

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

In the Matter of:

ROBERT C. GENNARO,

Appellant

HUDBCA No. 81-632-D37

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For the Government

DETERMINATION

Statement of the Case

By letter dated August 14, 1981, Robert C. Gennaro ("Appellant") was notified by the Department of Housing and Urban Development ("HUD") that it intended to debar him from participation in Departmental programs for a period of five years. The proposed debarment is based on sworn testimony given by Gennaro on January 23, 1979, in the case of United States v. Daniel J. Flood, that he promised to pay \$100,000 to Stephen B. Elko, an assistant to then Congressman Daniel J. Flood, if Flood's office was successful in gaining the approval of HUD or the Farmers Home Administration for financial assistance to Gateway Housing Corporation for a project known as Crestwood Hills.

Gennaro made a timely request for a hearing on the proposed debarment. The parties subsequently requested a temporary stay of an oral hearing. On July 1, 1982, the parties made a joint

request to have the matter decided on a written record composed of briefs and documentary evidence. The following determination is based on the written submissions filed on behalf of Appellant and the Government. Both parties submitted the transcript of Gennaro's testimony in the case of United States v. Daniel J. Flood, as evidence. The numbered findings following are based primarily on that official transcript of testimony.

Findings of Fact

1. Robert C. Gennaro is President and a major stockholder of Gateway Housing Corporation ("GHC"). GHC builds and develops residential housing projects throughout eastern Pennsylvania. (Govt. Exh. A, Transcript of the sworn testimony of Robert C. Gennaro, January 23, 1979, United States v. Daniel J. Flood, U.S.D.C. for the District of Columbia, Cr. No. 78-00561, at 3-4.)

2. In January 1973, GHC began the construction of Crestwood Hills, a development of 172 townhouses in Mountaintop, Pennsylvania. In the spring of 1973, after some of the townhouses were completed, Gennaro decided that GHC would not be able to sell the townhouses without some Government assistance because there was little or no conventional mortgage money available at that time. GHC applied to HUD, the Pennsylvania Housing Finance Agency and the Farmers Home Administration for subsidies to convert some of the units to rental properties and for low-interest Government mortgages for the sale of other townhouses. All of the applications for Government assistance were denied. (Govt. Exh. A at 5-10.)

3. In July, 1973, Gennaro sought the assistance of Daniel J. Flood, then a United States Congressman, in obtaining Government assistance for Crestwood Hills. Flood arranged for Gennaro to meet with Stephen B. Elko, Flood's Administrative Assistant, to discuss the problem. Gennaro met with Elko in Washington, D. C. At that meeting, Gennaro gave Elko copies of the applications for assistance that GHC had made to HUD, the Farmers Home Administration and the Pennsylvania Housing Finance Agency. (Govt. Exh. A at 12-16.)

4. Starting in September 1973, Elko began making suggestions to Gennaro concerning GHC's applications for assistance and encouraged him to start renting the townhouses at the low HUD-approved rental rates for subsidized rental housing. Gennaro spoke with Elko by telephone approximately 2-3 times a week, starting in September, 1973. Elko reported to Gennaro that Flood's office had contacted many Government agencies to assist GHC. (Govt. Exh. A at 17-19.)

5. In the spring of 1974, GHC applied to HUD for Section 8 subsidies for the tenants at Crestwood Hills but HUD denied the application. Farmers Home Administration also rejected a second GHC application for assistance. By October, 1974, GHC was in a

severe financial bind. First Valley Bank had become mortgagee-in-possession of Crestwood Hills because of non-payment of the construction loan by GHC. First Valley Bank also stopped filling GHC's requests for draws on the construction loan. During this period in 1974, Flood's office continued to arrange meetings with various Government offices on behalf of GHC. (Govt. Exh. A at 19-25.)

6. In August, 1974, Stephen Elko suggested to Gennaro that he offer Elko \$50,000 in exchange for the help Flood's office was giving GHC in its search for Government assistance for Crestwood Hills. Gennaro testified that he told Elko that Flood's help was "worth any amount if I can get out of this terrible situation I am in." Gennaro testified that he was relieved that Elko had raised the subject of a payoff because that meant to Gennaro that "I could see the light at the end of the tunnel." (Govt. Exh. A at 25-27.)

7. On October 25, 1974, in Washington, D. C., Elko asked Gennaro to pay him \$100,000 if Flood's office was successful in getting GHC Government financing for Crestwood Hills. Gennaro agreed to Elko's request, testifying that he told Elko that "if that is what it takes, I will be very happy to pay it when and if the project is financed." (Govt. Exh. A at 32-35.)

8. On October 29, 1974, Elko went to Gennaro's home to request a campaign contribution of \$5,000 to Flood to "help inspire Mr. Flood to be of more help." Elko asked Gennaro to make a \$2,000 contribution in cash and to have three of Gennaro's relatives each write a check to Flood's campaign for \$1,000. Gennaro borrowed the money from the First Valley Bank, transferred \$3,000 of it to his relatives in exchange for checks made out by them to Flood's campaign, and followed Elko's directions concerning the manner in which the contribution was to be made. Gennaro gave the cash and the checks to Elko on October 31, 1974. (Govt. Exh. A at 36-61.)

9. In 1975, HUD agreed to subsidize the low income rental units at Crestwood Hills (Govt. Br. at 2).

10. Gennaro did not pay Elko or Flood any portion of the \$100,000 he had promised to pay, even though HUD had given financial assistance to GHC (App. Br. at 7).

