

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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| AZZARELLI CONSTRUCTION CO. | : | HUDBCA No. 82-670-D11 |
| and | : | |
| JOSEPH I. AZZARELLI, | : | |
| | : | |
| Appellants | : | |

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For the Government

DETERMINATION

Statement of the Case

By letter dated June 2, 1981, the Department of Housing and Urban Development notified Joseph I. Azzarelli, President of Azzarelli Construction Company, that it intended to debar the company "and its affiliates, including you as President" from participation in Departmental programs for a period of five years from the date of the suspension of the company on January 8, 1979. The action was based on the conviction of the company for violation of 15 U.S.C. §1 and 18 U.S.C. §1341.

In cases of a proposed debarment based on a criminal conviction, a hearing is limited by regulation to submission of documentary evidence and written briefs. 24 C.F.R. §§24.5(c)(2) and 24.7. A timely request for the opportunity to submit briefs and documentary evidence was made on behalf of both Azzarelli Construction Company and Joseph I. Azzarelli, Appellants herein. Written submissions were filed on behalf of both Appellants and the Government in support of their respective positions on whether the Appellants should be debarred until January 7, 1984, a period of

five years from the effective date of their suspensions from HUD programs.

Findings of Fact

On June 6, 1978, Appellants were both charged in a thirteen count indictment with violation of the Sherman Antitrust Act, 15 U.S.C. §1, and the Federal mail fraud statute, 18 U.S.C. §1341. John Azzarelli, Vice-President of the company, was also indicted on all thirteen counts. (Govt. Exh. A.) Subsequently, after a jury trial, Joseph I. Azzarelli was acquitted of all charges in the indictment. However, the company and John Azzarelli were convicted on all thirteen counts. The company was fined \$212,000.00 and, after its appeal rights had been exhausted, was ordered to pay the full fine. (Govt. Exh. B, C.)

Both Appellants had been suspended from Departmental programs on January 8, 1979, based on the indictment returned against them. By letter dated June 2, 1981, HUD Assistant Secretary Philip D. Winn terminated the suspension of Joseph Azzarelli, based on his acquittal. (App. Exh. A, B.) Simultaneously, by a separate letter dated June 2, 1981, Winn notified Joseph Azzarelli that the Department intended to debar Azzarelli Construction Company "and its affiliates, including you as President" from further participation in HUD programs for a period of five years from the date of the original suspension, January 8, 1979. Both the company and Joseph Azzarelli, as its affiliate, were temporarily suspended pending determination of debarment. (App. Exh. C.) The company was also debarred by the Federal Highway Administration for a period of three years, based on the conviction (App. Exh. D).

The company had been convicted of submitting rigged collusive bids to the Illinois Department of Transportation in 1975 on contracts for highway construction funded in part by the Federal Government in a program conducted under the Federal-Aid Highway Act. The bids were to be competitive sealed bids, but the company conspired with other construction companies to submit abnormally high or low bids so as to predetermine the resulting award of the contracts. Azzarelli Construction Company was awarded one of the contracts for highway construction as a result of having conspired with others to the end that the Azzarelli Construction Company would be the low bidder on that contract. Those acts were in violation of the Sherman Antitrust Act. The company also received the fraudulently obtained contract itself and periodic payments for contract performance through the mail, in violation of the Federal mail fraud statute. (Govt. Exh. A, B.)

Letters attesting to the important role played by Azzarelli Construction Company in the economy of Kankakee, Illinois were submitted on behalf of the company. Essentially, the Mayor of that city stated that the high unemployment rate in the locality had been greatly affected by the suspension of Azzarelli Construction Company from highway construction work and the economy of the city would improve if the company were again allowed to engage in highway

construction. (App. Exh. E.) Letters of character were also submitted, but they address the character of John Azzarelli, who was convicted on all counts, and do not shed much light on the business responsibility of either the company or Joseph Azzarelli (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 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); 34 Comp. Gen. 86 (1954); 39 Comp. Gen. 468 (1959). Although the test for debarment is the present responsibility of the contractor, present lack of responsibility of a contractor can be found from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957). Appellants are "contractors or grantees" within the definition of the debarment regulation because they are "Federally assisted construction contractors". 24 C.F.R. §24.4(f).

