UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

Washington, D. C.

In the Matter of:	:	
HARRY NAIMAN/FABCRAFT, INC./ FABCO	:	HUDBCA No. 81-548-D4

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DETERMINATION

Statement of the Case

By letter dated September 18, 1980, Lawrence B. Simons, Assistant Secretary for Housing, notified Appellant, Harry Naiman, that the Department intended to debar him, FABCRAFT, Inc., FABCO and any other affiliates from further participation in HUD programs of the Department of Housing and Urban Development (HUD) for a period of one (1) year from the date of the letter. The stated causes applicable to this action under 24 C.F.R. §24.6 were: (1) failure to comply strictly with the Federal wage provisions as established by the Secretary of Labor, and (2) failure to obtain approval of the Los Angeles Housing Authority ("LAHA") prior to subcontracting work, in violation of the applicable contract between Appellant and LAHA. The letter cited as an example a contract with Michael Watkins "which relieved Mr. Watkins of the need to comply with Federal wage requirements."

In its brief, the Department cited as causes for the debarment action subsections §§24.6(a)(3)(i), 24.6(a)(3)(ii), and 24.6(a)(4). There was no notice of suspension in the letter.

By a copy incorporated as an exhibit to Appellant's brief, counsel for Appellant has advised that on December 17, 1980, Assistant Secretary Simons and FABCO executed an Agreement To Dismiss Suspension and To Dismiss Proposed Debarment Action with Prejudice in the Matter of Anthony Williams, Fabcraft, Inc., d/b/a FABCO, HUDBCA 80-508-D4 ("Agreement"). Pursuant to that Agreement, inter alia, HUD lifted the suspension which had been imposed upon Fabcraft, Inc. d/b/a Fabco ("FABCO") as of February 28, 1980, and reinstated FABCO, allowing it to participate in HUD programs. HUD also agreed to dismiss the proposed debarment action against FABCO with prejudice "in full and final settlement of any and all claims it may have or it has, involving Anthony Williams' association with Fabco." The Agreement recites that Anthony Williams, a FABCO employee, had pleaded guilty to a misdemeanor under 18 U.S.C. §1012 in relation to a false certification of a payroll report. For its part, FABCO agreed to implement certain specified procedures for bidding contracts and handling payroll reports.

Appellant made a timely request for a hearing on the proposed debarment pursuant to 24 C.F.R. §24.7. A hearing was conducted in Los Angeles, California, on June 24, 1981 at which Appellant Naiman was present and represented by counsel appearing on behalf of Appellant Naiman and the affiliate corporation, FABCO. This Determination is based upon the record of the hearing considered in light of the briefs submitted by the parties.

In the instant action, the Government contends that Naiman either knew or should have known of the requirements for compliance with Federal wage provisions and prior approval of subcontracts in connection with performance of FABCO's contract with the LAHA, and that if he did not actually know of those requirements and the violations which occurred, he nevertheless should be held accountable by reason of the doctrine of respondeat superior. Appellant contends that Naiman should be exonerated from responsibility for these violations because he did not have actual knowledge of the requirements to comply with the relevant labor standards and subcontract approval requirements or of the violations thereof.

Findings of Fact

Although the evidence on this fragmentary record is in various aspects contradictory, and many of the underlying circumstances and details of the material events and relationships were disputed by the parties, I find the essential facts necessary to this determination to be as follows.

1. Appellant Harry Naiman was president of FABCRAFT, Inc., a California corporation with approximately 124 employees doing business as FABCO, at all times relevant to this determination, FABCO was engaged in the business of manufacturing window

covering products. Naiman had been in business for forty years. (Tr. 128-29, 180.) Some of his business had involved contracts with the Federal Government (Tr. 160-61, 203).

2. On October 24, 1976, FABCO entered into a contract "Bid No. 1104" (the "Contract") with the LAHA for the installation of 1174 exterior doors and 532 screen doors at Ramona Gardens, CAL-401, a housing project in Los Angeles, California (the "Project"). The recitation in the Contract that HUD "provides direct or indirect aid in financing the work to be performed under the Contract" was undisputed. (Exh. G-1 at 3; Tr. 131-33.) The Contract was executed on behalf of FABCO by Anthony Williams ("Williams") as Contract Manager (Exh. G-1 at 2; Tr. 132).

