

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

In the Matter of:

NORMAN D. WILHELM,
Appellant

HUDBCA No. 82-679-D15

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DETERMINATION

Statement of the Case

By letter dated August 27, 1981, Norman D. Wilhelm, Appellant herein, was notified by the Area Manager for the HUD Area Office in Richmond, Virginia that he and his affiliates were temporarily denied participation in the Community Development Block Grant program in that Area for a period of one year from the date of the letter of notification. An opportunity for an informal hearing on reconsideration of the sanction was granted upon the request of Wilhelm. On November 24, 1981, the Area Manager affirmed the decision to temporarily deny participation. Thereafter, Wilhelm made a timely request for a hearing pursuant to 24 C.F.R. §24.7 on the temporary denial of participation.

On February 4, 1982, the Department of Housing and Urban Development proposed that Wilhelm and his affiliates be debarred from participation in all Departmental programs for a period up to and including August 8, 1985. Wilhelm was temporarily suspended pending determination of the debarment action. The proposed debarment was consolidated for purposes of a hearing with the temporary denial of participation. Both the temporary denial of participation and proposed debarment were based on

Wilhelm's conviction for violation of the Sherman Act. A hearing was held in Charlotte, North Carolina on July 21, 1982 to determine whether the temporary denial of participation was warranted and whether debarment of Wilhelm was necessary.

FINDINGS OF FACT

1. Norman D. Wilhelm is the President of Rea Construction Company, Charlotte, North Carolina, having held that office since January, 1980. From 1978 to 1980, Wilhelm was Senior Vice-President for staff functions and from 1976 to 1978 served as Senior Vice-President for corporate contracts. Prior to 1976, he was Vice-President in Rea's concrete paving division for about twelve years. (Tr. 105-106.)

2. Wilhelm reported to the President of Rea Construction until he himself became President in 1980. From 1964 to 1974 he reported to [REDACTED] Wuertenburger and from 1974 until January, 1980 he reported to [REDACTED] Black, both Wuertenburger and Black having served as Rea's President during those periods. (Tr. 107.)

3. On June 4, 1980, Wilhelm was charged with and entered a plea of guilty to conspiracy in unreasonable restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Specifically, Wilhelm pleaded guilty to having submitted collusive, non-competitive rigged bids to the City of Charlotte in connection with a contract for paved runways at Douglas Municipal Airport. The United States Federal Highway Administration furnished portions of the funds for the airport runway contract. (Exh. G-3.)

4. Wilhelm was sentenced to serve one year, but all but 60 days of that sentence was suspended (Exh. G-24).

5. Wilhelm entered his plea of guilty as part of a written agreement with the U.S. Department of Justice. He agreed to cooperate with the investigation and fully testify for the Government concerned practices in the paving and construction industries in Virginia, North Carolina and South Carolina. The United States agreed not to prosecute Wilhelm for any collusion, conspiracy or fraud committed prior to May 16, 1980, the date of the agreement, in connection with paving and asphalt contracts. (Exh. G-4.)

6. Rea Construction Company entered a plea of guilty on June 4, 1980 to two counts of violations of the Sherman Act in connection with the Douglas Airport contract. The Company was fined \$350,000.00. Rea also entered a plea of guilty to violation of Section 1 of the Sherman Act and was fined \$150,000.00, in connection with rigged, collusive bids submitted for a contract for airport runway construction at Byrd Airport, Richmond, Virginia, to be financed in part by the Federal Highway Administration (Exh. G-5.)

7. The State of North Carolina conducted an investigation of bid rigging by companies in that state. As a result of that investigation, Rea Construction Company agreed to pay \$650,000.00 in civil restitution to the State. (Tr. 58.)

8. In 1970, Wilhelm first became aware that the asphalt division of Rea was involved in a state-wide bid rigging conspiracy when the concrete division, to which he was assigned, was merged with the asphalt division in a reorganization (Tr. 108).

9. Wilhelm participated in the conspiracy to submit collusive, rigged bids on behalf of Rea for about ten years. He was an active participant from time to time, but more often he was aware of what was happening but did nothing to stop it. He was directed to participate actively by the men who served as President of Rea during that time period. His active participation ceased around 1978. (Tr. 109-111.)

10. Wilhelm felt uncomfortable about participating in the rigged bidding system but believed that he could not succeed at Rea unless he went along with it. He did not believe he would be able to do anything to change or stop the practice until and unless he became President of Rea. (Tr. 109.)

