

UNITED STATES OF AMERICA.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of :
:
JOHN P. DUNHAM, : HUDBCA No. 79-437-D50
: (79-666-DB)
Appellant :

Mr. John P. Dunham For the Appellant, Pro Se


Edward Eitches, Esquire For the Government
Office of General Counsel
Department of Housing and
Urban Development
Washington, D.C. 20410

DETERMINATION

Statement of The Case

By letter dated August 3, 1979, the Department of Housing and Urban Development notified John P. Dunham, Appellant herein, that it intended to debar him from participation in Departmental programs for a period of two years from February 26, 1979 until February 26, 1981.^{1/} The ground for the proposed debarment is 24 C.F.R. § 24.6(a)(1), based on the conviction of Appellant for violation of 18 U.S.C. § 1012.

In cases of debarment based on a conviction, a hearing is limited to submission of written briefs and documentary evidence. 24 C.F.R. §24.5(c)(2). Appellant filed a request for a hearing on a written record and submissions were filed on behalf of both Appellant and the Government.

1/ Debarment is a prospective sanction and is only effective from the date of the notice of proposed debarment if no hearing is requested pursuant to 24 C.F.R. §24.7, or from date of a determination of debarment. Louis J. Johnson, HUDBCA No. 79-392-D13 (November 26, 1979). Appellant has been temporarily suspended from participation in HUD programs pending determination of this debarment action pursuant to 24 C.F.R. §24.13(c).

APPLICABLE REGULATION

The departmental regulation applicable to debarment provides, in pertinent part, as follows:

§24.4 Definitions.

(f) "Contractors or grantees." Individuals . . . that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources, including, but not limited to . . . real estate agents and brokers, . . .

* * *

§24.6 Causes and conditions applicable to a 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) Causes. (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, or subcontract thereunder, or in the performance of such contract or subcontract.

(6) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.

FINDINGS OF FACT

Appellant is a licensed real estate agent in the State of California. On July 6, 1977, he was a co-signer on an application for HUD-FHA insurance on a mortgage for a home to be purchased by V [REDACTED] Jacobus. Appellant stated on the mortgage insurance application (HUD Form 2900-1) that the purchasers intended to occupy the property as their residence (Gov't. Exhibit B, Appellant's Brief at 1). In fact, the purchasers did not occupy the property and Appellant became aware that they did not intend to do so before the close of escrow on the property (Gov't. Ex. A, App. Brief at 1). Appellant did not notify either HUD-FHA or the mortgagee of this information.

The loan rates for properties to be occupied by a purchaser are significantly lower than the rates for properties purchased as income-producing investments. Appellant was aware of the difference in the loan ratios (App. Brief at 1). Appellant stated that he did not report that the purchasers did not intend to occupy the property when he became aware of it because the loan had already been approved and escrow was about to close. He admits that this was a faulty judgment and that he should have either cancelled the purchase or postponed the close of escrow to make arrangements for a different loan ratio (App. Brief at 1).

Appellant was indicted on one count of intent to defraud the Department for making a false statement on the Form 2900-1, in violation of 18 U.S.C. §1012 (Gov't. Ex. A). On February 26, 1979, Appellant entered a plea of guilty to the indictment. The court ordered him to pay a fine of \$750.00 and imposed a suspended sentence of three years imprisonment (Gov't Ex. B).

DISCUSSION

The purpose of debarment is to assure the Government that "awards be made only to responsible contractors. . ." and "shall be used for the purpose of protecting the public. . ." 24 C.F.R. §24.0, 24.5(a). Responsibility is a term of art in Government contract law. It has been defined to include the integrity and honesty of a contractor as well the ability to perform a contract. 34 Comp. Gen. 86 (1954); 39 Comp. Gen. 468 (1959); 49 Comp. Gen. 132 (1969). Appellant is clearly a "contractor or grantee" within the meaning of the regulation because he is a real estate agent who received HUD funds indirectly through a non-Federal source. 24 C.F.R. §24.4(f).

Appellant's proposed debarment is based on a criminal conviction involving a HUD contract, a cause which is a ground per se for debarment. 24 C.F.R. §24.6(a)(1). Moreover, making a false statement to influence HUD in any way is a separate and distinct ground for debarment even in the absence of a criminal conviction. 24 C.F.R. § 24.6(a)(6). However, mitigating factors may be considered in evaluating whether debarment is in the public interest. 24 C.F.R. §24.6(b).

In the instant case, Appellant's "faulty judgment" in making a false statement resulted in a far lower loan rate for the purchasers. He was aware of this fact when he decided to let escrow close without giving notice of the changed

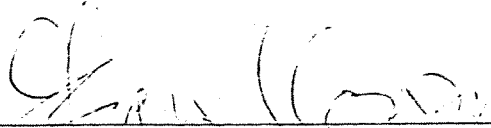
circumstances. Manipulation of a government program through false information has a negative impact on administration of that program and erodes public confidence in it. Although Appellant now states he knows what he should have done, he did not do it at the time. Such a decision is more than mere "faulty judgement." It constitutes a serious lack of responsibility.

The test for debarment, however, is present responsibility. Past acts can be the basis for a finding of present lack of responsibility. Schleslinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957). Appellant's brief, in the form of a letter prepared by him, indicates that he now knows what he should have done about the application when confronted with the problem. His record before and after the false statement incident has been good. Furthermore, the Government's case relies solely on lack of responsibility at the time of conviction and contains no evidence, other than the conviction, of present lack of responsibility. Appellant's thoughtful comments in his written submission rebut the presumption of present lack of responsibility. I find that Appellant, although not responsible in 1977, is presently responsible.

Appellant has been temporarily suspended since August 3, 1979 pursuant to departmental regulation, pending resolution of this debarment action. 24 C.F.R. § 24.13(c). Although the temporary suspension was applied in accordance with the regulation, and was in the public interest, it is now terminated upon issuance of this Determination.

CONCLUSION

For the foregoing reasons and based on the record in this case, it is not in the public interest that Appellant be debarred. The temporary suspension dated August 3, 1979 shall be terminated.



 Jean S. Cooper
 Administrative Judge
 HUD Board of Contract Appeals

Issued at Washington, D.C.
 December 28, 1979.