3. The Contract contained certain provisions requiring compliance with Federal wage standards under the Davis-Bacon Act (40 U.S.C. §§276a-276a-5) and requiring that "The Contractor shall not contract with any subcontractor who has not been accepted by the [LAHA]." (Exh. G-1, Paras. 27-32, 34 at 13-19; Para. 3a at 4.) The Contract also provided that "The Contractor shall be as fully responsible for the acts and omissions of his subcontractors, and of persons either directly or indirectly employed by them as he is for the acts and omissions of persons directly employed by him." (Exh. G-1, Para. 3d at 4.)

4. On November 16, 1976, Naiman, as President of FABCO, executed an affidavit to the effect that the proposal or bid was genuine and non-collusive, but he professed to have no knowledge of the substantive terms of the contract (Exh. G-2; Tr. 181).

5. At all times relevant to this determination, FABCO was organized under its President and Vice President into six virtually autonomous departments, each with salesmen functioning under a Department Manager (Tr. 129-30, 169).

6. Williams exercised comprehensive responsibilities as Department Manager of the Wire Screen Department and total authority as Project Manager for the Project on behalf of FABCO at all relevant times until June 1977 (Tr. 130-35, 181). He had maintained a close relationship with Naiman over many years and had Naiman's complete confidence (Tr. 133, 162, 171-72, 174, 177, 197).

7. Beginning in early May 1977, FABCO had entered into a series of three subcontracts with Michael Watkins to paint doors for the Project. These subcontracts, each of which superseded the previous one, provided for payment to Watkins on a piece rate basis, initially at four dollars per door. After the first contract had been executed and partially performed, Watkins was required by LAHA inspectors to improve the quality of his performance. He then negotiated a new contract providing a price of eight dollars per door for the work. Subsequently, concerned by a perceived need to comply with Federal Wage standards,

Watkins demanded still higher compensation per door under a new written contract which he prepared, expressly "contingent upon no labor wage agreements and my filling out no federal forms." This subcontract, dated May 16, 1977, was signed by Watkins, and was accepted by Harry Naiman, President (the "Subcontract"). (Exh. G-5, -6; Tr. 136-39.)

8. In June 1977, Williams was relieved of his responsibilities as Department Manager and Project Manager because of his mismanagement related to the subcontracts with Michael Watkins and because of resulting pressure from the LAHA (Tr. 133-36, 165-67). It was not disputed that neither those subcontracts nor the subcontractor, Watkins, had the approval of LAHA.

9. In his statement given to the Government investigator, [redacted] Hall, on November 8, 1977, Watkins indicated that his negotiations regarding the subcontracts had been conducted with both Naiman and Williams, and that they both had given him assurances that they would manage the necessary payroll compliance, notwithstanding Watkins' reservations about the low wages he actually paid to his workers. (Exh. G-5). Appellant contested this evidence by adducing evidence of a conflicting subsequent statement signed by Watkins and given to Appellant's investigator, [redacted] LaJeunesse, on June 13, 1978. In that statement, Watkins categorically denied that he had discussed the Davis-Bacon Act or any labor wage agreement with Naiman, but admitted that an earlier talk with Williams about the Davis-Bacon Act had caused him to add the language to his Subcontract regarding labor wage agreements and Federal forms (Exh. A-2; Tr. 213-217). Appellant categorically denied any such knowledge or dealings prior to his being advised by Smith of the LAHA's complaint that the Subcontract lacked the necessary prior LAHA approval (Tr. 132-33, 140-41, 185-86). Neither Watkins nor Williams testified at the hearing.

10. Appellant contends that he signed the Subcontract at Williams' behest and at a time when he was exceptionally busy. He contends that the actual signing occurred on a Friday, which was subject to the added burden of payday. Naiman testified that his only concern in signing the contract was with cost or price. Naiman typically signed more than 100 documents per day. (Tr. 139-40, 167-72, 183-85,199, 201-02.) Naiman did not read the contracts he signed or involve himself in the details of contracting, preferring instead to delegate those responsibilities and to deal only with special situations (Tr. 139, 159, 163-64, 168-72, 174-76, 179, 183-84, 205, 207-08).

