

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

In the Matter of:

RUDY BARNES and
RUDY BARNES COMPANY, INC.,
Appellants

HUDBCA No. 81-588-D15

Edmund T. Wegener, Jr., Esquire
Gauche, Wegener & Oster
10th Floor
Southern Savings Building
New Orleans, Louisiana 70130

For the Appellants

Thomas Peeler, Esquire
U.S. Department of Housing and
Urban Development
Fort Worth Regional Office
221 West Lancaster Avenue
P. O. Box 2904
Fort Worth, Texas 76113

For the Government

DETERMINATION

Statement of the Case

By letter dated March 27, 1981, Mr. Rudolph Barnes was notified by the Department of Housing and Urban Development that it intended to debar him and his affiliate company, Rudy Barnes Company, Inc., from participation in departmental programs for three years, based on their alleged failure to perform two public contracts within a reasonable time period.

Appellants made a timely request for a hearing on the proposed debarment pursuant to 24 C.F.R. §24.7. This determination is based on the record established at the hearing and the post-hearing briefs filed on behalf of the parties.

Findings of Fact

1. Rudolph J. Barnes is the president and owner of Rudy Barnes Company, Inc. He does not operate independently of the corporation. Barnes has been in the construction business full time since 1962 and has had numerous public contracts with the Housing Authority of New Orleans ("HANO") for construction, rehabilitation and renovation work. (Tr. 282-86.)

2. On October 10, 1972, HANO entered into a consolidated contributions contract with the U.S. Department of Housing and Urban Development ("HUD"), which provided that HANO would undertake the development and operation of certain low-rent housing projects for which HUD would render financial assistance through HANO. HANO had a contractual obligation to diligently prosecute the development of any project covered by the contract. If it failed to proceed with timely development and was so notified by HUD, HANO had to take whatever action was necessary to conserve money and to stop overhead expenses and losses with respect to that project. A project known as [REDACTED]-52 was covered under the consolidated contributions contract between HANO and HUD. (G #6.)

3. On April 22, 1975, HANO opened the sealed bids it had solicited on the contract for [REDACTED]-52. Barnes was the lowest responsible bidder on the contract, but a temporary restraining order was issued by the Federal District Court concerning the award and the litigation on the award was not resolved until January 1977. (G #9.)

4. At the outset of the bid protest litigation, Barnes had informally agreed to perform the contract at his bid price after the matter was resolved. He expected the litigation on the award to take four months at most. Barnes felt obligated to renew that commitment in 1977 even though the litigation had actually taken almost two years and HANO had given him an opportunity to withdraw his bid at that point. (Tr. 337.)

5. On January 20, 1977, Barnes agreed to perform the [REDACTED]-52 contract at his original bid price made in 1975 (Tr. 336).

6. Barnes believed that he could still make a profit, although small, on [REDACTED]-52 in 1977 at his 1975 bid price because his subcontractors had agreed to hold closely to their original cost estimates, and both Barnes and his subcontractors expected an immediate award of the contract and notice to proceed in January, 1977 (Tr. 337). Barnes notified HANO that he needed an early award to keep his costs from escalating (G #10).

7. HANO did not award [REDACTED]-52 to Barnes until April 19, 1977 (J.E. #1).

8. [REDACTED]-52 required Barnes to construct 24 residential units on scattered sites within 240 days after the notice to proceed was given (J.E. #1). Notice to proceed was given on May 2, 1977, and the contract was to be completed by December 27, 1977 (J.E. #3).

9. Between January and April, 1977, there was an unprecedented and unforeseeable increase in building-related prices in the Near Orleans area (Tr. 264, 337). Also, certain building materials and labor required for performance of [REDACTED]-52 were very difficult to obtain in the spring of 1977 because there was a "building boom" in New Orleans. (Tr. 261-64.)

