

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, DC

In the Matter of:	:	
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	:	
JAMES G. DAMASKOS,	:	HUDBCA No. 93-C-D32
	:	Docket No. 93-1974-DB
Respondent.	:	
	:	

For the Respondent:

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For the Government:

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DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

October 14, 1993

Statement of the Case

By letter dated December 14, 1992, Arthur J. Hill ("Hill"), Assistant Secretary for Housing - Federal Housing Commissioner, U.S. Department of Housing and Urban Development ("HUD") notified Respondent James G. Damaskos that HUD proposed to debar Respondent for a period of three years, based on his conviction in the United States District Court for the District of Colorado for violation of 18 U.S.C. §2 and 26 U.S.C. §7206(1). The scope of the proposed debarment would prevent Respondent from participating in primary covered transactions and lower-tier transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government, and from participation in procurement contracts with HUD for a three-year period beginning on December 14, 1992, the date of the notice of proposed debarment. The notice also informed Respondent that he was immediately suspended and that this suspension would continue pending a resolution of the proposed debarment.

Respondent requested a hearing pursuant to 24 C.F.R. §24.412 with regard to his proposed debarment. In cases of proposed debarment based upon a conviction and suspension based upon an indictment or conviction, a hearing is limited to the submission of briefs and documentary evidence. 24 C.F.R. §24.313(b)(2)(ii). This determination is based on the written submissions of the parties.

Findings of Fact

1. At all relevant times, Respondent was a self-employed real estate appraiser, licensed in Colorado as both a real estate broker and appraiser, who performed real estate appraisals for HUD and other government agencies. He consistently received good to excellent ratings on all of his appraisals. (Resp. Brief at 1-2; Resp. Exhs. 1 and 11).

2. Respondent was indicted on November 8, 1991, for making and subscribing to false statements by understating gross business receipts on joint federal income tax returns for 1985, 1986, and 1987, in violation of 26 U.S.C. §7602(1), and for aiding and abetting with respect to the same, in violation of 18 U.S.C. §2. (Resp. Exh. 2).

3. On May 1, 1992, Respondent entered a plea of guilty to all counts of the Indictment and was convicted by the U.S. District Court for the District of Colorado. On July 20, 1992, he was sentenced to be placed on probation for a period of three years, including six months of home detention. (Resp. Exh. 4; Govt. Exh. 2). Respondent has met all conditions of his probation and has received [REDACTED] treatment. (Resp. Exhs. 7-8). During the period from May, 1992, to the present, Respondent has been allowed to maintain his real estate broker and appraiser licenses on a probationary status, after hearings on both licenses. (Resp. Exhs. 9-10).

4. During the period after Respondent was notified of his suspension from participation in HUD programs, he was assigned three real estate appraisals by the HUD Denver Regional Office, which he performed for that office. The HUD Denver Regional Office was aware that Respondent had been suspended when it assigned those cases to him. (Resp. Exh. 12).

5. On October 1, 1992, Respondent failed to indicate on his annual HUD Application Certification, which would enable him to continue as an approved real estate appraiser for HUD, that he had been indicted and had pled guilty to submitting false statements on his federal income tax forms, and aiding and abetting the same, and to the fact that his debt to the IRS was

unresolved at that time. The form specifically requires such information to be included on it. (Govt. Exh. 3).

6. Respondent has submitted portions of the transcript of his sentencing hearing containing statements of the United States District Court Judge who presided over the action leading to his conviction. (Resp. Exh. 6). Respondent has also submitted affidavits of his [REDACTED], his probation officer, and the District Director in the Denver office of U.S. Representative Patricia Schroeder, all of which state that Respondent is a presently responsible person who should be permitted to continue his work as a real estate appraiser. (Resp. Exhs. 7, 8, and 11). Furthermore, Respondent submitted an affidavit in which he addresses circumstances that are in mitigation of both his conviction and subsequent failure to list it on the HUD Application Certification, by explaining that both were caused by his negligence, and not by any intent to mislead or defraud the Government.

Discussion

Respondent admits that he is a "participant" and "principal" as defined at 24 C.F.R. §24.1 and §24.105(p). He has entered into multiple covered transactions with HUD and may reasonably be expected to do so in the future. Under applicable HUD regulations, at 24 C.F.R. §24.305, a debarment may be imposed on a participant or principal for:

(a) Conviction or civic judgment for:

* * *

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person; . . .

The Government bears the burden of demonstrating that cause for suspension and debarment exists. 24 C.F.R. §§24.313(b)(3), (4); *James J. Burnett*, HUDBCA No. 80-501-D42, 82 BCA ¶ 15,716. When the suspension and proposed debarment are based on an indictment and conviction, that evidentiary burden deemed to have been met. 24 C.F.R. §§24.405(b) and 24.313(b)(3). I find that the Government has established cause for debarment pursuant to

24 C.F.R. §24.305(a)(3), based on Respondent's conviction for making false statements. That was likewise adequate evidence to support the suspension. 24 C.F.R. §24.405.

However, existence of a cause for debarment does not automatically require imposition of a debarment. In gauging whether to debar a person or entity, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§24.115(d), 24.314(a), and 24.320(a). Respondents bear the burden of proving the existence of mitigating circumstances. 24 C.F.R. §24.313(b)(4).

