

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

In the Matter of:

ROBERT F. HAYTER,

Appellant

HUDBCA No. 82-697-D25

Andrew Wilcoxon, Esquire
Wilcoxon & Cate
112 North Fifth Street
Muskogee, Oklahoma 74401

For the Appellant

Mark M. Eisenstadt, Esquire
Room 10266
Office of General Counsel
U. S. Department of Housing
and Urban Development
Washington, D. C. 20410

For the Government

DETERMINATION

Statement of the Case

By letter dated July 8, 1981, Assistant Secretary Philip D. Winn notified Appellant, Robert F. Hayter, that the Department of Housing and Urban Development ("HUD") was considering debarring him and his affiliates from further participation in HUD programs for a period of five years from March 26, 1980, the date of his suspension by Assistant Secretary Lawrence B. Simons, following his indictment. The stated basis for HUD's debarment action under 24 C.F.R. §24.6 was the Appellant's conviction in the United States District Court for the Eastern District of Oklahoma, No. 80-8-CR, for violations of 18 U.S.C. §§371 and 1621.

To accommodate certain inquiries on Appellant's behalf concerning the effect of the suspension and debarment, Assistant Secretary Winn delayed issuing an Order of Final Determination and extended the opportunity for Appellant to request a hearing by letters dated July 30, 1981 and January 18, 1982. Appellant's affiliates, INCA and OMNI have been debarred without contest. No other affiliates have been specifically identified by the

Government in connection with this proceeding. The Appellant filed a timely notice of request for hearing dated January 25, 1982.

Since the debarment action is based upon a prior conviction, an appeal of the action is limited by 24 C.F.R. §24.5(c)(2) to submission of documentary evidence and written briefs to the Hearing Officer. The documentary evidence submitted with the Government's brief consisted of the notice of proposed debarment, the indictment, and Judgment and Commitment Order, plus certain correspondence between the Assistant Secretaries and Appellant's counsel, which is not material to this determination. The documentary evidence submitted with Appellant's brief consisted of a letter from Appellant's probation officer. In addition, Appellant and his wife each filed separate unsworn statements in mitigation, copies of which were provided to counsel for the parties.

Findings of Fact

By an indictment filed on February 5, 1980, in the United States District Court for the Eastern District of Oklahoma, the Appellant was charged with five counts of conspiracy to defraud HUD under 18 U.S.C. §371, mail fraud under 18 U.S.C. §1341, and perjury under 18 U.S.C. §1621. Appellant was convicted by a jury on May 20, 1980, on three counts of the indictment that charged him with conspiracy and perjury. He was acquitted of the mail fraud charges. As a result of his conviction on the conspiracy counts, Appellant was sentenced to five years of confinement, four and one-half years of which were suspended. He was placed on probation for the balance of that sentence. As a result of his conviction for perjury, the court suspended imposition of sentence and placed Appellant on probation for five years to commence upon his release from confinement.

In substance, the indictment charged Appellant and certain named co-conspirators with two elaborate conspiracies to defraud the United States Government and with wrongful misapplication of low cost housing funds provided by HUD to benefit the Cherokee Indian Tribe of Oklahoma. At the time of the offenses charged, the Appellant was an employee of companies doing business with the Cherokee National Housing Authority, which under Oklahoma law is an agency of the state. That Housing Authority was engaged in construction of low cost scattered site Indian housing under an Annual Contributions Contract with HUD which provided for payments by HUD to underwrite the costs of such housing through grants and loans. The Housing Authority was funded, regulated, and supervised by HUD.

Count I charged Appellant and his co-conspirators with a fraudulent conspiracy in March and April 1975, which involved the submission of inflated bills for certain services and materials and fraudulent bills for services never performed to the

Cherokee Housing Authority, and the division of corruptly obtained proceeds among the conspirators for their own personal use. Count II charged Appellant and his co-conspirators with a separate fraudulent conspiracy in April through November 1976 involving the sale of a piece of raw or unimproved land to the Cherokee Housing Authority at an inflated price reflecting an appraisal of the land as "improved property". Count II further specified that Appellant and his co-conspirators charged the Housing Authority for construction of improvements already reflected in the appraisal and that they divided the corruptly obtained proceeds from both of these transactions. Both schemes were effected with the aid of an insider official and co-conspirator within the Housing Authority and various fictitious corporations allegedly under control of Appellant or his co-conspirators. Count V charged the Appellant with perjury while testifying in court.

Discussion

The Government contends in its brief that Appellant's debarment is justified by the causes enumerated in 24 C.F.R. §§24.6(a)(1), (4) and (9). The Government's case in support of debarment is limited to undisputed proof of Appellant's conviction after trial by jury of three serious felony charges as set out in the indictment.