11. When Wilhelm was elected President of Rea in January, 1980, he told the President of Rea's parent company, [REDACTED] Jones, that he would no longer permit Rea to be involved in the bid rigging system. By that time, Rea was already under investigation and Wilhelm expected the company to be indicted. (Tr. 110.)

12. Wilhelm knew that he was not required to participate either directly or indirectly in the bid rigging but believed that, were he to refuse to go along, he would either have to leave the industry or leave the state. He believed that would have been very difficult to do because he already had been in the industry for 20 years, although not all of his employment was with Rea or in North Carolina. (Tr. 111-112.) He never spoke to either Black or Wuertenburger about changing Rea's policy when those men were President because "I wasn't in charge. I did not attempt to change it." However, he was sure that both Black and Wuertenberger knew he was "uncomfortable" with Rea's bidding activities. (Tr. 118.)

13. In North Carolina, the asphalt paving companies either participated in the bid rigging conspiracy or never got into the public contracts area at all. The practice had been endemic to the industry in that state for well over 30 years and virtually all asphalt paving companies participated in it. It was not until late 1979 or early 1980, when the Federal Government and the state both conducted an extensive investigation of the practice, that the practice ceased. All of the witnesses agreed

that no rigged bids have been submitted since early 1980. (Tr. 49, 54, 65, 69, 75, 80, 120-121)

14. When Wilhelm became President of Rea, he instituted a management system whereby all of the managers and all new employees are instructed about the laws, both state and Federal, governing collusive bidding. (Tr. 113). Rea is also a party to a Consent Decree with the United States Department of Justice which constrains any illegal activity concerning contracting (Tr. 113). He did not fire the Rea employees who were involved in the collusive bidding because they were not the ones who set up the system, although Wilhelm acknowledged that they, like him, perpetuated it (Tr. 128A-129). Wilhelm makes it clear to his employees that illegal activities of any kind, not just collusive bidding, will not be tolerated while he is President of Rea (Tr. 129).

15. Wilhelm testified that he would never knowingly violate the law again because of the great pain and humiliation he brought on his family, his community, and himself (Tr. 114, 128A). He does not believe that he would choose to "go along to get along," were he faced today with the prospect of violating the law, because of his experience. (Tr. 123).

16. Wilhelm cooperated with the State and Federal investigations of bid rigging to the satisfaction of the individuals who conducted those investigations (Tr. 53-54, 66, 81-82). However, the testimony of those individuals indicated that Wilhelm gave general information and led them to others who had knowledge of the system, but basically directed them away from his own rather active involvement in it. (Tr. 53, 61, 74, 82).

17. Rea Construction Company was suspended by the Federal Highway Administration in 1980 for a period of 18 months, but that period was subsequently reduced to twelve months and Rea is presently eligible to do business with that Federal agency. (Tr. 116). Rea was also suspended by the North Carolina Department of Transportation for three months but was reinstated upon the recommendation of the State Department of Justice (Tr. 56-57).

18. On August 27, 1981, the HUD Area Manager in the Richmond Area Office issued a Temporary Denial of Participation (TDP) against Wilhelm. (Exh. G-1). The scope of the sanction applied to participation in the Community Development Block Grant program within the Richmond Area Office's jurisdiction. The basis for that action was Wilhelm's conviction resulting from the bid for the Douglas Airport contract. (Tr. 21, 23).

19. Wilhelm requested and was granted an informal hearing on the TDP at which he and his attorney had the opportunity to submit evidence and oral argument as to why the sanction should be lifted. The Area Manager's recollection of the arguments

Wilhelm made at the informal hearing were that he was not a contractor and that he had no day-to-day knowledge of what was happening at Rea in connection with the collusive bidding system. She was not convinced by Wilhelm's arguments as to himself (Exh. G-7), but she did lift the TDP as it applied to one of Wilhelm's affiliates. She also referred Wilhelm's case to the HUD Central Office for consideration of debarment. (Tr. 13-14, 22.)

20. On February 4, 1982, HUD proposed to debar Wilhelm and his affiliates from that date up to and including August 8, 1985. Rea had been debarred by HUD until August 8, 1985 and the Department took that date into consideration in proposing the period of debarment for Wilhelm. He was also temporarily suspended pending determination of debarment. Wilhelm's proposed debarment was based on his conviction for violation of the Sherman Act. (Exh. G-8; Tr. 30.)

