

UNITED STATES OF AMERICA

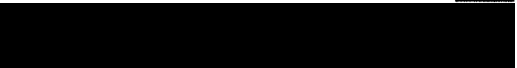
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

Washington, D. C.

In the Matter of: :
: :
: :
THOMAS MACK CROSSLAND, : HUDBCA No. 80-466-D14
: (Activity No. 79-676-DB)
Appellant :
:

Thomas Mack Crossland, Pro Se



Marylea W. Byrd, Esquire
Office of General Counsel
Department of Housing and
Urban Development
Washington, D. C. 20410

DETERMINATION

Statement of the Case

By letter dated October 31, 1979, the Department of Housing and Urban Development ("HUD") notified appellant THOMAS MACK CROSSLAND that he was temporarily suspended from participation in HUD programs pending final determination of proceedings to debar him and his affiliates for cause under 24 C.F.R. §24.6. The debarment sought was from further participation in HUD programs for a period of five years from the date of his conviction, September 27, 1979, in the United States District Court for the Eastern District of Oklahoma, No. 79-63-CR.

Appellant was convicted under a multiple count indictment filed July 18, 1979 of a single count under 18 U.S.C. §371 and four counts under 18 U.S.C. §1163. These counts charged him with conspiracy to defraud the U.S. Government and wrongful misapplication of low cost housing funds intended to benefit the Cherokee Indian tribe in Oklahoma. Appellant was sentenced to a 25-year term of imprisonment. He has been released on bond during the appeal of his conviction. By correspondence to the Department dated October 4, 1979, Assistant United States Attorney John R. Osgood on behalf of Julian K. Fite, United States Attorney for the District of Oklahoma, advised HUD of appellant's conviction, and the seriousness with with the prosecutor weighed the misconduct of which appellant had been convicted. He emphasized that appellant's dealings with HUD had been nationwide in their scope.

By letter dated November 6, 1979, appellant advised that after his conviction, his attorney had filed a motion for new trial on his behalf and would appeal the conviction should a new trial be denied. Appellant's trial counsel, Bruce Green, transmitted a copy of the brief in support of the motion for a new trial under cover of a letter dated November 9, 1979 which, though it made no explicit request for hearing, was acknowledged and treated as such a request by separate letters from HUD dated November 20, 1979 to Mr. Green and to appellant. Mr. Green has not entered his appearance in this case.

By letter dated December 4, 1979, the hearing officer set January 7, 1980 and February 6, 1980 as filing dates for the Government's and appellant's briefs, respectively. That letter apparently was received on appellant's behalf, but no brief was filed. A subsequent notice to appellant extending the period of time for filing his brief to August 10, 1980 was returned unclaimed. Another letter to appellant dated December 16, 1980 granted him additional time to submit a brief, after investigation had located him and disclosed that he had been released from confinement on bond. However, appellant advised by letter dated December 26, 1980, that he would not oppose the debarment action against him.

Findings of Fact

At the time of the operative events underlying appellant's conviction and suspension, appellant was the Executive Director of the Housing Authority of the Cherokee Nation, in Tahlequah, Oklahoma. Appellant was convicted of successfully conspiring to receive kickbacks from a contractor working on a public housing project being constructed by the Cherokee Housing Authority. The conspiratorial scheme involved an arrangement between Crossland, his nephew, and a codefendant to effect awards of fencing contracts by the Cherokee Housing Authority to the Apollo Fence Company, in which Crossland had undisclosed financial interest. The contract prices were alleged to be excessive, but, in any event, a substantial portion of the earnings to the company were paid over to Crossland as kickbacks. The kickbacks identified in the indictment totaled approximately \$120,000. Crossland was actually convicted of four counts in which the amounts alleged to have been misapplied totaled \$34,789.25.

Applicable Regulations

§24.4 Definitions.

(a) "Debarment" means, exclusion from participation in HUD programs for a reasonable, specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance generally not to exceed five years. However, the hearing officer may exclude a party for an indefinite period because of egregious and willful improper conduct....

(b) "Suspension" means a disqualification from participation in HUD programs for a temporary period of time because a contractor or grantee is suspected upon adequate evidence of engaging in criminal, fraudulent, or seriously improper conduct.

* * *

(f) "Contractors or grantees." Individuals, state and local governments and public or private organizations that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources including, but not limited to, borrowers, builders, mortgagees, real estate agents and brokers, area management brokers, management and marketing agents, or those in a business relationship with such recipients including, but not limited to, consultants, architects, engineers and attorneys.

* * *

§24.5 General.

(a) Debarment, [and] suspension, ... may be invoked by offices of the Department either to exclude or to disqualify contractors and grantees from participation in Department programs. These measures shall be used for the purpose of protecting the public and are not for punitive purposes.

(b) Department action to exclude or to disqualify contractors and grantees from participation in its programs, or to reconsider such measures, shall be based upon all available relevant facts....

