UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGE

In the Matter of	
ROYCE A. BROTHERS AND GOLD STAR INVESTMENTS	HUDALJ 87-1136-DB
Respondents	

John W. Sweeney, Jr. Esquire
For the Respondent

William L. Johncox, Esquire
For the Department

Before: ALAN W. HEIFETZ
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose as a result of a proposal by the Department of Housing and Urban Development ("the Department" or "HUD") to debar Royce A. Brothers and his affiliate, Gold Star Investments (collectively referred to as "the Respondents"), from further participation in HUD programs for a period of five years, and to temporarily suspend the Respondents from further participation in HUD programs, pending the outcome of the debarment. The Department's action is based upon the Brothers' conviction in the United States District Court for the Northern District of Texas, Fort Worth Division, for the offenses of intent to defraud HUD, 18 U.S.C. § 1012 (1982), aiding and abetting, 18 U.S.C. § 2 (1982), and mail fraud, 18 U.S.C. § 1341 (1982). The Respondents were duly notified of the proposed debarment and thereafter filed a timely request for a hearing, which was limited to submission of documentary evidence and briefs, pursuant to 24 C.F.R. § 24.5(c)(2) (1987).

Upon the record submitted, I make the following findings and conclusions:

Findings of Fact

Royce A. Brothers is a real estate broker doing business in the State of Texas and is the recipient of funds, either directly or indirectly, from the HUD Mortgage Insurance

Program. Gold Star Investments is an affiliate of Mr. Brothers. [1]

On July 31, 1986, a Grand Jury convened for the United States District Court at Fort Worth, Texas, returned an indictment charging Mr. Brothers with four counts of felony mail fraud. (Ex. 3). Mr. Brothers pled guilty to count two of the indictment, and counts one, three and four were dropped. After being found guilty of mail fraud in violation of 18 U.S.C. § 1341 (1982), Mr. Brothers was convicted, sentenced to three years imprisonment and fined $1,000. The court suspended execution of the imprisonment and placed Mr. Brothers on three years probation. The court further required that Mr. Brothers perform 250 hours of community service. (Ex. 2a).

In connection with his guilty plea, Mr. Brothers stipulated to the facts comprising the felony mail fraud. These facts were contained in a factual resume, which stated in part:

> On September 15, 1982 the defendant reported to the Fort Worth Police Department that his real estate office had been burglarized and numerous items, including the computer system, stolen. On September 24, 1982 the defendant provided a tape recorded statement to the adjuster handling the claim submitted to the St. Paul Insurance Company. As a result of the reported burglary and on October 1, 1982, the defendant completed and signed a sworn proof-of-loss statement claiming the total value of $14,649.55 loss for the computer system, when in fact he knew that the total computer system had not been stolen. This proof-of-loss, together with a copy of the computer system acquisition agreement, was placed in the United States mail in an envelope addressed to and was in fact delivered to The St. Paul Insurance Company, Dallas-Fort Worth Service Center . . . .
> (Ex. A).

On November 3, 1986, the United States Attorney in the United States District Court at Fort Worth, Texas, filed a Supersedeas Information against Mr. Brothers. This Information charged Mr. Brothers with violating 18 U.S.C. §§ 2 and 1012 (1982), by "receiv[ing] a compensation and reward in connection with the issuance of an insured mortgage on 1505 Fifth Avenue, Fort Worth, Texas, with the intent to unlawfully defeat the purpose of [HUD] in issuing insured mortgages for owner-occupant property." (Ex. 4). After pleading no contest

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1. In his request for hearing, Respondent acknowledged Gold Star Investments as his affiliate.

to these charges, Mr. Brothers was convicted and fined $800. (Ex. B).[2]

Discussion

The Department relies upon 24 C.F.R. §§ 24.6(a)(4)(5) and (6) as authority for the proposed debarment. (The Department's Brief at 5). These provisions permit HUD to debar a "contractor or grantee" for

> (4) Any . . . cause of such serious compelling nature affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.
>
> (5) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance, or guarantee or to the performance of obligations incurred pursuant to a grant of financial assistance, or conditional or final commitment to insure or guarantee.
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> (6) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.
> 24 C.F.R. §§ 24.6(a)(4)(5) and (6) (1987).

It is undisputed that the Respondents are "contractors or grantees" within the meaning of the Department's regulations. See 24 C.F.R. § 24.4(f) (1987). HUD contends that Mr. Brothers' convictions for mail fraud and unlawful receipt of compensation and aiding and abetting evidence "a serious, flagrant violation of the law, a lack of present responsibility and business integrity, and is cause for debarment . . . ." (Department's Brief at 6).

The debarment regulation implements the Department's policy of protecting the public interest by insuring that only those qualified as "responsible" be allowed to participate in HUD programs. 24 C.F.R. § 24.0 (1987); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980); Roemer v. Hoffman, 419 F. Supp. 130, 131 (D.D.C. 1976).