10. Barnes encountered delays at the start of the contract due to the undisputed unavailability of pilings and pile drivers. That delay ended on approximately August 30, 1977, and construction then proceeded rapidly. In November, 1977, progress began to slow down and, by June, 1978, was almost at a standstill. As of August, 1980, six of the twenty-four units had still not been completed. (Tr. 29-30, 32, 34-35.)

11. On August 13, 1980, HANO terminated Barnes' right to proceed on [REDACTED]-52 because the original contract performance period had been exceeded by 960 days without final acceptable completion of the work (J.E. #4).

12. Barnes was not able to finish [REDACTED]-52 because he lacked the cashflow to keep his men on the job or pay his suppliers. He kept putting his own money into the project but could not borrow more than \$100,000 because his property was tied up in a costly disputed divorce proceeding (G #22; Tr. 340-41). He explored all reasonable financial sources of money to complete the project (Tr. 380). His cashflow problems were exacerbated by the increase in costs of goods and services, reduction by HANO of his draw requests (progress payments), and HANO's failure to pay him an undisputed \$62,000 it owed him for completion of another contract, [REDACTED]-14. (Tr. 351, 357, 379-80, 394, 402.)

13. Barnes never told the HANO officials that he was not able to complete [REDACTED]-52 on time because he lacked the funds to pay his work force. HANO sent repeated letters and made telephone calls to Barnes on the subject but Barnes rarely responded to the letters from HANO and never indicated the reasons for non-performance until the contract performance date had long since passed.

14. Barnes estimated that there were only three or four days of work left to be done on [REDACTED]-52 at an estimated cost of \$1,300 at the time HANO terminated Barnes' right to proceed on the contract (Tr. 350). Barnes' field superintendent agreed with Barnes' estimate of that time and cost for completion (A #3, 4, 5; Tr. 201).

15. HUD officials were involved in the awarding, inspecting, and monitoring the progress of █████-52 from its award to termination. (Tr. 86-88.) HUD officials were also responsible for the four-month delay in giving Barnes a Notice to Proceed on the contract (Tr. 106). When it became obvious that the project would not be completed by the completion date in the contract, a HUD official, Clyde Cheek, called the HANO contracting officer several times to determine what HANO would do to get the contract back on schedule (Tr. 93). The HUD Area Office was under pressure from the HUD Regional and Central Offices to get the contract completed (Tr. 95). On September 27, 1978, Cheek sent a letter to HANO, directing it to get Barnes' bonding company to finish the job (G #11). HANO did not contact the bonding company until December 4, 1979 (G #3), and the bonding company never fulfilled its obligation under the bond (Tr. 11).

16. Clyde Cheek recommended that HUD debar Barnes because of the excessive time overrun on █████-52. A normal period of overrun in the New Orleans area at that time for a contract similar to █████-52 was between 30 and 90 days. (Tr. 96-98.) Cheek knew that Barnes and other contractors were having difficulty obtaining materials but, because the other contractors managed to keep their jobs on or near schedule, he did not credit Barnes' complaints to him about material delays (Tr. 94). In Cheek's opinion, Barnes suffered a maximum of six months of excusable delays on █████-52, which meant that he should have completed it, at the latest, in fifteen months (Tr. 104). Later, Cheek got the impression that Barnes was having personal financial problems although Barnes never told him so directly (Tr. 95). It was not until one year after the contract was to have been completed that Barnes first told Cheek that he lacked the funds to continue. Barnes blamed the lack of funds on HANO, claiming that HANO was unfairly reducing his draw requests. (Tr. 99-100.) Cheek was not aware that HANO was holding back a total of \$81,000 for disputed and undisputed items on Contract No. █████-14 at the direction of HUD, money which would have given Barnes the capital he needed to complete █████-52 (Tr. 109-110).

17. On March 21, 1977, Barnes had entered into Contract No. █████-14 with HANO for the renovation of the kitchens in 926 apartment units located in the Desire Housing Project in New Orleans. The award to Barnes was for one-half of the work in the originally advertised contract, as agreed to by Barnes and another contractor who had bid on the contract, Robinson Electrical Company, Inc. The contracts awarded to Barnes and Robinson were essentially identical. (J.E. #2.)