The pertinent regulation provides that proof of the criminal conviction establishes the existence of cause, at the discretion of the appropriate official under 24 C.F.R. §24.6(a)(1). 24 C.F.R. §24.6(a)(1) provides that the Department may debar if a contractor or grantee has been convicted for commission of a criminal offense as an incident to obtaining or attempting to obtain, or in the performance of, a public or private contract, or subcontract under such a contract. §24.6(a)(4) authorizes debarment for "Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary to warrant debarment." §24.6(a)(9) authorizes debarment if the contractor or grantee has been convicted "for the commission of the offense of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, fraudulent use of the mail in connection with commission of such offenses, or conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility."

Appellant does not dispute that he is a "contractor or grantee" within the meaning of 24 C.F.R. §24.4(f). That definition includes within its scope, "Individuals, state and local governments and public or private organizations that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources ...; all participants, or

contractors with participants, in programs where HUD is the guarantor or insurer" Since at the relevant times Appellant was an employee of companies doing business with a state agency which was receiving financial assistance from and under contract with HUD, he comes within the definition.

Appellant's conviction is sufficient evidence to establish a cause for debarment under 24.6(a)(9). Edward G. Venable, HUDBCA 77-232-D54 (June 30, 1980). Since the conviction is for an offense which I find "seriously and directly affects the question of present responsibility," it supports a compelling inference in this case that Appellant lacks the requisite present responsibility to do business with the Government, unless I determine that evidence offered in mitigation is sufficient to rebut that inference. The conviction for perjury, in addition to its serious character, tends to impeach the credibility of the Appellant's unsworn statement submitted in mitigation. The recitations in the indictment in Counts I and II of which Appellant was convicted establish that the conviction was for offenses within the ambit of §24.6(a)(1) because they were "incident to obtaining or attempting to obtain a public or private contract or subcontract thereunder or in the performance of such contract or subcontract." The nature of the offenses is also clearly of such character as to fall within the Assistant Secretary's reasonable exercise of discretion under §24.6(a)(4).

While both Appellant and his wife have contended in their unsworn statements that Appellant was the innocent victim of a miscarriage of justice, I am not obligated to go behind the conviction to determine the merits of this contention. See Tempo Trucking and Transfer Corp. v. Dickson, 405 F. Supp. 506 (E.D. N.Y. 1975); Roy C. Markey/The Roary Company/Be-Mark Homes, HUDBCA 82-712-D33 (Nov. 18, 1982) (Decision on Motion for Due Process Hearing). Since it is axiomatic that I am without authority to consider any challenge to the validity of the conviction itself, I deem it inappropriate and futile to consider contentions in mitigation to the extent that their acceptance would be necessarily premised upon impeachment of the validity of Appellant's conviction.

Where the Government's proposed debarment is based, as here, upon a conviction, the Hearing Officer must evaluate the evidence of the character of the offenses for which the Appellant has been convicted and the circumstances surrounding the conviction in order to determine the extent to which such past acts as proved by the conviction provide insight into the Appellant's present responsibility. The Hearing Officer must then project the business risk to the Government that would be assumed if it were to deal with the Appellant, by evaluating, among other relevant factors as demonstrated, his integrity, which is central to a contractor's responsibility in performing a business duty toward the Government, his honesty, and his ability to perform any relevant undertaking.

The purpose of a debarment is to protect the public interest by ensuring that the Department does not do business with contractors or grantees who are not responsible. 24 C.F.R. §§24.0 and 24.5(a). "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 also the honesty and integrity of the contractor. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). Although the test for debarment is the present responsibility of the contractor, present lack of responsibility of a contractor can be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967). Debarment, however, is not penal or punitive in nature. It is a measure properly taken by the Government to effectuate its statutory obligation to protect the public. See L. P. Steuart & Bros. v. Bowles, 322 U.S. 398 (1964); Gonzales v. Freeman, 344 F. 2d 570 (D.C. Cir. 1964). The existence of a cause for debarment does not necessarily require that a contractor be excluded from departmental programs, since debarment is discretionary with the Department and is to be rendered in the best interest of the Government. 24 C.F.R. §24.6(b)(1).

The principal issues related to this proposed debarment, therefore, are whether the Appellant's conduct has been such as to establish such a lack of present responsibility as to require his debarment, and if so, how long a debarment period is required to protect the public interest adequately. Under the debarment standard of present responsibility, a contractor or grantee may be excluded from HUD programs for a period based upon projected business risk. Roemer v. Hoffman, *supra*; Stanko Packing Company, Inc. v. Bergland, *supra*. Where present responsibility is the applicable standard, any mitigating circumstances affecting responsibility must also be considered under the holding in Roemer v. Hoffman, *supra*. Therefore, debarment is inappropriate if the affected participant can demonstrate that, notwithstanding any past nonresponsible conduct, he no longer constitutes a business risk. 24 C.F.R. §§24.0 and 24.6(b)(1).