11. Whether the Subcontract, which was prepared by Watkins, was presented to Naiman for signature by Watkins or by Williams, there is no affirmative evidence of record which contradicts Naiman's insistence that he merely signed the Subcontract without reading it. Neither is there evidence which affirmatively

establishes that Naiman actually noticed or took cognizance of the disclaimer on the face of the Subcontract regarding wage agreements and Federal forms. (Tr. 137-40.)

12. In the absence of contradiction, Appellant's evidence establishes that after Naiman received the LAHA's complaint regarding FABCO's failure to obtain prior LAHA approval of the Watkins subcontract, Naiman and FABCO took immediate and comprehensive remedial action designed to avoid any recurrence of past deficiencies. (Exh. A-1; Tr. 140-47, 184-86, 208.) The Government concedes that "Naiman and FABCO have attempted to correct the situation that led to the violations." (Govt. Brief at 15.) Williams was demoted from his position as Departmental Manager and removed from any position of control or responsibility for signing contracts. Naiman took over his responsibilities related to the Project and the general manager replaced Williams as Manager of the Screen Department (Tr. 145, 181). A safeguard system was implemented which provided for multitiered internal reviews in connection with the bidding and execution of contracts (Tr. 145-47). Naiman changed his practice of not reading documents and adopted a practice of reading all documents crossing his desk (Tr. 168-69, 183-84, 208). Naiman immediately sought LAHA's approval of the only subcontract which was then outstanding and, upon receiving no reply, terminated the subcontract and hired the subcontractor as an employee on an hourly wage (Exh. A-1; Tr. 206). FABCO completed performance of the contract at a substantial financial loss (Tr. 132-33). Appellant also professed concern for the adverse effects of the incident upon the reputation of the company and the effect of the approximately one-year suspension by HUD to which FABCO was subjected (Tr. 145, 148-49).

13. The Government has not disputed Appellant's contention that FABCO has no record of misconduct associated with it prior to the incidents which are the subject of this action, and has made no suggestion of any subsequent deficiencies in Appellant's conduct of his business.

Discussion

The Assistant Secretary's letter dated September 18, 1980, which charges Appellant Naiman as President of FABCO with the failure to comply with Federal wage provisions and subcontracting restrictions, cites 24 C.F.R. §24.6 as regulatory authority for the proposed debarment. Under that provision, as specified in the Government's brief, HUD "... may debar a contractor or grantee in the public interest for any of the following causes:

> (a) Causes. * * *
>
> (3) Violation of contract provisions, as set forth below, of a character which is regarded by

> the Department to be so serious as to justify debarment action:
>
> (i) Willful failure to perform in accordance with the specifications or within the time limit provided in the contract.
>
> (ii) A record of failure to perform, or of unsatisfactory performance, in accordance with the terms of one or more contracts: Provided, That such failure or unsatisfactory performance has occurred within a reasonable period of time preceding the determination to debar. Failure to perform or unsatisfactory performance which the contractor can show was caused by events beyond its control which were not reasonably foreseeable shall not be considered to be a basis for debarment provided that no fault or negligence of the firm or individual was involved.
>
> * * *
>
> (4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.

Since Appellant has not objected to the manner in which the Government has defined the causes upon which it has relied as the specific basis for this debarment action, the evidence has been evaluated in relation to the specific causes identified in the Government's brief.

The purpose of HUD debarments is to protect the public interest by ensuring that the Department does not do business with contractors and grantees who are not responsible. 24 C.F.R. §§24.0 and 24.5(a). The Appellant has been shown to be within the scope of the definition of "contractors or grantees" under the debarment regulation which involves "Individuals ... and ... private organizations ... that receive HUD funds indirectly through non-Federal sources...." 24 C.F.R. §24.4(f). "Responsibility" is a term of art in Government contract law that has been defined to include not only the ability to complete a contract successfully, but the honesty and integrity of the contractor. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). Although the test for debarment is the present responsibility of the contractor, present lack of responsibility of a contractor can 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); 46 Comp. Gen. 651, 658-59 (1967). Debarment is not penal or punitive in nature, but a measure properly taken by the Government to effectuate its statutory

obligation to protect the public. See L. P. Steuart & Bros. v. Bowles, 322 U.S. 398 (1964); Gonzales v. Freeman, 344 F. 2d 570 (D.C. Cir. 1964). The existence of a cause for debarment does not necessarily require that a contractor be excluded from departmental programs, since debarment is discretionary with the Department and is to be rendered in the best interest of the Government. 24 C.F.R. §24.6(b)(1).

