a "contractor or grantee" both within the meaning of 24 C.F.R. §24.4(f) (January 27, 1977) and 24 C.F.R. §24.4(g) (December 22, 1971).

2. Appellant falsely certified under oath on August 1, 1975 in the "Application and Certificate for Payment" form executed by him for RAC that all amounts had been paid by RAC for work for which previous Certificates for Payment were issued and payments received from the LHA.

3. Appellant's false certification is of such serious compelling nature, affecting responsibility, as to warrant debarment for a period of three years.

Discussion

Appellant alleges that, in the absence of any proof that appellant profited or personally received any of the funds received by RAC as a result of its elevator modernization contract with the LHA, the Department has not sustained its burden of proof that appellant is a "contractor or grantee" within the meaning of 24 C.F.R. §24.4(f). RAC was a recipient of HUD funds granted to the LHA for the purpose of elevator modernization work upon an LHA project by virtue of its construction contract with the LHA for said work. It is well-settled that an officer of a private organization which is an indirect recipient of HUD funds is a "contractor" within the meaning of 24 C.F.R. §24.4(f). See, e.g., Mark B. Horner, HUDBCA No. 79-410-D43; Docket No. 79-655-DB (1980); Larry Roehr, Docket No. 77-474-DB; 77-HUD(JD)-37 (1977); Glen Smith and Miricar, Inc., Docket No. 77-484-DB; 77-HUD(JD)-36 (1977). Indeed, an individual who closely participates in the creation, organization, management, control and day-to-day

operations of an indirect corporate recipient of HUD funds has been held to be a "contractor" within the meaning of HUD's debarment regulations even though he or she is not an officer of the corporate entity. William B. Jolley and Monarch Enterprises, Inc., Docket No. 75-310-DB; 75-HUD(JD)-26 (1975). Appellant's contention, therefore, is clearly without merit.

Appellant also alleges that 24 C.F.R. Part 24, 42 Fed. Reg. 5304 (January 27, 1977) is not applicable to him because the conduct upon which the proposed debarment is grounded occurred prior to the effective date of said regulation. Appellant claims that the debarment regulations which were effective on August 1, 1975, the date of the false certification, should be applied in the instant proceeding. Appellant's contention has no merit for a number of reasons. First, appellant has suffered no substantive prejudice from the application of the present regulations. Appellant's duty to certify truthfully did not retrospectively arise from the current debarment regulation. Appellant's duty not to falsely certify in 1975 existed independently of any administrative sanction that might later be imposed. In no way can it be said that appellant is presently being adjudged by standards of conduct that did not exist at the time that the alleged misconduct occurred. Second, whatever procedural differences exist between the current debarment regulations and those effective on August 1, 1975 have not caused appellant any prejudice. At the time when appellant was first apprised of the Department's proposal to debar him, he was also notified of the applicable regulations. (See Notice of Intended Debarment.) It cannot be said that appellant has proceeded under a belief that the 1975 regulations applied. Furthermore, It should be noted that the debarment regulations have been revised since 1975, in large measure to comport with judicial mandates requiring greater procedural protection for persons being debarred. See Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976). Lastly, with regard to the grounds for debarment, and the procedure applicable to this case, the current Part 24, which became effective January 27, 1977 and the predecessor Part 24, which became effective December 22, 1971, and which was in effect on August 1, 1975, are virtually identical.

Appellant contends that he did not falsely certify to payments made to subcontractors as alleged in the Notice of Proposed Debarment. The Department has shown that prior to August 1, 1975, RAC had applied for and received from the LHA $171,720.00 for payments to be made to City Elevator, Winthrop Electrical and Quinn Brothers, and that as of that date RAC had paid to these subcontractors only $123,761.00.

The sworn certification which appellant executed on August 1, 1975 reads in pertinent part:

> [RAC] certifies ... that all amounts have been paid by him for Work for which previous Certificates for Payment were issued and Payments received from the Owner ...

The Department contends that the certification could have been truthfully attested to only if appellant had applied all amounts received by RAC from the LHA as appellant had indicated in the prior Certificates for Payment forms that they would be applied. Since the amount paid to City Elevator, Winthrop Electrical and Quinn Brothers by RAC prior to August 1, 1975, was $47,959.00 less than the total amount which RAC had applied for and received from the LHA for payments to be made to these subcontractors, the Department alleges that appellant, in having certified to "all amounts" having been paid, falsely certified.

Appellant contends, however, that the certification should be construed as though it read:

> [RAC] certifies ... that all amounts have been paid by him for Work for which previous Certificates for Payment were issued and payments received from the Owner less any amount specified in any court proceedings barring such payment, and also less any amount claimed due from the subcontractor by the general contractor (See Brief and Documentary Evidence for the denial of Debarment at p.30)

Appellant's authority for this interpretation of the certification is a Massachusetts statute which provides:

> Every contract awarded pursuant to sections forty-four A to L, inclusive, of chapter one hundred and forty-nine 3/ shall contain the following subparagraphs (a) through (i) and every contract awarded pursuant to section thirty-nine M of chapter thirty 4/ shall contain the following subparagraphs (a)

3/ MASS. ANN. LAWS, Chapter 149, §§44A-44L (Michie/Law. Co-op) applies to contracts for the construction, reconstruction, alteration, remodeling, repair or demolition of any building by the Commonwealth of Massachusetts or any governmental unit thereof estimated to cost more than $2,000.00 in the case of any governmental unit thereof. The subcontracts in the instant proceeding were awarded pursuant to these provisions. (Appellant's Exhibit 5.)

