

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

Washington, D. C.

In the Matter of:

MILTON H. GIRARD

:
:
:
: HUDBCA No. 81-730-D47
:
:

Charles P. Ciaccio, Esquire
127 Camp Street
New Orleans, Louisiana 70130

Joan J. Saloschin, Esquire
Office of General Counsel
Department of Housing and
Urban Development
Washington, D. C. 20410

DETERMINATION

Statement of the Case

By letters dated June 30, 1982, the Department of Housing and Urban Development ("HUD"), notified Milton H. Girard ("Appellant") and Girard Plumbing Supply House, Inc., ("PSH") that the Department proposed to debar them and their affiliates from further participation in HUD programs for a period of five years, based on the convictions of Girard Plumbing Supply House, Inc. and Appellant for violation of 18 U.S.C. §1341. Appellant was advised that he, and his known affiliates, Girard Plumbing Supply House, Inc., and Girard Plumbing and Sprinkler Company, would be temporarily suspended from participation in HUD programs pending final determination of debarment.

By letter dated July 12, 1982, counsel for Appellant requested an opportunity to submit documentary evidence and a written brief on the proposed debarment in accordance with 24 C.F.R. §24.5(c)(2) and §24.7. No such request was made in regard to the proposed debarment and suspension of Girard Plumbing Supply House, Inc. or Girard Plumbing and Sprinkler Company.

Findings of Fact

1. Appellant owned, managed and was the authorized agent of Girard Plumbing Supply House, Inc. and Girard Plumbing and

Sprinkler Company, both Louisiana corporations. PSH was a small closely held corporation engaged in the business of selling plumbing supplies to builders in the New Orleans area. Appellant owned 40 percent of the stock of PSH, his wife owned 40 percent, and his daughter owned 20 percent. (Government Exhibit E at 5.)

2. Between November 15, 1976 and March 16, 1977, Appellant, on behalf of Girard Plumbing and Sprinkler Company, entered into a series of contracts with the New Orleans Housing Authority for the removal and replacement of heating, ventilating and air conditioning systems. HUD provided funds to the Housing Authority to be used to finance the work under the contracts. (Government Exhibit G.)

3. By agreement dated March 6, 1979, Appellant, on behalf of PSH, executed an agreement with Walter E. Heller and Company ("Heller"), a national finance company, whereby Heller would advance to PSH eighty percent (80%) of the amount owed to PSH for plumbing supplies purchased from PSH through credit sales in a ninety-day period. In the event that the financed accounts extended beyond the ninety-day period, Heller would discontinue the financing agreement and PSH would be required to reimburse Heller for the monies advanced plus a service charge. (Government Exhibit D.)

4. Under the terms of the agreement with Heller, PSH was obligated to maintain books, records and documents of its accounts receivable. PSH agreed to furnish Heller with reports correctly reflecting the age of the various PSH accounts receivable and to permit Heller to audit PSH books to verify the amounts owed to PSH from those accounts. (Government Exhibit D.)

5. From April 25, 1979 to November 11, 1979, fictitious invoices and false debits and credit charges to accounts receivable were created by PSH to incorrectly reflect the age of accounts receivable for the purpose of inducing Heller to continue financing unpaid accounts that were 90 days or older. Fictitious sales invoices representing credit sales in the amount of \$291,222.02 were also sent to Heller by PSH for financing. Heller financed those accounts, unaware that they were fictitious. (Government Exhibit D.)

6. Heller verified PSH accounts by mailing forms to credit customers of PSH, requesting them to verify their account balances and return the form by mail to Heller's accountant. PSH caused fake and fictitious verifications of accounts to be mailed to Heller in response to Heller's request. (Government Exhibit D.)

7. On November 19, 1981, a Federal Grand Jury returned a three-count Indictment charging Appellant and PSH with mail fraud in violation of 18 U.S.C. §1341. That Indictment was dismissed. (Government Exhibit C.)

8. On January 21, 1982, a Federal Grand Jury convened for the Eastern District of Louisiana returned a three-count Superseding Indictment for Mail Fraud, charging that Appellant, on behalf of PSH, devised and executed a scheme to defraud Heller by concealing the fact that certain valid accounts receivable were over ninety days old, issuing false debit charges and false credits charges simultaneously, and sending fictitious sales invoices to Heller through the mail. The Indictment further charged that Appellant, on behalf of PSH, sent false verifications of accounts to Heller. (Government Exhibit D.)

9. On May 10, 1982, Appellant pleaded nolo contendere to the three-count Superseding Indictment charging him with violations of 18 U.S.C. §1341, and pleaded guilty to all three counts of the Superseding Indictment on behalf of PSH. (Government Exhibit E).

10. The Court sentenced Appellant to five years incarceration on each count to run concurrently and imposed a fine of one thousand dollars (\$1,000) for each count. The penal sentence was suspended but Appellant was ordered to perform community service as a special condition of his sentence. PSH received a suspended sentence and was placed on one year inactive probation on each count to run concurrently. The sentence imposed on Appellant was the maximum allowed by law. (Government Exhibit E.)

Discussion

Debarment is not penal in nature, but a means by which the Government effectuates its statutory obligation 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). The purpose of debarment is to assure the Government that it only does business with responsible contractors or grantees. 24 C.F.R. §24.0. Appellant is a "contractor or grantee" within the meaning of the departmental regulation applicable to debarment because he is a corporate officer of a contractor that received HUD funds indirectly from the New Orleans Housing Authority.