(c) Where Department action results in an applicant's being denied financial assistance on the basis of his previous conduct with the Department, the applicant is entitled to a hearing in accordance with this part, except that: ... (2) where the action is based on an indictment or conviction of the part, an appeal of the action is limited to submission of documentary evidence and written briefs to the hearing officer.

* * *

§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) 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.

* * *

(9) ...[C]onviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

* * *

(b) Conditions. (1) The existence of any of the causes set forth in paragraph (a) of this section does not necessarily require that a contractor or grantee be excluded from departmental programs. In each instance, whether the offense or failure, or inadequacy of performance, be of a criminal, fraudulent, or other serious nature, the decision to debar shall be made within the discretion of the

Department and shall be rendered in the best interest of the Government. Likewise, all mitigating factors may be considered in determining the seriousness of the offense, failure or inadequacy of performance, and in deciding whether the Administrative Sanction is warranted.

(2) The existence of a cause set forth in paragraphs (a)(1) and (2) of this section shall be established by criminal conviction by a court of competent jurisdiction at the discretion of the appropriate official.

Discussion

Appellant's conviction for violations of 18 U.S.C. §371 (1 count) and §1163 (4 counts) represent the very serious offenses of conspiring to defraud the U.S. Government and wrongfully misapplying funds of the Housing Authority of the Cherokee Nation received from the Federal Government. This conviction is sufficient cause for debarment under 24 C.F.R. §24.6(a)(1). In addition, the nature and circumstances of the offenses underlying the conviction as shown on this record also reflect lack of integrity of the most fundamental sort and, therefore, such lack of responsibility as would preclude dealings with HUD in the interest of protecting the public. This conclusion is cause for debarment under §24.6(a)(9).

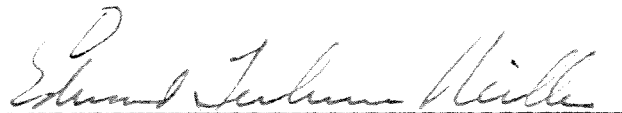
Debarment is a measure which may be invoked by HUD to exclude or to disqualify "contractors and grantees" from participation in HUD programs as a measure for protecting the public. 24 C.F.R. §24.5(a) "Responsibility" is a term of art in public contract law and the instant context which has been defined to include integrity and honesty as well as ability to perform. See Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954) 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 F. 2d ,111 (D.C. Cir.1957); Roemer v. Hoffman, supra; Onofrio Vincent Bertolini, HUDBCA No. 79-390-D33 (Nov. 13, 1979). Integrity is central to a contractor's responsibility in performing a business duty toward the Government. 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954)

Appellant's status at the relevant times fell within the ambit of the term "contractors or grantees" as defined in 24 C.F.R. §24.4(f). He was an employee of the Housing Authority of the Cherokee Nation, an agency of the State of Oklahoma. It is not disputed that the Housing Authority was involved in the construction of scattered site housing under an Annual Contributions Contract with HUD which provided for payments by HUD to underwrite the costs of developing low-cost Indian housing through grants and loans. Appellant's compensation by the Housing Authority made him an indirect recipient of HUD funds. The nature of the kickback scheme would also have made him a recipient of such funds.

The issue in a debarment case is whether the appellant currently "possesses the requisite honesty and integrity to participate in Government programs that expend public funds." Carol E. Patterson, 80-1 BCA Para. 14,224 (HUDBCA No. 78-325-D54, 1979). Debarment is not a penalty but a way for the Government to execute its statutory obligations effectively to protect the public. See L.P. Steuart & Bros. v. Bowles, 322 U.S. 398 (1944); Gonzales v. Freeman, 344 F. 2d 570 (D.C. Cir. 1964). In light of the causes for debarment stated in 24 C.F.R. §24.6(a)(1) upon which the Government relies in its brief, and subsection (9) as well, and in further consideration of the factual underpinnings which disclose the serious violations involved in this case, the imposition of a substantial period of debarment is warranted in the best interests of both the Government and the public. Appellant does not oppose the debarment. No mitigating factors appear of record to alleviate the conviction of serious offenses reflecting adversely on appellant's responsibility as the basis for debarment. The Assistant U.S. Attorney responsible for appellant's conviction has expressed serious concern that appellant be barred from further dealings with HUD. The Government has sought a debarment period of five years from the date of appellant's conviction.

Conclusion

Upon consideration of the public interest and the entire record in this matter, it is hereby determined that appellant THOMAS MACK CROSSLAND should be debarred from doing business with HUD from the date of this Determination through September 27, 1984, with credit having been given for the period of his suspension beginning October 31, 1979. If appellant's conviction should be reversed on appeal, that would be a basis for a petition for reinstatement at that time.



Edward Terhune Miller
Administrative Judge
HUD Board of Contract Appeals

Issued at Washington, D. C.
on January 22, 1981.