11. On October 12, 1978, Daniel J. Flood was indicted by a Federal Grand Jury in Washington, D. C. on a charge of conspiring to demand and accept money in return for influencing him in the performance of his official acts as a U. S. Congressman. The receipt of \$5,000 from Gennaro and Gennaro's promise to pay \$100,000 in return for Flood's agreement to influence officials of HUD and the Farmers Home Administration on behalf of GHC were cited in the indictment as examples of the means of the conspiracy. (Govt. Exh. B.)

12. Gennaro cooperated with the United States Attorney and testified on behalf of the Government at the trial of Daniel J. Flood. His testimony was considered crucial to the prosecution. (App. Exh. F.)

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. Responsibility is a term of art in Government contract law, defined to include not only the ability to successfully perform a contract but the honesty and integrity of the contractor. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959). While debarment is not to be used for punitive purposes, it is a sanction that the Government may use to protect the public interest. 24 C.F.R. §24.5. The test for whether debarment is warranted is the present responsibility of the contractor or grantee. However, a finding of present lack of responsibility can be based on past acts. Roemer v. Hoffman, supra; Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957).

Robert Gennaro is a "contractor or grantee" within the regulatory definition of that phrase because he is a builder and marketing agent whose company was the beneficiary of HUD rental subsidies through the Section 8 program. 24 C.F.R. §24.4(f). HUD contends that Gennaro's promise to pay \$100,000 if Daniel J. Flood were successful in helping GHC obtain financial assistance from HUD or other Federal agencies constituted a cause for debarment under 24 C.F.R. §24.6(a)(4) of such a serious and compelling affecting responsibility, that it warrants a debarment of five years.

The fact that Gennaro promised to pay \$100,000 for Flood's influence is not contested by the parties, nor is the fact that Gennaro did not pay that amount, as he had promised. The Government bases its case on the agreement of Gennaro to participate in a corrupt scheme that was devised by Elko and possibly Flood. The Government did not cite the \$5,000 payment made by Gennaro to Flood's re-election campaign as a basis for the proposed debarment, although that payment was cited in Flood's indictment as evidence of a conspiracy to demand money in exchange for political influence.

Gennaro contends that his proposed debarment is not warranted because he did not follow through on his promise to pay \$100,000 in exchange for political influence. He also contends that he was an innocent victim of the corruption of Flood and Elko. Finally, he cites his cooperation with the Government before the Grand Jury and at Flood's trial as mitigation of the seriousness of his conduct and evidence of present responsibility.

This case presents certain problems on the record, as established, because it fails to shed any light on the reasons why Gennaro did not fulfill his promise to pay \$100,000, once GHC received rental subsidy approval from HUD. The fact that Gennaro carried out Elko's convoluted directions for making a \$5,000 "campaign contribution" in October, 1974, is certainly evidence that he had few, if any, scruples about buying influence with a public official. Gennaro's testimony only describes his state of mind at the time the promise to pay was made in 1974. It is difficult to determine from that record whether he now understands the serious problems posed by his willingness to agree to participate in influence buying. Gennaro's eagerness to agree to pay the money in exchange for Flood's influence is obvious from his testimony at the Flood trial. No doubts about the correctness of his actions were expressed in that testimony.

Buying and selling political influence is a crime. The bribe sought by Elko was presented to Gennaro as exactly what it was and there could have been no doubt in Gennaro's mind that what Elko demanded was prohibited by law. Gennaro should have rejected Elko's demand. He also should have reported it to the authorities. Instead, he accepted the demand with a feeling of relief. It is clear from the record that it was not important to Gennaro that Elko's request was criminal in nature. Gennaro was not surprised that a public official was corrupt and that participation in corruption was a necessary and useful tool for doing business with the Government. He felt no obligation to avoid that corruption or stop it because he was too eager to benefit from it. Gennaro believed that he was in the kind of business trouble that could only be solved by drastic measures. He made a conscious choice that the measures could be illegal.

A Government contractor who willingly and eagerly participates in the corruption of what is designed to be a fair and neutral system of public financial assistance lacks the honesty and integrity required to continue to do business with the Government. I can find no assurance in the record before me that, were Gennaro to again feel that he was in a desperate situation, he would not again agree to participate in the corruption of a public process. The Government has established a ground for debarment under 24 C.F.R. §24.6(a)(4), based on the serious lack of responsibility shown by Gennaro in agreeing to buy the influence of a U. S. Congressman.

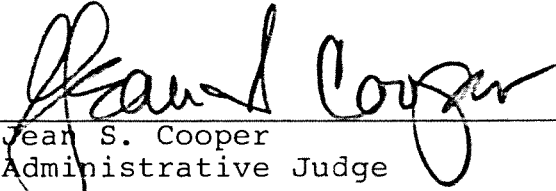
Gennaro has failed to bring forth convincing evidence in mitigation of the seriousness of his acts. That fact that he ultimately did not pay the money promised cannot be weighed in mitigation because the reasons for the failure to pay were not addressed by either party. Furthermore, Gennaro's cooperation with the United States Attorney in the prosecution of Daniel Flood is not evidence that either mitigates the seriousness of his lack of integrity or shows present responsibility. It may

only be evidence of a man trying to save himself through the most convenient means available to him at the time.

I find that Robert Gennaro has failed to show that he is presently responsible. Therefore, a period of debarment is warranted. Gennaro's acts that are the basis for the debarment action took place more than eight years ago. While he may not be presently responsible based on those past acts, I cannot find that the record justifies a five year debarment this many years after the fact. A period of debarment of three years from this date would appear to be sufficient to protect the public interest.

CONCLUSION

For the foregoing reasons, Robert C. Gennaro shall be debarred from participation in departmental programs from this date up to and including November 24, 1985.



Jean S. Cooper
Administrative Judge

Dated: This 24th day of November, 1982.