Conviction under the Federal Antitrust Statutes, including the Sherman Act, arising out of the submission of bids or proposals is a cause for debarment. 24 C.F.R. §24.6(a)(2). Likewise, conviction for fraudulent use of the mail is a cause for debarment "which seriously and directly affects the question of present responsibility." 24 C.F.R. §24.6(a)(9). There is no question that the Government has established that there are multiple causes for the debarment of Azzarelli Construction Company by virtue of its multi-count criminal conviction.

While existence of a cause for debarment does not necessarily require that a contractor be excluded from departmental programs, 24 C.F.R. §24.6(b)(1), the record does not contain evidence of mitigating factors that outweigh the clear need for debarment of Azzarelli Construction Company. The seriousness of the offenses for which it was convicted cannot be minimized. Both the State of Illinois and the Federal Government were defrauded by the bid rigging scheme in which the company participated and from which it was enriched at public expense. There is no indication that the convicted corporate officer has been removed from office or that any other changes have occurred in the company that would render it less of a serious threat to the best interests of the Government and the public. Therefore, I find that debarment of Azzarelli Construction Company is warranted and indeed necessary.

However, the proposed debarment of Joseph Azzarelli presents serious problems. First, Joseph Azzarelli is not an "affiliate" of Azzarelli Construction Company as defined in the regulation applicable to debarment because only "business concerns", not individuals, can be "affiliates" by definition. 24 C.F.R. §24.4(d). Furthermore, the only other section of the regulation that addresses the issue of affiliates, §24.14(b), refers to an affiliate as an

"organization" but that section applies to the scope of suspension only, not debarment. It also substantively requires that the Department consider the "likelihood of the affiliate's knowledge of or participation in the suspected improper conduct," 24 C.F.R. §24.14(b)(2)(ii). However, although conduct of an individual can be imputed to the organization with which he is connected, that imputation does not apply in the reverse. 24 C.F.R. §24.14(b)(3).

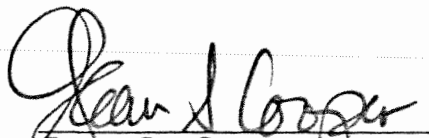
Debarment of Joseph Azzarelli cannot be effected simply because the company and its vice president were convicted of a crime. Joseph Azzarelli was exonerated of the very criminal charges on which the Department has proposed his debarment one step removed as an "affiliate". An evidentiary linkage of Joseph Azzarelli to the criminal conduct of the company must be shown in some way--either that he played a role in it or could have prevented it in his capacity as President. Otherwise, he poses no risk as an individual to the business concerns of the Department. Indeed, the Government's brief only addresses the debarment of the company, not the debarment of Joseph Azzarelli individually. Furthermore, the termination of Joseph Azzarelli's suspension based on his acquittal was the appropriate Departmental response under its own regulation. See, 24 C.F.R. §24.14(a). Why it instituted a debarment action on the very day that it terminated Joseph Azzarelli's suspension based on his acquittal is not revealed.

It would be improper to impute the lack of responsibility of the company to its president in the evidentiary void presented by the record in this case. Any presumption of logic for the debarment of Joseph Azzarelli simply because he was the President of Azzarelli Construction Company is more than overcome by his acquittal. The Department has failed to establish that the debarment of Joseph Azzarelli is in the best interest of the public or the Department.

The Department has proposed a period of debarment of five years for Azzarelli Construction Company from the date of its suspension. Debarment is a prospective sanction and cannot predate its proposal. However, credit can be given for the period of the suspension so that the company will have effectively been restricted from participation in HUD programs for a total period of five years. I find that the best interests of the public and the Government will be served by the debarment of Azzarelli Construction Company from this date up to and including January 7, 1984.

CONCLUSION

For the foregoing reasons, it is determined that Azzarelli Construction Company shall be debarred from this date up to and including January 7, 1984. Joseph Azzarelli shall not be debarred. His temporary suspension pending determination of debarment shall be terminated as of this date.



Jean S. Cooper
Administrative Judge

Dated: This 8th day of January, 1982