21. The Department did not propose Wilhelm's debarment until 1982, two years after his plea of guilty, and three years after the practice of collusion bidding ceased in the State, because it was not until early 1982 that the HUD Central Office became aware of Wilhelm's conviction (Tr. 34). However, the seriousness of the offense, the amount of taxpayers' dollars involved, and the substantial fines imposed on Rea convinced the HUD officials considering Wilhelm's debarment that a substantial period of debarment was warranted (Tr. 34).

22. The Department considers bid rigging to be an offense that strikes at the heart of the Government's procurement function. Public contracts are to be awarded to the lowest bidder after a full and open competitive advertisement. Under HUD's Community Development Block Grants Program, the Department makes money grants to localities, which in turn are to obtain the best use of those Federal dollars to provide low and moderate income housing. Collusive bids frustrate that purpose by removing the element of competition, thereby escalating costs. (Tr. 31-32.)

23. The Department allowed the County of Mecklenburg to continue with a Community Development Block Grant funded contract awarded to Rea as the low bidder on May 6, 1980, (Exh. G-6), even though Rea was to be under a HUD sanction, because to readvertise the contract would have been a burden on the County and cost an extra \$10,000 (Tr. 43).

23. Virtually all of the witnesses from the State Departments and Commissions who testified at the hearing believe that Wilhelm is a man of honesty and integrity, in spite of his plea of guilty to violation of the Sherman Act (Tr. 56-57, 66-67, 82, 91-92, 97, 101). Both the North Carolina Department of Justice and the City of Charlotte Engineering Department witnesses believe that Wilhelm is presently a responsible contractor who should be able to do business with both the State

and the Federal Government (Tr. 56-57, 101). His minister, who counselled him before, during and after his conviction, believes that Wilhelm would never accede to illegal activity again because of the great pain in causes his family, community, and him (Tr. 97). However, none of these witnesses were familiar with the HUD regulation applicable to debarment or its purposes, as evidenced by their belief that debarment is a punishment, much like a penal sentence (Tr. 71, 76, 92, 101).

DISCUSSION

Introduction

HUD may not apply the sanctions of temporary denial of participation, suspension or debarment unless the individual or entity to be sanctioned is a HUD "contractor or grantee," as defined by the applicable Department regulation at 24 C.F.R. §24.4(f). Norman Wilhelm is a "contractor or grantee" within the scope of the regulation because he is a Federally assisted construction contractor who received HUD funds indirectly through the County of Mecklenburg.

I. Temporary Denial of Participation

Appellant contends that his Temporary Denial of Participation in the Community Development Block Grant program within the jurisdiction of the Richmond Area Office is improper as a matter of law because the offense on which the sanction is based did not occur under any HUD program, as required by 24 C.F.R. §24.18(a)(3)(i).

The Departmental regulation applicable to the TDP sanction, 24 C.F.R. §24.18, sets forth the causes and conditions under which a TDP may be invoked. The causes, enumerated at §24.18(a)(2), include by reference to §24.13(a), violation of the Federal anti-trust statutes arising out of the submission of bids and proposals. 24 C.F.R. §24.13(a)(1)(ii). Wilhelm's conviction for violation of Section 1 of the Sherman Act in connection with a bid submitted for a paving contract at Douglas Municipal Airport falls squarely within the regulatory causes for imposition of a TDP.

Section 24.18(a)(3) is entitled "Period and scope of temporary denial of participation." It expressly provides that:

(3)(i) A denial of participation is limited to the program under which the offense occurred.

The offense on which the sanction is based did not occur under a HUD program, but one indirectly funded by the Federal Highway Administration. Wilhelm's only contact with HUD programs was through the contract that Rea was awarded by Mecklenburg County for work that was funded in part by HUD's Community Development

Block Grant Program. No wrongdoing has been alleged in connection with that HUD-funded contract.

The language of §24.18(a)(3)(i) is clear and unambiguous. It states unequivocally that the TDP sanction cannot be applied outside of the program "under which the offense occurred." All of the enumerated causes for imposition of a TDP are susceptible of having taken place within a HUD program. The fact that in the instant case the offense did not occur under a HUD program precludes the imposition of a TDP. There is no other reasonable or rational construction of that limitation. No other provision of the regulation conflicts with that construction.

