

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
BOARD OF CONTRACT APPEALS  
Washington, D. C.

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In the Matter of: :  
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 REA CONSTRUCTION COMPANY, : HUDBCA No. 81-550-D6  
 : (Activity No. 80-728-DB)  
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 Appellant :  
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J. Carlton Fleming, Esquire  
Fleming, Robinson, Bradshaw & Hinson, P. A.  
2500 First Union Plaza  
Charlotte, North Carolina 28282 For the Appellant

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

INITIAL DETERMINATION

Statement of the Case

By letter dated August 8, 1980, REA Construction Company, "Appellant" herein, was notified by the Department of Housing and Urban Development ("HUD") that it intended to debar Appellant from participation in departmental programs for a period of five years based on its conviction of violation of 15 U.S.C. §1, conspiracy in unreasonable restraint of interstate trade and commerce. Appellant was temporarily suspended pending determination of debarment.

Appellant filed a timely request to submit a written brief and documentary evidence pursuant to 24 C.F.R. §24.5(c)(2) and 24 C.F.R. §24.7 in support of its position that it should not be debarred. Submissions on behalf of both Appellant and the Government were filed in support of their positions. On January 22, 1981, the Government filed a Motion to Supplement Record, which was granted by Order dated February 6, 1981.

#### APPLICABLE REGULATION

The departmental regulation applicable to debarment and suspension of contractors and grantees, 24 C.F.R., Part 24, provides in pertinent part as follows:

#### §24.4 Definitions.

\* \* \*

(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; all participants, or contractors with participants, in programs where HUD is the guarantor or insurer; and Federally assisted construction contractors.

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#### §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) Conviction under the Organized Crime Control Act of 1970, 18 U.S.C. 1961 et seq. or conviction for the commission of the offense of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, fraudulent use of the mail in connection with commission of such offenses, or conviction 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.

#### Findings of Fact

Appellant is a North Carolina corporation engaged in the business of construction. On or about March 3, 1978, the Capital Regional Airport Commission, a public entity operating Richard E. Byrd International Airport in Richmond, Virginia, solicited sealed bid proposals for the construction and reconstruction of runways and taxiways at Byrd Airport. The Airport Commission was required by Virginia law to award the contract to the lowest responsible bidder.

Appellant and two other construction contractors conspired to submit collusive, non-competitive rigged bids to the Airport Commission. They agreed to submit intentionally high, complementary bids to fix the price of the contract at an artificial, non-competitive level, thus denying the Airport Commission and the Federal Government, which funded 90% of the contract through the Federal Aviation Administration, the benefits of free competition for the contract. (Gov't. Exhibit A).

On or about August 28, 1979, the City of Charlotte, North Carolina solicited sealed bids for construction and reconstruction of runways and taxiways at Douglas Municipal Airport in Charlotte. That contract was funded to the extent of 75% by the Federal Government through the Federal Aviation Administration. Appellant conspired with other contractors to submit collusive, rigged bids to the City of Charlotte on the contract for construction at Douglas Municipal Airport. (Gov't. Exhibit E).

On or about July, 1978, Appellant conspired to submit collusive bids for highway construction to the North Carolina Department of Transportation in connection with a contract funded by the Federal Highway Administration. (Gov't. Exhibit E).

On March 21, 1980, Mecklenburg County, North Carolina accepted bids on a contract for roadway improvements. The funds for the roadway construction were provided by the Department of Housing and Urban Development under the Community Development Block Grant Program. The contract was awarded to Appellant and was signed on May 6, 1980 (Gov't. Exhibit H).

On February 29, 1980, Appellant was indicted by a Federal Grand Jury in the Eastern District of Virginia for alleged conspiracy to restrain interstate commerce and trade in violation of the Sherman Act, 15 U.S.C. §1, for submitting collusive bids in connection with the construction contract at Byrd Airport. (Gov't. Exhibit A). On June 5, 1980, Appellant pleaded guilty to the indictment of February 29, 1980 and was fined \$150,000.00 (Gov't. Exhibit B). Appellant was also indicted for alleged violations of the Sherman Act in the United States District Court for the Western District of North Carolina, based on the submission of collusive bids in connection with the contracts for construction of runways at Douglas Municipal Airport and the construction of highways in North Carolina. (Gov't. Exhibit E). Appellant pleaded guilty to that indictment on June 4, 1980, and was fined \$350,000.00 for conspiracy to violate the Sherman Act (Gov't. Exhibit F).

Appellant was debarred by the Federal Highway Administration based on its conviction for violation of the Sherman Act in North Carolina (Gov't. Exhibit G). HUD has proposed the debarment of Appellant based on its conviction in the Eastern District of Virginia. (Gov't Exhibit C).

Appellant has submitted evidence that it entered into a Settlement Agreement with the State of North Carolina, dated September 18, 1980, to provide restitution to the State for past damages and to cooperate in the State's investigation of contract bidding practices. Appellant's officers contacted the State Attorney General to volunteer their cooperation in the investigation after the plea of guilty was made in Federal Court to the Sherman Act charges. (App. Exhibit A). Likewise, Appellant entered into a comparable agreement with the Commonwealth of Virginia on December 11, 1980. (App. Exhibit B). On September 30, 1980,

Appellant and the United States agreed to the entry of a consent decree in Federal District Court, Western District of North Carolina, providing that Appellant is enjoined from entering into any contract or conspiracy for the purpose of fixing or rigging contracts for the sale of asphalt or concrete paving. The judgment entered by the court is in effect for a period of ten years following the date of its entry. (App. Exhibit C).