18. Contract █████-14 provided that it was to be completed within 270 days after the Notice to Proceed was issued by HANO. Liquidated damages for delay in completion were set by the provisions of the contract at \$50.00 per day. (J.E. #2.)

19. Barnes was given the Notice to Proceed on [REDACTED]-14 on March 28, 1977, with a completion date of December 28, 1977 (Tr. 134).

20. Barnes completed [REDACTED]-14 on July 6, 1978. HANO assessed Barnes a total of \$2,800.00 in liquidated damages for 59 days of unexcused delays. (J.E. #5; Tr. 161.)

21. Although HANO accepted Barnes' work on [REDACTED]-14 as acceptably completed, it held back \$82,190.64 for various costs and claims, including the liquidated damages. Included in this sum retained by HANO were \$10,000.00 for city certificates of approval not received, \$1,500.00 for caulking at the base of water closets, \$3,594.00 for "labor not performed in dwelling units", \$1,108.00 for punch list items, \$20,000.00 for relocation of open site drains to side of kitchen cabinets, and \$43,188.64 claimed by Barnes for extra payment due to him for performance of electrical work outside the scope of the contract. (J.E. #5.)

22. The amount withheld for relocation of the open site drains was a disputed amount on a specification deletion credit due to HANO. Both Barnes and Robinson used the same plumbing subcontractor on their contracts. At the start of the contracts, the subcontractor, Carter J. Rader, Jr., made a recommendation to both Barnes and Robinson for a better and less costly method of installation of the open site drains. The change suggested would have resulted in a cost savings to HANO because less pipe was needed for each installation, with a slightly reduced labor cost. (Tr. 164-70.) Barnes submitted Rader's drawing of the suggested change to HANO for approval on June 23, 1977 (G #19).

23. HANO did not approve the change order request until August 2, 1977 (G #19). Rader testified that the rest of the kitchen renovation work could not be performed until the change was approved because the kitchen cabinets had to be dismantled to do the drain work. If Barnes had proceeded with the installation of new cabinets before the drain change was approved, he would have had to dismantle the new cabinets to do the drain work. (Tr. 171.)

24. Although Barnes requested an extension of time due to HANO's delay in approving the change order for the drains, no extension was granted for that work (A #12).

25. Barnes also experienced delays on [REDACTED]-14 due to inaccessibility of the units to be remodeled. HANO was responsible for making the units available, but inasmuch as the units were occupied during the remodeling, Barnes' work teams were often not able to enter the units on schedule. (Tr. 189, 196.) HANO gave Barnes a time extension of 48 days due to the inaccessibility of the units (G #19), but Barnes' superintendent on the job believed that Barnes should have been given fifteen more days for the delay (Tr. 203-04).

26. Although Barnes agreed to pay the liquidated damages for 59 days of unexcused delay, I find that the delays he experienced due to the open site drain dispute were not due to his own negligence, and he should have been given an extension of time on [REDACTED]-14 for the performance of that work because it impacted on other work to be performed.

27. The change order on [REDACTED]-14 relating to the mode of installation of the open site drains decreased the contract price by \$40,595.89. Barnes signed the change order but apparently all parties knew the amount of the deduction was in dispute. (G #19.) HANO deducted \$20.00 per drain but Barnes and Rader both contended that HANO was only entitled to an adjustment of \$3.98 per drain for the decrease in the amount of pipe needed to perform the work (Tr. 150-51). Payment for the drain work had not yet been made at the time of the hearing on the debarment action.

28. Barnes has also never been paid for installation of electrical outlets under [REDACTED]-14. He performed the work, claiming that it was outside the scope of the contract. (Tr. 291.) Although the issue of Barnes' claim for payment for the extra electrical work is not directly before me to be resolved, Item 1 of Addendum #6 to the contract specifications clearly directs the contractor to "delete from plans and specifications any ... electrical work" (J.E. #2). Thus, Barnes' contention that the electrical work should be paid for as extra work outside the contract would appear to be justified. HANO apparently agreed that the electrical work should be paid for because it was included in a 1979 Compromise Agreement between HANO and Barnes to settle all disputes on [REDACTED]-14 for \$62,000 (A #1).