Although the issue was not addressed at the hearing or in the Government's brief and was mentioned only in passing in the Appellant's brief, I cannot accept the stated scope of the debarment action, which purports to include FABCO as an affiliate of Naiman, the principal object of the Department's action. By its Agreement of December 17, 1980, the Department effectuated a dismissal of the "proposed debarment action [against FABCO] with prejudice in full and final settlement of any and all claims it may have or it has involving Anthony William's association with Fabco." Yet the Government's entire case against Naiman related to violations of contractual obligations by Williams. In the instant case, the Government has sought to establish that Naiman knew or should have known of or otherwise should be held responsible for those violations. The Government made no suggestion or attempt to establish that FABCO had in any way violated the Agreement, which by its express terms indicated that such a violation would be grounds for debarment. I, therefore hold that the Department is estopped from debarring FABCO, as an affiliate or otherwise, on the basis of the record before me.

The Government's evidence against Naiman was fragmentary; it conflicted with the contrary evidence of comparable credibility; and much of it was second-hand. In the face of Appellant's denials, the Government did not satisfy its burden to prove by a preponderance of the evidence that Naiman had actual knowledge of the requirements under FABCO's contract with LAHA to comply with Federal wage standards or to obtain prior approval of any subcontractors, or of the violations thereof. This conclusion does not ignore the strain which Naiman's categorical denials of such knowledge also place upon credulity.

There is no substantial dispute and no question on this record that the Subcontract was executed by Naiman on behalf of FABCO without the required prior approval of LAHA. Nor is there any dispute that the Subcontract on its face not only failed to incorporate the required Federal wage standards provisions, but in fact purported expressly to release the subcontractor Watkins from such obligations. Even if such facts do not comprise a willful failure Naiman or FABCO to perform in accordance with the specifications of the contract under 24 C.F.R. §24.6(a)(3)(i) as charged by the Government in its brief, they clearly establish a record of inexcusable failure to perform in accordance with the terms of the contract under 24 C.F.R. §24.6(a)(3)(ii). Such facts could also comprise a cause of serious compelling nature,

affecting responsibility, as determined by Assistant Secretary Simons to warrant debarment under 24 C.F.R. §24.6(a)(4).

The principal issue to be decided, therefore, is whether Naiman's involvement in these violations was such as to establish such a lack of present responsibility as to require his debarment. Under the debarment standard of present responsibility, a contractor or grantee may be excluded from HUD programs for a period based upon projected business risk. Roemer v. Hoffman, supra; Stanko Packing Company, Inc. v. Bergland, supra. Where present responsibility is the only applicable standard, any alleged mitigating circumstances affecting responsibility must also be considered under the teaching of Roemer v. Hoffman, supra, so that debarment is inappropriate if the affected participant can demonstrate that it no longer constitutes a business risk. Cf. 24 C.F.R. §24.0.

A corporation can only function through its officers, directors, and shareholders. See Warren Brothers Roads Co. v. United States, 355 F. 2d 612, 616 (Ct. Cl. 1965), citing 39 Comp. Gen. 468, 471 (1959); Holmes v. Bateson, 583 F. 2d 542, 560 (1st Cir. 1978); Trap Rock Industries, Inc. v. Kohl, 284 A. 2d 161, 166-67 (N.J. 1971); see Lawrence C. Humphrey, HUDBCA 81-640-D41 (Dec. 21, 1981). "Holding a corporate contractor or grantee to a standard of "responsibility" necessarily means, therefore, that those who control its activities, policies, and management have a special obligation to monitor the corporation's public activities and may be required to account for any negligence or wrongdoing committed. Cf. Warren Brothers Roads Co. v. United States, and Trap Rock Industries, Inc. v. Kohl, both supra." Lawrence C. Humphrey, supra at 6.