Appellant contends that, because it "cooperated" with the states after the indictments and convictions in Federal Court, made restitution, and entered into a Consent Decree with the United States to not submit collusive bids or fix prices on future asphalt or concrete paving contracts, that it is presently a responsible contractor and should not be debarred.

#### DISCUSSION

The purpose of debarment is to assure the Government that it will only award contracts to "responsible contractors and grantees." 24 C.F.R. §24.0. It is a measure to be used for protection of the public interest and shall not be used for punitive purposes. 24 C.F.R. §24.5(a).

Appellant is a "contractor or grantee" within the meaning of the regulation because it receives HUD funds indirectly through Mecklenburg County, North Carolina, for roadway improvements on a contract entered into for that purpose on May 6, 1980. 24 C.F.R. §24.4(f). "Responsible contractor" is a term of art in Government contract law. It has been defined by the courts and the Comptroller General to include the honesty and integrity of a contractor or grantee, as much as the ability to perform a contract. Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976); 34 Comp. Gen. 86 (1954); 39 Comp Gen. 468 (1959); 49 Comp. Gen. 132 (1962).

Appellant was convicted for commission of a criminal offense as an incident to obtaining or attempting to obtain a public contract, which is a ground, per se, for debarment. 24 C.F.R. §24.6(a)(1). Furthermore, conspiring to submit collusive, rigged bids is clearly an offense indicating a lack of business integrity or honesty which seriously and directly affects the question of present responsibility. 24 C.F.R. §24.6(a)(9). While the departmental regulation does not mandate an automatic debarment for such a conviction, the seriousness of the offense would be the primary consideration in weighing any mitigating factors presented by Appellant in determining whether it is in the best interest of the public and the Government to debar Appellant. 24 C.F.R. §24.6(b)(1). The test for the necessity of debarment is present responsibility. However, past acts may be the basis for a finding of present lack of responsibility, particularly when those acts have occurred in the recent past. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957)

In the instant case, I find the acts committed by Appellant in 1978 and 1979, which resulted in convictions in two jurisdictions, were indeed acts which indicate a serious lack of business integrity and honesty. Rigged bidding strikes at the most basic foundation of a fair, cost effective procurement program. To conspire to artificially inflate bids on public contracts is an economic and social affront to the tax paying public and the State and Federal Governments charged with effective administration of procurement policy. No explanation has been given by Appellant as to why it engaged in such antisocial behavior on at least three occasions. The conviction in Virginia, on which HUD's debarment action is based, is clearly not an isolated incident in the history of REA Construction Company. The "cooperation" given by Appellant's officers came after the indictments and convictions in Federal court in Virginia and North Carolina. It can in no way be considered mitigation of either the seriousness of Appellant's offense or an indication that Appellant is presently a responsible contractor. Settlements and consent decrees are a form of plea bargain to escape more stringent legal sanctions and the necessity of a public trial, not "cooperation", particularly when they occur after the fact of indictment and conviction. The consent degree entered into by Appellant may be no more of a deterrent to its actions in the future than the Sherman Act was to its actions in the past. It is also a limited order only applicable to submission of bids for asphalt and concrete paving.

Appellant's convictions were entered approximately one month after the HUD financed contract had been awarded to Appellant by Mecklenburg County. It is unclear whether the contracting authority was aware of the outstanding indictments against Appellant at the time of the contract award. Without regard to that consideration, I find that Appellant poses a serious present risk to HUD as a contractor on a HUD-financed project. Appellant's recent history of the most egregious contract manipulation outweighs the subsequent financial reimbursements and consent decrees in consideration of whether debarment is warranted. I find that a substantial period of debarment is warranted to protect the public interest.

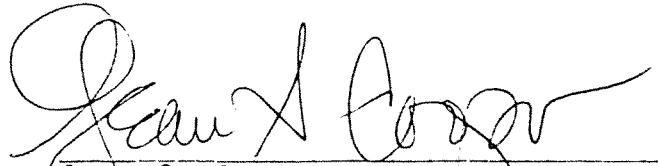
Appellant has been temporarily suspended <sup>1/</sup> from participation in Departmental programs since August 8, 1980. The time Appellant has been suspended shall be taken into consideration in ordering the appropriate period of debarment. I find that it is in the best interest of the Government and the public that Appellant be debarred from this date up to and including August 8, 1985, a total period of five years, including the period of temporary suspension.

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<sup>1/</sup> A conviction of a contractor is adequate evidence to warrant imposition of a suspension pending debarment. 24 C.F.R. §24.13(c).

DETERMINATION

For the foregoing reasons and based on the record considered as a whole, Appellant, REA CONSTRUCTION COMPANY, shall be debarred from this date up to and including August 8, 1985.

A handwritten signature in cursive script, appearing to read "Jean S. Cooper". The signature is written in black ink and is positioned above a horizontal line.

Jean S. Cooper  
Administrative Judge  
HUD Board of Contract Appeals

Issued at Washington, D. C.  
April 14, 1981.