29. HUD also agreed that Barnes should be paid for the electrical work he was ordered to perform. However, HUD wanted HANO to send supporting documentation to it on the cost of the electrical work. (Tr. 147, 148.) HANO was unable to furnish sufficiently detailed cost information to satisfy HUD and, as a result, HUD has never allowed HANO to recompense Barnes for the electrical work (Tr. 148).

30. HUD also has held up payment on the open site drain work performed by Barnes under [REDACTED]-14. HANO eventually agreed to Barnes' figure of \$3.98 per drain credit, but HUD would not approve that agreement until it evaluated the work at the site for its actual cost. (Tr. 150-51.)

31. No explanation was given by the HUD engineering technician assigned to [REDACTED]-14 for HUD's failure to approve and process the amount agreed upon by HANO for payment for the drain work, despite the fact that HUD had the original contract drawings, the change order, and access to inspection of the work as performed at all times (Tr. 152-53).

32. I find that HUD's withholding of approval of the payment of the \$62,000 agreed to between Barnes and HANO for the drains and electrical work on [REDACTED]-14 is inexcusable.

33. I further find that had HUD approved the payments rightfully due Barnes for his work on [REDACTED]-14 in a timely manner, Barnes would have had the capital he needed to complete contract [REDACTED]-52 by the fall of 1978.

34. I further find that HANO and HUD were extremely delinquent in not terminating [REDACTED]-52 before August, 1980. Under the terms of the contract, HANO and HUD had an obligation to act promptly to terminate the contract when it became apparent that completion was unreasonably delayed (J.E. #1). None of the excuses given by Barnes to either HANO or HUD were sufficiently compelling for them to have allowed the contract to continue until August, 1980 with so little progress being made on the work.

35. Barnes and Rudy Barnes Company, Inc. were subjected to a Temporary Denial of Participation by the HUD New Orleans Area Office from February 22, 1980 until February 21, 1981, as a result of the failure to complete [REDACTED]-52 (A #18).

36. The only public contract on which Barnes ever experienced a serious time overrun was [REDACTED]-52 (Tr. 286-87).

DISCUSSION

The purpose of debarment is to assure the Government that it only does business with responsible contractors and grantees. 24 C.F.R. §24.0. Barnes is a Federally-assisted construction contractor who received HUD funds indirectly through HANO. Therefore, Barnes and his company are "contractors and grantees" within the definition of the regulation applicable to debarment. 24 C.F.R. §24.4(f). The Departmental regulation applicable to debarment provides that a record of failure to perform in accordance with the terms of one or more contracts is a ground for debarment, provided that the failure was not caused by events beyond the contractor's control which were reasonably foreseeable. 24 C.F.R. §24.6(a)(3)(ii).

The instant case presents the situation of a contractor who was unable to complete a contract because he ran out of funds. When a contractor bids on a contract, he assumes the financial responsibility for its completion within foreseeable limits. In almost all cases, financial problems are not an excuse that will forestall a termination for default. However, the instant case does not concern the propriety of the termination of Appellant's contract. Rather, it concerns the imposition of a serious sanction, in addition to termination, for that default.

The history of the two contracts awarded to Barnes a month apart are financially interwoven. Both were for large sums of money, one for over \$1.5 million dollars (████-14) and the other for over a half million dollars (████-52). Although █████-52 should have been completed in about fifteen months, taking into consideration excusable delays, it was not. The reason why █████-52 was not completed on time was strictly financial. Some of that financial pressure was caused by a four-month delay by HUD in approving the actual award of █████-52 after Barnes had agreed to perform the contract in January, 1977 at his 1975 bid price. The reasons for that delay were not adequately explained by the Government witnesses but were neither foreseeable nor caused by Barnes. With perfect hindsight, Barnes should have refused the contract when it was finally awarded in April, 1977 because of the dramatic escalation in the cost of construction between January and April of 1977. However, rightly or wrongly, Barnes felt obligated to keep his word about maintaining his bid price. That decision cost him dearly.