In this regard, an individual who assumes the position of corporate president and represents a company in its dealings with HUD assisted entities should expect to be held responsible for that company's internal management. See Lawrence C. Humphrey, supra; The Mayer Company, Inc., HUDBCA 81-544-D1 (Dec. 1, 1981); John Haris Killingsworth, HUD 77-522-DB (Mar. 10, 1978); Gerald F. Sands, HUD 75-357.A-DB (Jul. 14, 1977).

The proof of record establishes that Naiman managed FABCO as President, but that he did so by delegation of responsibility such that he was consciously and intentionally insulated from many day-to-day business decisions and knowledge of any constraints upon them. However, because of the crisis that had developed in relation to the Subcontract with Watkins, and because of Williams' apparent mismanagement of the episode, Naiman admittedly had the chance to focus on the offending Subcontract. Under such circumstances, he cannot be excused of significant management responsibilities because of his own judgmental reliance on Williams or other corporate employees. Trap Rock Industries, Inc., v. Kohl, supra at 167; Lawrence C.

Humphrey, supra; The Mayer Company, supra; John Harris Killingsworth, supra; Gerald F. Sands, supra.

However, the decision to debar need not rest solely on a conclusion that Naiman can properly be held responsible for FABCO's management in regard to the handling of the Subcontract and performance of the Contract. The record reflects actual mismanagement which may be inferred from Naiman's admitted management practices. These included the categorical refusal to concern himself with the obligations assumed under contracts entered into by the Company, except sometimes as to costs or pricing; the abdication of responsibility to insure that management procedures effectively assured compliance with contract requirements, especially those contracts affecting the interests of governmental entities, state or Federal. Such practices also include the failure to exercise adequate supervision over employees and to promulgate clear policies precluding noncompliance with or evasion of applicable wage standards as evidenced by the Watkins subcontracting episode. It is clear that Naiman consciously abdicated responsibility for all of these without regard for possible and foreseeable consequences. Therefore, absent certain other important considerations of record, these past deficiencies might support an inference of a continuing lack of the requisite responsibility to participate in HUD programs.

The Government, however, nowhere challenged Naiman's assertion through is own testimony and that of FABCO's Vice President Jerry Browner that immediately upon notice of the improper subcontract with Watkins from the LAHA, Naiman acted to remedy the noticed deficiencies. Indeed, as previously noted, the Government has conceded that Naiman and FABCO have attempted to correct the situation that led to the violations and has not identified any defect in the prescribed or other remedial action. Those changes would for the most part have occurred prior to the execution of the Settlement Agreement between HUD and FABCO.

The record shows that Naiman immediately demoted Williams, and revised the internal procedures of the corporation to insure multiple step reviews including his own, of contracts and other documents to insure that the cited deficiencies would not be repeated. Moreover, the Agreement between HUD and FABCO dated December 17, 1980, incorporated remedial procedures specified by HUD, and effectuated the reinstatement of FABCO, which had been suspended since February 28, 1980. Since then, Naiman has continued in his role as President of FABCO.

Thus, under these peculiar circumstances, I conclude that Naiman's prospective debarment could only be punitive, and not necessary to protect the public interest. In addition, it would not be to the interest of the Government to raise the difficult practical and theoretical problems of how a prospective debarment of Naiman as President would jibe with FABCO's status under its

Agreement with HUD. And it is also significant that the events in question occurred on or before June 1977, more than five years prior to this determination. There is no evidence whatever that contradicts Appellant's assertion that the incidents cited as the basis for this action were isolated incidents of misconduct, attributable to a particular individual who has since been subjected to criminal penalties, during an otherwise long and unblemished business experience and occasional relationship with the Government.

Conclusion

For the foregoing reasons, I have determined that under the particular circumstances of this case, no debarment of the Appellant Naiman, or the affiliate FABCO, is appropriate.

Edward Terhune Miller
Administrative Judge

Dated: This 30th day of September, 1982.