A TDP is, by its very nature, a programmatic sanction only. It is not a mini debarment or suspension within an Area Office's jurisdiction. Other appropriate sanctions were available to the department that would have been permissible. The Department could have based a suspension on Wilhelm's conviction as well as a debarment. The Area Manager exceeded her authority by choosing to apply the TDP sanction rather than referring the matter to the HUD Central Office for appropriate action. Application of the TDP sanction is limited by the express wording of the regulation to those offenses which occur within a HUD program. The imposition of the TDP on Norman Wilhelm was therefore improper.

II. Temporary Suspension

HUD temporarily suspended Wilhelm on February 4, 1982, when it proposed his debarment based on his conviction for violation of the Sherman Act. Suspicion of violation of the Federal antitrust statutes arising out of the submission of bids and proposals is a ground for suspension, if that suspicion is based upon adequate evidence. 24 C.F.R. §24.13(a)(1)(ii). Furthermore, conviction of a contractor or grantee is adequate evidence to warrant imposition of a suspension pending debarment. 24 C.F.R. §24.13(c). Inasmuch as a cause for suspension was established by adequate evidence, namely Wilhelm's conviction, the temporary suspension imposed on Wilhelm was appropriate.

III. Debarment

Debarment is the most serious sanction within the arsenal of a Government agency. Under HUD's regulation, debarment is department-wide and nationwide. The purpose of debarment is to assure the Department that it only does business with responsible contractors and grantees. 24 C.F.R. §24.0. It is a measure to be invoked for the purpose of protecting the public and not for punitive purposes. 24 C.F.R. §24.5(a).

Responsibility is a term of art in Government contract law. It concerns the integrity and honesty of a contractor or grantee as much as his ability to satisfactorily perform the actual work of a contract or grant. 34 Comp. Gen. 86 (1954); 39 Comp. Gen.

468 (1959); 49 Comp. Gen. 132 (1969). The test for debarment is present responsibility, although a finding of present lack of responsibility may be based on past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957). Even if a cause for debarment is established, existence of a cause does not necessarily require that a contractor or grantee be excluded from Departmental programs. 24 C.F.R. §24.6(b)(1). All mitigating factors must be considered in determining the seriousness of the offense, and present responsibility must be evaluated in determining whether the sanction is necessary to protect the public interest and is warranted in the best interests of the Government. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976); 24 C.F.R. §24.6(b)(1).

The record in the instant case clearly establishes a cause for debarment under 24 C.F.R. §24.6(a)(2). That section provides that a contractor or grantee may be debarred for a conviction under the Federal Antitrust Statutes arising out of the submission of bids or proposals. Wilhelm's conviction of violation of the Sherman Act is indeed a most serious cause for debarment. Collusive bidding undermines the two basic foundations of government procurement: competition and limitation of costs. The premise of a competitive system of procurement is that it will guarantee the best work for the least amount of money. Collusive bidding removes all elements of competition. Furthermore, rigged bids can, and do, set the cost of procurement at a level well above that which would be established in an open, competitive system. The American taxpayer bears the financial burden of a non-competitive, rigged procurement process. The State of North Carolina assessed Rea Construction Company \$650,000.00 for profits on contracts obtained through rigged bids. That amount is indicative of the great financial drain on the public treasury caused by a collusive bidding system.

The rigging of bids on asphalt paving contracts was a way of life in North Carolina for generations. Those who did not participate in this system were essentially excluded from the business of public contracting. The explanations offered for why this practice was peculiar to the asphalt paving industry do not in any way excuse or mitigate the seriousness of the practice itself. The fact that it remained in place, unquestioned, for years beyond corporate memory is an affront to the American public and the people of the State of North Carolina. The practice of collusive bidding in North Carolina, at least in the asphalt paving industry, ceased in 1980. However, it was not stopped voluntarily by those who devised it or those who perpetuated it. Rather, intensive criminal and financial investigations at the Federal and State levels brought it to a halt. Punishment and the prospect of stiff civil penalties made it financially unrewarding. Those investigations were not begun because anyone from within decided that the system was morally or legally wrong. The Norman Wilhelms only came forward to assist with the investigations after they and their companies were

imperiled. Such self-interested assistance, even if it was crucial to successful prosecution and termination of the practice, is not necessarily indicative of present responsibility.