Underlying the Government's authority not to do business with a person or entity is the requirement that agencies only do business with "responsible" persons or entities. 24 C.F.R. §24.115. The term "responsible" is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. 48 Comp. Gen. 769 (1969). The test for whether a debarment is warranted is present responsibility, although a lack of present responsibility may be inferred from past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. §24.115(d).

Filing false income tax returns is a crime involving personal dishonesty and lack of integrity. However, Respondent swears that the false statements he made on his personal income tax forms for tax years 1985, 1986, and 1987, were caused by his failure to maintain complete tax records and his hasty reconstruction of such records just prior to his filing the returns, and not by any personal intention to cheat on his Federal taxes. Certainly, even if what Respondent states is so, it is evidence of gross negligence that certainly raises concerns of responsibility. However, those acts which led to Respondent's conviction occurred between five and seven years ago. I draw little current automatic inference of lack of present responsibility based on those remote acts, particularly because they were unrelated to Respondent's work as a HUD appraiser.

Respondent's work as a HUD appraiser has consistently been rated as good to excellent, a record of good professional work far more recent than his criminal acts. I consider it particularly significant that neither the sentencing judge, nor the Colorado Real Estate Commission or Board of Real Estate Appraisals, all of whom had more exposure to Respondent and the record of both his work and his crime than do I, all concluded that there was no present risk to his continuing his work. Likewise, his probation officer and [REDACTED] reached this same conclusion.

Regarding the Government's claim that Respondent continued to accept appraisals from HUD in violation of his suspension, which is not a ground for either his suspension or proposed debarment, I find that this was a permissible waiver of Respondent's suspension by HUD, not a violation of it by Respondent. The HUD Denver Regional Office chose to assign the appraisals to Respondent, despite being aware of the fact that Respondent was suspended. Moreover, these actions indicate that the HUD Denver Regional Office, which was familiar with Respondent's work, found him responsible and decided that it was not a risk to waive his suspension and use Respondent for appraisal work. I find this to be evidence of present responsibility.

Regarding the allegation that Respondent made false claims as to his conviction and unresolved IRS investigation on his annual Application Certification dated October 1, 1992, Respondent swears that he failed to read the document because he thought he was aware of its contents, as he had signed "many similar forms in the past." He contends that his failure to inform HUD of his offense was inadvertent and not intended to mislead the agency. Furthermore, HUD was aware of his conviction, and was not misled by the form. The form signed by Respondent consists of one page listing six short paragraphs. Paragraph three, the largest and most noticeable of the paragraphs, requires the applicant to certify that he has not been convicted of a felony. When Respondent signed that certification, he obviously did so improperly.

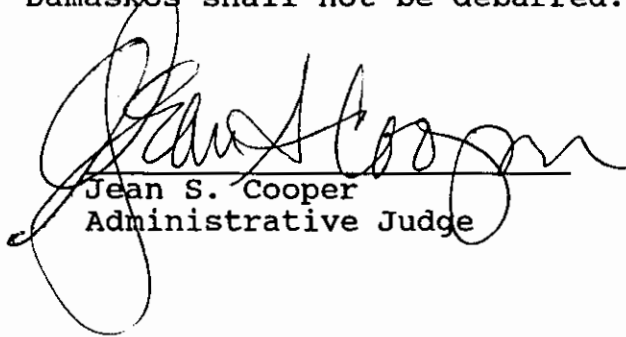
I would expect Respondent to be more careful with all Government forms, after the debacle with his Federal income tax returns. I am troubled by his carelessness that resulted in a clearly false certification to HUD on the Annual Application Certification. Were this a stated ground for debarment, I might give this weight. However, it is not a ground for debarment, and I decline to draw deciding inferences from it. Nor may I rely upon it to conclude that Respondent is not presently responsible, because such an inference properly arises from a stated cause for debarment, not from make-weight additional data that is not the basis for the Government's action. This is particularly true when an inference of present lack of responsibility based on the cause for debarment is not warranted, as I have found in this case. Had HUD considered this false certification to be the real reason why it does not want to do business with Respondent, it should have based this case on it, rather than opting for a short-form proceeding based on Respondent's conviction for acts that occurred many years ago. Furthermore, the Denver Regional Office of HUD was actively seeking to do business with Respondent not only after he was suspended, but months after he had filed the false certification with HUD. Thus, it seems appropriate to give it no greater weight than was given to it by the Denver Regional Office when it sought out Respondent's services as a

real estate appraiser after December 14, 1992. See *Silverman v. U.S. Department of Defense and Defense Logistics Agency*, 817 F.Supp. 846 (S.D.Cal. 1993).

I conclude that debarment based on Respondent's conviction is not warranted or necessary to protect the public interest or the interest of HUD. I can find no public interest in keeping him from doing real estate appraisals based on his conviction. Whatever public interest or Governmental interest there was in keeping Respondent from participation in HUD programs has been satisfied by his suspension of more than ten months.

Conclusion

Based on the record in this matter, and for the foregoing reasons, I find that a debarment of Respondent is not warranted or necessary to protect HUD or the public interest. It is therefore ORDERED that James G. Damaskos shall not be debarred.


Jean S. Cooper
Administrative Judge