The Appellant was convicted of defrauding the Cherokee Indian Housing Authority of substantial sums by misrepresentations and other manifestly improper and unlawful conduct. The nature of such activity is inherently and utterly lacking in the responsibility necessary to dealings with the Government. Moreover, I find from the nature of the offenses underlying the conviction, as described in the indictment, that such lack of responsibility is likely to continue for an extended period absent some extraordinary showing that the compelling inference to be derived from the conviction of such offenses is no longer valid.

In addition to the two unsworn statements of Appellant and his wife contending, in substance, that Appellant's conviction was a miscarriage of justice, Appellant has submitted in mitigation a letter addressed to the undersigned from his U.S. Probation Officer assigned to the U.S. District Court in which Appellant was convicted. Though that statement is also unsworn, I find that that letter is likely to be reliable in its representations and, as a consequence, is worthy of serious consideration. The Probation Officer has represented that he has supervised the Appellant since November 13, 1980, when Appellant was released from incarceration. The Probation Officer's detailed representations are impressive.

Prior to sentencing, sixty-three (63) letters were received by this office attesting to Mr. Hayter's sterling character and detailing numerous instances of community involvement. In short, while conducting the presentence investigation, I found that he enjoyed a flawless reputation within his home community and I could find no one who would speak ill of Mr. Hayter or believe that he could be involved in the charged criminal offense. In addition to all the community support, he enjoyed the intense loyalty of a close family group.

Since being released from the institution and commencing his probation, he has remained arrest free. He has been prompt and regular in submitting his monthly reports, has established lawful, gainful employment. Prior to being notified of the HUD debarment, he was employed by Allen Interprises, Inc., located in Shawnee, Oklahoma, as a salaried estimator-coordinator. In November, 1981, he secured employment with Myriad Builders located in Miami, Oklahoma, as a project coordinator. Myriad Builders is in the private sector constructing residential and office condominiums. There has been no adverse reaction toward his supervision.

In the letter constituting his unsworn statement in mitigation, the Appellant describes an impressive background and considerations relevant to Appellant's present responsibility:

I was engaged in the Government's Indian Housing Program from 1967 through 1980; having assisted the Government in the program's development from its very inception. During these 12 years I was responsible for the construction of more than 2,000 houses, under contracts with many tribal Nations, including the Cherokee Nation of

Oklahoma, the Creek, Choctaw, Otoe-Missouri, Comanche and the Eastern Band of Cherokees in North Carolina. In many instances, I functioned as an advisor and consultant to the Tribe and their Housing Authorities. Much to the detriment of my company's financial position, I came to the aid of the Cherokee Nation many times to support their faltering construction operations by fulfilling their contractual obligations which bore heavily upon the future outcome of the Indian Housing Program. I have been dedicated and committed to the betterment of living conditions for the American Indian.


I have enjoyed excellent personal and business reputations within HUD, BIA, PHS, the Tribes, their Housing Authorities and the city in which I live, Tahlequah. My honesty and integrity has never been questioned ... in spite of the conviction, I have maintained that fine reputation. A letter from the U.S. District Court was directed to Your Honor in connection with this matter and it appears to be very supportive of my statements. If time permitted, I am reasonably certain that I could have secured a number of similar letters from substantial individuals within HUD's Area, Region and Central offices. I am very proud of my 12 year track record with HUD and of my [REDACTED] years on Earth in general. I was devastated by ... the trial, the conviction, the incarceration and all of their collective repercussions I have lost all that I have worked very hard for and am now starting all over.

The fact that none of these mutually reinforcing assertions by either the Probation Officer or the Appellant has been affirmatively or specifically disputed by the Government would, under appropriate circumstances, tend to enhance their significance in mitigation. See David L. Hamilton, HUDALJ 82-827-DB (Aug. 2, 1982). Considering the serious nature of the offenses for which the Appellant was convicted, those considerations, the supporting letters to which the Probation Officer refers among other factors, and perhaps the quality of the evidence against him and his defense, may have influenced the sentencing judge to impose a relatively light sentence. Compare Thomas Mack Crossland, HUDBCA 80-466-D14 (Jan. 22, 1981) (Crossland, a named co-conspirator, was sentenced to twenty-five years confinement.) There is no indication that the Department was specifically familiar with any of this material when it proposed to debar the Appellant.

Nevertheless, after weighing these submissions I conclude that the record before me is insufficient to overcome the very strong inference, tantamount to a presumption, of continuing lack of responsibility that inevitably derives from Appellant's conviction by a jury of crimes of such inherently egregious and irresponsible nature affecting business responsibility as those charged in the three relevant counts of the indictment. I therefore conclude that debarment until March 25, 1985, as proposed by the Government, is appropriate and reasonable to protect the public interest.

Conclusion

Appellant shall be debarred from participating in HUD programs until and including March 25, 1985, with credit given for the period of his suspension from March 26, 1980.


EDWARD TERHUNE MILLER
Administrative Judge

Dated: This 23rd day of March, 1983.