"Responsibility" is a term of art in Government contract law, defined to include not only the ability to successfully perform a contract but also 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). The test for whether debarment is warranted is the present responsibility of the contractor or grantee. A finding of present lack of responsibility, however, can be based upon past acts. Roemer v. Hoffman, supra; Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1965).

It is a well established principle that a plea of nolo contendere in a criminal proceeding cannot be used as an

admission of guilt in a subsequent civil litigation. Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1975); Tempo Trucking and Transfer Corporation, 405 F. Supp. 506 (E.D.N.Y. 1975). However, prior decisions on the proposed debarment of HUD contractors have sustained the propriety of a conviction based on a plea of nolo contendere as sufficient cause for debarment under 24 CFR §24.6 because a conviction resulted from the plea. James J. Wannemacher, HUDBCA No. 81-585-D14 (December 2, 1981); Edward J. Venable, HUDBCA No. 77-232-D54 (June 30, 1980). It is the fact of the conviction that establishes cause for debarment under the existing departmental regulations. 24 C.F.R. §24.6(a)(1) and (9). See, Louis DeNaples, HUDBCA No. 78-312-D46 (June 18, 1980); Edward G. Venable, supra. Furthermore, a conviction is sufficient to support a temporary suspension pending determination of debarment. 24 C.F.R. §24.13(c).

Appellant correctly asserts that a plea of nolo contendere does not admit factual allegations upon which the criminal action is based. Tseung Chu v. Cornell, supra. The facts alleged in the indictment to which the accused entered his plea cannot be considered in the debarment proceeding unless they are introduced into evidence by means other than evidence of the conviction. Although cause for the debarment is clearly established, the record is silent as to the facts speaking to the seriousness of the offense. It is these facts which are relevant in determining the appropriateness of an administrative sanction, if imposed, and its duration. Thus, evidence demonstrating the gravity of the offense is severely limited in a debarment action where the Government rests its evidentiary case solely on a conviction based upon a plea of nolo contendere.

The Government's documentary evidence in this instant case consists of the original and Superseding Indictment, the judgment order, and the transcript of the plea proceeding. No other independent evidence corroborating the allegations was introduced into the record. Appellant in his brief argues that none of the documentary evidence submitted by the Government contains probative evidence of the specific acts alleged to have been committed by Appellant. The indictment and subsequent plea of nolo contendere, standing alone, have no probative value as to the truth or falsehood of the facts charged in the Indictment. However, the plea of guilty by Appellant on behalf of PSH admits the facts in the Superseding Indictment as to the corporation. Inasmuch as those facts establish that the corporations's actions were all conducted by Appellant on behalf of PSH, Appellant's personal plea of nolo contendere cannot be used to negate the implications of the facts he admitted on behalf of PSH. The plea of guilty entered by Appellant on behalf of PSH directly implicates him in the acts underlying the conviction on which the proposed debarment action is based. Because the language of the Indictment to which Appellant entered the plea on behalf of PSH is inclusive of a description of Appellant's criminal actions, it


would be mere tautology to contend that Appellant admitted no facts concerning his own conduct.

The Government, in its brief, argues that under the doctrine of respondent superior, Appellant as president of a closely-held corporation, is responsible for the fraudulent acts created and implemented in that corporation. This position is well-taken. A corporation can only function through its officers, directors and shareholders. Warren Brothers Road Co. v. United States, 355 F.2d 612, 616 (Ct. Cl. 1965), citing 39 Comp. Gen. 468, 471 (1959); Lawrence C. Humphrey, HUDBCA No. 81-640-D41 (Dec. 21, 1981). While a corporation is a separate entity, its credibility and integrity can be no greater than that of those who are its corporate officers and directors. "Holding a corporate contractor or grantee to a standard of 'responsibility' necessarily means, therefore, that those who control its activities ... have a special obligation to monitor the corporation's activities and may be required to account for any negligence or wrongdoing committed." Warren Brothers Roads Co. v. United States, supra. As such, a corporate officer may be debarred for acts of his corporation even if he did not actively participate in the wrongdoing. In the Matter of: Gerald Sands, Docket No. 75-357A-DB (July 14, 1977); In the Matter of: Mark B. Horner, HUDBCA No. 79-410-D43 (March 24, 1980).

The criminal acts admitted by Appellant on behalf of PSH reflect a serious lack of honesty and integrity. His opportunity to control those acts in a small corporation would certainly militate against relieving him from responsibility for those acts, even if he had not been an active participant in them. However, Appellant's activities on behalf of the corporation constituted the criminal conduct itself. HUD was not the victim of that fraud, but there is no indication that a corporation controlled by Appellant that did do business with HUD would not attempt a similar scheme in the future that could involve HUD directly.

Although the specific acts on which the criminal charges were based took place in 1979, I find that the Department's request for debarment is wholly justified by the record. No mitigating evidence in response to the issue before me was produced by Appellant. Letters attesting to Appellant's character gave no indication that the writers were aware of either the criminal activities in Appellant's closely held corporation or of Appellant's responsibility for those illegal corporate activities. Therefore, the letters submitted do not establish mitigating circumstances that might affect either the need for debarment or the appropriate duration of the sanction. I find Appellant's acts on behalf of his corporation to be so flagrantly dishonest that I infer from the record that there exists a present lack of responsibility based on those past acts.

I find that the fraud perpetrated on Heller warrants a substantial period of debarment to protect the public interest. However, inasmuch as Appellant has been temporarily suspended since June 30, 1982, I will credit him with that period in considering the debarment term. I find that a period of debarment up to and including June 29, 1987 is consistent with the record in this case and is necessary to protect the public interest.



Jean S. Cooper
Administrative Judge
HUD Board of Contract Appeals

Date: May 23, 1983.