4/ MASS. ANN. LAWS, Chapter 30, §39M (Michie/Law. Co-op) applies to contracts for the construction, reconstruction, alteration, remodeling or repair of any public work by the Commonwealth of Massachusetts or by any county, city, town, district or housing authority and estimated to cost more than $2,000.00 in the case of a housing authority.

through (h), and in each case those subparagraphs shall be binding between the general contractor and each subcontractor.

(a) Forthwith after the general contractor receives payment on account of a periodic estimate, the general contractor shall pay to each subcontractor the amount paid for the labor performed and the materials furnished by that subcontractor, less any amount specified in any court proceedings barring such payment and also less any amount claimed due from the subcontractor by the general contractor. 5/ (emphasis supplied.)

Appellant argues that, since RAC had outstanding claims against subcontractors City Elevator, Winthrop Electrical and Quinn Brothers in the amount of $124,200.00 as of August 1, 1975, the date of the certification in issue, he did not misrepresent any amounts previously paid to these subcontractors. 6/

The primary issue in this proceeding is by whose interpretation of the certification, appellant's or the Department's, should appellant's action be adjudged. Given the lack of dispute on the essential facts concerning appellant's payment of the LHA funds to the subcontractors, resolution of this issue is determinative of the question of false certification if appellant had no reasonable basis for believing his interpretation of the certification correct, and if a reasonable person in appellant's position would have construed the certification to mean that which the Department says it does. 7/ The issue of appellant's compliance with his interpretation of the certification is irrelevant if he had no basis for believing the reasonableness of his construction of it.

In light of the clear meaning which the words of the certification convey and the purpose which the certification was meant to serve, it must be concluded that appellant's interpretation of the certification is unreasonable and the Department's determination that appellant made a false certification emminently correct.

5/ See MASS. ANN. LAWS, Chapter 30, §39F(1)(a) (Michie/Law. Co-op). (Appellant's Exhibit 32.)

6/ It is interesting to note that in the August 1, 1975 certification as well as in the previous twelve certifications, RAC also certified the "Work covered by this Application for Payment has been completed in accordance with the Contract Documents."

7/ Since the certification appears to have been provided by the LHA without prior discussion with appellant, its meaning should be construed under a standard of reasonable understanding, i.e., a standard which would attach to the words the meaning which the person to whom they are addressed might reasonably give to them. See Restatement of Contracts §227.

It is beyond cavil that the plain meaning of the certification's words supports the Department's construction of it and militates against adopting appellant's interpretation.

Appellant has offered no factual evidence nor made any legal argument showing that the Department's interpretation of the certification does not comport with the ordinary meaning of the words used. The Department contends that the certification "calls for a representation of fact without reference to any subjective judgment by RAC of legal entitlement." (Department's Reply to Appellant's Brief and Documentary Evidence for the Denial of Debarment, p. 5.) Certainly, unless a radical adjustment is made in the meaning of any of the words as they are ordinarily understood, the certification plainly refers to the payment of "all amounts" for which prior payment applications were issued and payments received from the LHA. It should be stressed that appellant does not contest the Department's "plain meaning" interpretation of the Certification, rather, he asserts that his "legalistic" interpretation should supplant that of the Department's.

Appellant asks that a Massachusetts statute, requiring insertion of a clause in a subcontract regulating the respective rights of the contractor and subcontractors, be incorporated into a certification intended to affect the owner - contractor relationship. Appellant attempts to incorporate the statute into the certification by use of the word "payment" in the certification. He says that "[t]he word 'payment' in the world of creditors and debtors can have only one meaning, namely, legal payment." (Brief and Documentary Evidence for the Denial of Debarment, p. 30) Appellant has introduced no evidence supporting his bare assertion that the word "payment" has a different meaning "in the world of creditors and debtors" than that usually attached to it. In the absence of clear evidence showing that a contractor in appellant's position would interpret the word "payment" in the certification to include the provisions of the MASS. ANN. LAWS, Chapter 30 §39 F(1)(a), either the certification or the statute would have to refer to an intent to accomplish an incorporation in order for appellant's incorporation theory to have any semblance of validity. Obviously, no such intention can be gleaned from either document. As counsel for the Department aptly asserts, "[i]f the drafters of the certification intended to incorporate the reservations urged by appellant, it would have been a simple matter to have done so explicitly." (Department's Reply to Appellant's Brief and Documentary Evidence for the Denial of Debarment, p. 5.) Similarly, if the Massachusetts legislature had intended by its enactment of MASS. ANN. LAWS, Chapter 30 §39 F(1)(a) to alter the ordinary meaning of the word "payment" in all contractual relations in which it or its political subdivisions are involved, it too could easily have explicitly done so.