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2. The Department would have me find that Mr. Brothers pled guilty to these charges. (Department's Brief at 3). While the Department's position is based upon a Judgment and Probation/Commitment Order indicating that Mr. Brothers pled guilty (Ex. 2b), this Order was later amended to reflect that Mr. Brothers pled nolo contendere to the Supersedeas Information. (Ex. B). By motion filed August 7, 1987, the Department seeks permission to file further pleadings to resolve what it finds to be an apparent discrepancy in the criminal proceedings. Since there is, in fact, no discrepancy, and in view of the conclusions I have reached on the merits, the Motion is denied.

"Responsibility" is a term of art which in the instant context speaks to the projected business risk of a contractor or grantee, including his integrity, honesty, and ability to perform. See Roemer v. Hoffman, supra; 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). Although the primary test for debarment is present responsibility, a finding of a present lack of responsibility can be based on past acts. Roemer v. Hoffmann, supra. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957);

Mail fraud involves moral turpitude, United States v. Reimer, 30 F. Supp. 767 (S.D.N.Y. 1939), aff'd, 113 F.2d 429 (2d Cir. 1940) (one who performs an act with intent to defraud is guilty of an act of moral turpitude), which has been defined as "inherent baseness in the private, social or public duties which one owes to his fellowmen or to society, or to his country, her institutions, and her government." Kurtz v. Farrington, 132 A. 540, 541 (Conn. 1926). Therefore, Mr. Brothers' conviction for mail fraud is evidence of his lack of present responsibility and ability to conduct his business affairs with honesty and integrity. Mr. Brothers' lack of present responsibility is magnified by his convictions for intent to defraud HUD and aiding and abetting.

The Respondents argue that Mr. Brothers' conviction for intent to defraud HUD and aiding and abetting may not be used as a basis for this proposed debarment because this conviction was based on a plea of no contest. (Respondents' Brief at 4). Although it is true that facts may not be inferred from a plea of no contest, Tseung Chin v. Cornell, 247 F.2d 929 (9th Cir. 1957), and the plea carries no admission of guilt, see Doherty v. American Motors Corp., 728 F.2d 334, 337 (6th Cir. 1984), a conviction, even though based on a plea of no contest, is sufficient to establish a cause for debarment under 24 C.F.R. § 24.6 (1987). In re Halperin, Docket No. HUDALJ 82-815-DB (Initial Determination July 15, 1982). "It is the fact of such a conviction, and not the existence of guilt, which triggers the cause for this debarment proceeding." In re Halperin, supra. Accordingly, based on Mr. Brothers' convictions for mail fraud, intent to defraud HUD and aiding and abetting, I conclude that the Department has made a prima facie case that Respondents are not presently responsible and that debarment is warranted.

As a mitigating factor, Respondents argue that the events which precipitated these convictions occurred some four and one-half years ago. (Respondents' Brief at 5). However, the passage of time does not, by itself, affect present responsibility. The Department having made its prima facie case, the burden is on Respondents to show that based upon their conduct over the past four and one-half years, they are now presently responsible. The Respondents also cite the fact that Mr. Brothers has not had any other legal charges filed against him. (Respondents' Brief at 5). However, in the absence of any evidence as to the reason Mr. Brothers has avoided a contretemps with the authorities, this proof of a negative proposition amounts to mere faint praise. Finally,

the Respondents argue that the fact that Mr. Brothers was placed on probation for the mail fraud conviction and fined a total of $1,800 militates against debarment. (Respondents' Brief at 5-6). While these facts suggest that the trial judge may have felt that the circumstances warranted a more lenient criminal penalty, they do not constitute evidence of present responsibility. The fact remains that Mr. Brothers was convicted of violations of 18 U.S.C. §§ 2, 1012 and 1341 (1982) and received a suspended sentence of three years imprisonment for mail fraud. Under the circumstances, and in the absence of mitigating evidence which would tend to show that the Government would be protected from a recurrence of those violations, I conclude that the requested five-year period of debarment is appropriate and necessary to insure that the seriousness with which HUD views the Respondents' conduct will not be misconstrued and that HUD and the public will be protected. [3]

Conclusion

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Royce A. Brothers and his affiliate, Gold Star Investments, from doing business with HUD for a period of five years from April 20, 1987, the date this action was initiated, through April 20, 1992.

Alan W. Heifetz
Chief Administrative Law Judge

Dated: August 10, 1987

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3. The Respondents contend that a five-year debarment would be punitive when compared with the sentence Mr. Brothers received for his convictions. (Respondents' Brief at 4). However, debarment need not be proportional to the severity of a prior criminal sentence and may, under appropriate circumstances, exceed it. Shane Meat Co., Inc. v. United States Dep't of Defense, 800 F.2d 334, 338 (3d Cir. 1986).