Norman Wilhelm did not invent the practice of collusive bidding. He was not even a major player in its perpetuation, but perpetuate it he did, nonetheless. When the situation required his active participation, he participated fully. His "discomfort" with the practice was overcome for ten years by his ambition to be the President of Rea Construction Company. That ambition was realized at tremendous cost to the public fisc, to his family, to his community, and to himself. I have no doubt that Wilhelm has gone through much personal suffering and tragedy as a result of his conviction. Indeed, I also have no doubt that he would not knowingly ever violate Section 1 of the Sherman Act again.

Wilhelm has made some but not enough changes in the operation of Rea since he became its President in 1980. Most of those changes relevant to collusive bidding were mandated by the Consent Decree with the U. S. Department of Justice. However, it is not clear that Wilhelm has given more than verbal emphasis to his desire to run a tight ship. The Rea employees and officials who participated day after day in the rigged bidding were not fired or removed from office. No evidence was offered of an internal audit system to monitor the activities of the various departments within Rea. Wilhelm sincerely believes that he has successfully created a moral climate, by his personal remorse and example, that will effectively eliminate any corporate desire to engage in illegal activity. It can only be hoped that his faith is rewarded because he has no reliable mechanisms in place to test that faith.

It is apparent to me from Wilhelm's testimony that, although he knows that collusive bidding is illegal, he does not really understand why that is so, despite the personal discomfort he felt when he engaged in it. For example, he doesn't necessarily believe that rigged bids lead to inflated prices for contracts. Nonetheless, Wilhelm vehemently asserts that he will never again participate in any illegal activity, even if it were necessary to protect or enhance his career, because of the pain his conviction caused him and those he loves. However, remorse and fear of further punishment do not constitute proof of present responsibility, although they are persuasive indicia of beneficial changes in an individual.

The witnesses who appeared on behalf of Wilhelm were impressive. All except his minister could testify about Wilhelm's professional competence, his willing assistance to the State investigation of bid rigging, and their individual opinions of his present responsibility as a public contractor. His minister and spiritual counsellor was very sure that Wilhelm

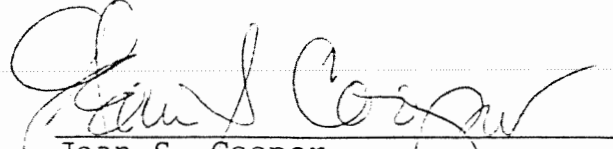
would never again fall into the trap of putting personal ambition ahead of the mandates of the law. However, the testimony of those witnesses also raised some questions in my mind as to how forthcoming Wilhelm really was with them about his personal involvement with the collusive bidding practices at Rea. This apparent lack of candor has periodically shown itself even after Wilhelm supposedly came to terms with his guilt. The testimony of the HUD Area Manager was telling. In 1981, Wilhelm was still trying to give the impression that he had no day-to-day contact or involvement with the pre-1980 practices at Rea. Although he was honest and straightforward about his personal involvement at the hearing before me, I am troubled by his posture in other settings, as evidenced by the testimony presented. Most of the witnesses who appeared on his behalf did not seem to realize that Wilhelm actually participated in the collusive bidding practices at Rea, or that his participation was of many years duration.

The record in this case, considered as whole, presents a most difficult dilemma for a hearing officer who must assess present responsibility. I believe that Wilhelm is sincere in his commitment to putting himself and Rea back on the right path. He does not pose a long-term threat to HUD's mission, personally or in his capacity as President of Rea, because he is a changed man today from the man who went along to get along for so many years. However, the record convinces me that a nominal period of debarment is and will be in the best interests of the Government. During that period, Wilhelm can take the additional steps necessary to insure that Rea is rid of those who might not have the same commitment to scrupulously honest dealings that he now professes. Fear of getting caught is not always sufficient to guarantee that irresponsible and illegal acts will not be committed or tolerated. A real understanding of the purposes of the laws that proscribe such behavior is needed to ensure a reliable moral compass. A responsible contractor must know why and when certain acts are wrong. Therefore, I find that a period of debarment is warranted in this case, although I do not believe that a period until 1985 is necessary under the circumstances.

Wilhelm has been subject to the improperly applied TDP for twelve months. I find that it is in the public interest to credit him with that period in considering a period of debarment. Therefore, I find that it is in the best interests of the Department to debar Norman Wilhelm from this date up to and including August 27, 1983.

CONCLUSION

Norman D. Wilhelm shall be debarred from this date up to and including August 27, 1983.



Jean S. Cooper
Administrative Judge
Board of Contract Appeals

Issued this 27th day
of August, 1983.