It must be presumed that appellant understood the purpose of the certification he was signing. Clearly, there are at least three purposes of which he should have been cognizant. First, it

is presumed that appellant knew that the LHA was asking him to provide it with information as to his prior disbursements to subcontractors of funds received from the LHA. Such information was meant to obviate the need for the LHA to make an independent investigation to obtain facts that were known to appellant. Second, it is presumed that appellant knew that the certification was meant to assure the LHA that the funds it gave to him were being applied to payment of the subcontractors on the LHA's project. Such assurance induced reliance on the part of the LHA to continue making payments, and appellant's failure to certify would have apprised the LHA of potential problems between appellant and the subcontractors possibly prejudicing the timely completion of the LHA contract work. Third, it is presumed that appellant knew that the certification was meant to put him on record as having attested to certain facts in the event that problems later developed. Such attestation was meant to make appellant responsible for the actions he certified to having taken.

Appellant must surely have recognized that his interpretation of the certification would frustrate the aforementioned purposes for which the certification was used by the LHA. He should have understood that the certification was useless unless it was construed as calling for an objective representation of fact without reference to any subjective judgment by the contractor of legal entitlement. It is inconceivable that appellant could reasonably have believed his interpretation to be correct, when he is presumed to have recognized that his construction of the certification would render it useless.

Notwithstanding a determination that appellant's interpretation of the certification was unreasonable, appellant's reliance on that interpretation without attempting before signing it to make inquiry with the LHA as to its correctness and without at least explaining his position to the LHA in an attachment evidences a serious lack of responsibility. The fact that appellant is presumed to have recognized that his construction of the certification would frustrate its purposes and the fact that the plain meaning of the certification was unambiguous should have put appellant on notice that he was inviting a misunderstanding with the LHA with his interpretation of the certification. For appellant to disavow having had any responsibility to ascertain what the LHA was asking him to certify to is disingenuous at best. Contrary to appellant's assertion that it would have been "superfluous" to attach documents that would have explained his position (Appellant's Rebuttal to Department's Reply to Appellant's Brief and Documentary Evidence for the Denial of Debarment, p. 5.), appellant had an affirmative duty to apprise the LHA of RAC's withholding of payments to subcontractors. Appellant could have satisfied this duty either by not signing the certification or by attaching an explanatory addendum to it. Appellant's failure to do either is viewed as nothing less than a circumvention by appellant of his responsibility, imposed by the certification, to let

the LHA know that RAC was withholding certain payments from its subcontractors.

Debarment is a measure which may be invoked by HUD to exclude or to disqualify "contractors and grantees" from participation in HUD programs as a measure for protecting the public. "Responsibility" is a term of art in public contract law and the instant context which has been defined to include integrity and honesty as well as ability to perform. See Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976). The test for debarment is present responsibility, although a finding of a present lack of responsibility can be based on past acts. Schlesinger v. Gates, 249 F2d 111 (D.C. Cir. 1957), cert. denied, 355 US 939 (1958); Roemer v. Hoffman, supra. Integrity is central to a contractor's responsibility in performing a business duty toward the Government.

Notwithstanding any damage that results therefrom, false certifications made by persons with whom the Department deals is a matter of very serious concern. It demonstrates a lack of honesty that threatens the integrity of Departmental programs. Appellant's false certification in 1975 demonstrates that at that time, he was decidely lacking in business responsibility. The $47,959.00 to which he falsely certified as having paid his subcontractors was substantial.

Appellant's clinging adherence to the tortured explanation of why he signed the certification, knowing well that he had withheld payments to subcontractors, leads inexorably to the conclusion that appellant still lacks the requisite responsibility to participate in Departmental programs. Appellant appears to be under the impression today, no less than he was on August 1, 1975, that his right to reasonably interpret words of legal and practical significance includes the right to contort them to mean whatever will best suit his purposes. It is indefensible for appellant to claim that he had, and would still have, no responsibility to apprise a party to whom he owed a duty of cooperation, that his construction of a certification, on which the other party relied, was at variance with its plain meaning.

The Department has every right to expect of persons with whom it deals the highest ethical conduct. It would be an abrogation of the Department's responsibility to the public to have a business relationship with persons whose conduct falls below that high standard. Consequently, it is in the best interest of the public and the Department that appellant and any business concerns in which he has a substantial interest be debarred from participation in all Departmental programs for a period of three years.

ORDER

It is the determination of the undersigned that appellant and any business concern in which he has a substantial interest, to

include R.A.C. Company, Inc., be debarred from participation in all Departmental programs for a period of three years beginning September 14, 1979, and ending September 13, 1982.

Issued at Washington, D.C.
on March 24, 1981

Martin J. Linsky
Chief Administrative Law Judge
U.S. Department of Housing
and Urban Development
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