Barnes was well aware of his financial problems when he started on █████-52. By November, 1977, he did not have enough cash to pay his work force. At that time, he should have advised HANO and HUD of his problems and asked for direction. Instead, he led the Government on by silence. On the other hand, the Government officials failed in their obligation to effectively utilize public funds by letting the situation drag on until August, 1980, before any real action was taken to relieve Barnes of his contract. The problem should have been readily apparent since November, 1977, to both the HANO and HUD inspectors. The inaction of the Government in the face of clear unexcused non-performance is unfathomable.

If the Government wanted Barnes to continue with █████-52 despite the time overrun, it frustrated its own objective by the way in which it administered █████-14 in 1978. By that time, both HUD and HANO knew that Barnes' problems on █████-52 were financial. The unexcusable holdback of funds on █████-14 that were not in true dispute absolutely assured that Barnes would be pushed further into a financial hole on █████-52. Since 1978, the Government has improperly failed to pay for the work it received. The public fisc is not entitled to windfalls. The Government did absolutely nothing to mitigate the damages it was incurring as a result of Barnes' failure of performance on █████-52. The delay in performance completion on █████-14 was not excessive, and the Government collected liquidated damages in an amount probably in excess of that which it was entitled to receive, given the circumstances of the delay on that contract.

Debarment is not to be used for punitive purposes. 24 C.F.R. §24.5(a). Even if a cause for debarment is established, imposition of the sanction is neither automatic nor mandatory. 24 C.F.R. §24.6(b)(1). Mitigating factors must be considered in determining the seriousness of the failure of performance on

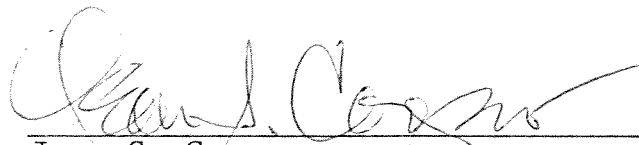
which the debarment is based. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976); 24 C.F.R. §24.6(b)(1). Although Barnes failed to perform in accordance with the terms of [REDACTED]-52, and that failure was attributable in part to his own fault or negligence, the seriousness of his failure is mitigated substantially by the Government's own conduct that exacerbated the situation to a deplorable degree.

The facts in the instant case are far different from those presented in two recent cases in which periods of debarment were imposed for failures to perform satisfactorily on one or more contracts, Wilbert T. Alexander, HUDBCA No. 81-648-D47 (Feb. 18, 1982); Andrew R. Calhoun, HUDBCA No. 82-676-D14 (June 30, 1982). In both Alexander and Calhoun, the contractors had failed to perform satisfactorily on a large number of contracts and offered no evidence that in any way mitigated the seriousness of those failures. In contrast, Barnes had only one serious failure of performance on a contract in an otherwise successful career as a construction contractor. Despite that failure, I do not find that Barnes' history as a Government contractor warrants a period of debarment when viewed in the light of present responsibility or when considered in terms of potential business risk. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1975); Roemer v. Hoffman, supra.

Barnes has been effectively prevented from participating in HUD programs as a result of the Temporary Denial of Participation which had been imposed for Barnes' failure to complete [REDACTED]-52. I find that the imposition of the Temporary Denial of Participation was a sufficient sanction to protect the public interest and the Government under the facts and circumstances presented in this case. I cannot find a public purpose in imposing a debarment on the same ground.

Conclusion

For the foregoing reasons, Rudolph Barnes and Rudy Barnes Company, Inc. shall not be debarred because their debarment is not required to protect the public interest.


 Jean S. Cooper
 Administrative Judge

Dated: This 20th day of August, 1982.