

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

Washington, D. C.

In the Matter of:

HOMER E. NICHOLS, JR.,
Appellant

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: HUDBCA No. 80-490-D32
: (Activity No. 80-694-DB)
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Mr. Homer E. Nichols, Jr., Pro Se

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Patricia M. Black, Esquire
Office of General Counsel
Department of Housing and
Urban Development
Washington, D. C. 20410

DETERMINATION

Statement of the Case and Findings of Facts

By initial notice dated October 19, 1979, the Department of Housing and Urban Development ("HUD") advised appellant Homer E. Nichols, Jr. that he and his affiliates were suspended from participation in HUD programs under the provisions of 24 C.F.R. §24.13(c). The basis for the suspension was information that appellant had been indicted in the Eastern District of Wisconsin for alleged violation of 18 U.S.C. §287.

Subsequently, on October 25, 1979, appellant pleaded guilty to one of eight counts of the indictment before the United States District Court for the Eastern District of Wisconsin, and the remaining counts were dismissed.

The count to which appellant pleaded guilty charged that on or about November 21, 1977, at Racine, Wisconsin, appellant knowingly and willfully presented a fraudulent claim to HUD by means of an FHA Form No. 3102 which represented that HUD owed one L.L. Freeman, Inc., a participant Mortgage Company in the Section 235 program, \$1,020.51. That form, the Mortgagee's Certification and Application for Assistance or Interest Reduction Payments, represents a mortgage lender's monthly request for payment from HUD. Judgment was filed that same date, suspending imposition of sentence and placing appellant on probation for three years.

By letter dated January 14, 1980, HUD advised appellant that as a result of his conviction, his debarment for three years from the date of that letter was under consideration. Appellant acknowledged receipt of that letter on January 23, 1980 and requested additional time for submission of his brief. By correspondence dated February 6, 1980, the Government was directed to file its documentary evidence and brief by February 29, 1980 and appellant was directed to file its documentary evidence and brief by March 21, 1980. An extension of time was granted to the Government, whose brief was filed March 17, 1980. By letter dated July 11, 1980, appellant was given an extension of time to file until August 10, 1980, but advised that a written decision would be issued based on the state of the record at that time. Although it appears that both letters were received, appellant has neither filed a brief or other material nor requested any relief. This determination is issued accordingly, there being no dispute on this record as to the operative facts.

Although both the October 19, 1979 and January 14, 1980 letters advising appellant of his suspension and contemplated debarment embraced appellant's affiliates within the scope of the contemplated debarment action, no affiliate is treated in the Government's submissions and there is no basis on this record to assume that the scope of this debarment action actually extends beyond appellant individually.

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.

* * *

(d) "Affiliates." Business concerns are affiliate of each other when either directly or indirectly one concern or individual formulates, directs, or controls the other concern; or has the power to formulate, direct, or control the other concern; or has the responsibility and authority either to prevent in the first instance, or promptly to correct, the offensive conduct of the other concern. Business concerns are also affiliates of each other when a third party is similarly situated with respect to both concerns.

* * *

§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....

* * *

§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.

* * *

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

* * *

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

* * *

(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.

(3) The existence of a cause set forth in paragraphs (a) (3), (4), (5), (6), (7) and (8) of this section shall be established upon the evidence presented as determined by the Department and consistent with pertinent statutes and regulations.

Discussion

The undisputed allegations in the Government's brief that appellant's employment status at the time of his wrongful actions was that of Treasurer of the L. L. Freeman corporation, named in the indictment. That corporation was directly and necessarily contractually involved in the Department's Section 235 program. When read together with the language of Count 1 of the indictment, these elements bring appellant within the definitional scope of "contractor or grantee" under 24 C.F.R. §24.4(f). Both the fact and nature of appellant's conviction for submissions of false claims to a U.S. department provides ample cause for appellant's debarment under 24 C.F.R. §24.6(a)(1), (4), (6) and (9). The nature of the offense for which appellant was convicted, submission of a false claim to HUD, manifests a lack of business integrity and honesty and thus of responsibility.


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)

The issue in this case is whether appellant currently possesses the requisite responsibility for participation in Government programs at public expense. 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 24 C.F.R. §24.6(a) (1), (4), (6) and (9), the serious offense involved in this case, the absence of contest, mitigation, or even interest on the part of appellant, a substantial period of debarment is warranted in the best interests of the Government and the public. The Government has sought appellant's debarment for three years from the date of the January 14, 1980 letter notifying appellant of HUD's contemplated debarment action. The debarment period sought is reasonable under the circumstances.

Conclusion

Upon consideration of the record in this matter and the best interests of the Government and the public, Homer E. Nichols, Jr. should be debarred from participation in HUD programs from the date of this Determination through January 14, 1983, credit having been given for the period of suspension after January 14, 1980.


Edward Terhune Miller
Administrative Judge
HUD Board of Contract Appeals

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