

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

In the Matter of:	:	
	:	
ROY C. MARKEY/THE ROARY	:	
COMPANY/BE-MARK HOMES,	:	HUDBCA No. 82-712-D33
	:	
Appellants	:	
	:	

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DETERMINATION

Statement of the Case

By letter dated April 21, 1982, Philip Abrams, General Deputy Assistant Secretary for Housing for the U. S. Department of Housing and Urban Development ("HUD") notified Roy C. Markey ("Markey") that, on the basis of his conviction in the U. S. District Court for the Western District of Michigan for the violation of Title 18 Section 1001, U.S.C. (False Statements to HUD), his conviction was cause for debarment under Title 24 C.F.R. §24.6. The letter also identified affiliates of Roy C. Markey, The Roary Company ("Roary") and Be-Mark Homes ("Be-Mark"), and indicated that these affiliates as well as Roy C. Markey would be subject to a proposed debarment from participation in departmental programs for a period of three years. The letter also stated that pending final determination of the issues, Markey and the named affiliates would be temporarily suspended from participation in HUD programs. All of the Appellants timely appealed the proposed debarments and requested a hearing.

The Appellants filed three preliminary motions. Appellants' "Motion for Adequate Notice," which contended that the notification letter of Mr. Abrams of the proposed debarments was ineffective because it failed to advise the Appellants of the proper cause for the debarment action, was denied by Order and written decision issued October 29, 1982. The Appellants also filed a "Motion for Due Process Hearing," contending that the Appellants were entitled to an oral hearing under applicable regulations and that a denial of an oral hearing constituted a denial of due process. Appellants' Motion for an oral hearing was denied by Order and written decision issued on November 18, 1982. Appellants also filed a Motion for Dismissal of Temporary Suspension, contending, inter alia, that the suspension of the affiliates was an improper Departmental action, that the suspension of the Appellants was "in fact, indefinite in duration," and that such an indefinite suspension was violative of Departmental regulations and a denial of due process. Appellants' Motion for Dismissal of Temporary Suspension was denied by Order and written decision issued on February 17, 1983.

Findings of Fact

1. Roy C. Markey is the president, treasurer, and stockholder of the Roary Company, a Michigan corporation; he is the principal owner of Be-Mark Homes, a Michigan "Assumed Name" business (Govt. Exhs. E and F; Brief of Roy C. Markey and Be-Mark Homes, p. 1). The Roary Company is engaged in the business of supplying home improvement items for use in remodeling and rehabilitating homes in HUD's Title I home improvement program. Be-Mark Homes is engaged in the business of managing rental properties and providing grass-cutting services. Both Be-Mark Homes and the Roary Company are admittedly affiliates of Markey. (Brief of Roy C. Markey and Be-Mark Homes, pp. 1-2; Brief of the Roary Company, p. 4.)

2. Markey, acting in his personal capacity, submitted in response to an invitation for bid, three separate bids in October 1976, October 1977, and February 1978 as an "owner-occupant" for the purchase of three separate HUD-owned properties located in Lansing, Michigan in connection with a HUD property disposition program (Govt. Exh. C). At this time, the Department, in the administration of this program, gave owner-occupant bids preference over investor bids in order to encourage homeownership. Under this policy, if an owner-occupant bid amount was "at or above the minimum HUD advertised sales price, all investor bids would be returned unopened," and the award would be made to the owner-occupant bidder. (Government's Brief in Support of Debarment, pp. 1-2.)

3. Markey was "afforded ... a bidding preference on said bids, and he was in fact the low bidder, or only bidder, and was

allowed to purchase the [properties] at the bid price" (Brief of the Roary Company, p. 3).

4. On September 24, 1981, a three-count Indictment was returned by a Federal Grand Jury for the U. S. District Court for the Western District of Michigan, Southern Division, charging Markey with knowing that each of his sealed bids, when submitted, was fraudulent in that "he had no intent to occupy said property, nor did he intend to have the property occupied by a blood relative all in violation of Title 18, United States Code §1001" (Govt. Exh. C).

5. On February 16, 1982, a jury found Markey guilty on each Count as charged in the Indictment. The court subsequently placed Markey on probation for a period of five years, required him to provide temporary employment for two persons referred to him by the United States Probation Office, and fined him \$12,000. (Govt. Exh. B.)

Discussion

The conviction of Markey provides a cause for his proposed debarment pursuant to the causes listed in 24 C.F.R. §24.6 which states in pertinent part:

... the Department may debar a contractor or grantee in the public interest for any of the following causes:

(a) Causes. (1) Conviction for commission of a criminal offense ... to obtain a public or private contract, ... or in the performance of such contract or subcontract.

* * *

(6) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.

* * *

(9) ... conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

The purpose of debarment is to protect the public interest by insuring that the Department does not do business with contractors and grantees who are not responsible. 24 C.F.R. §24.0. Markey is clearly within the scope of the definition of contractor or grantee, which includes participants in programs

where HUD is the guarantor or insurer, such as the Department's property disposition program where HUD acquires and disposes of property as a consequence of a default on a HUD-insured mortgage. 24 C.F.R. 24.4(f); William R. Absalom, HUDBCA 82-746-D45 (March 22, 1983); Winnie Fay Owings, HUDBCA 80-468-D16 (January 22, 1981).

Debarment is not penal or punitive in nature, but a measure properly taken by the Government to effect its statutory obligations to protect the public. 24 C.F.R. §24.5(a). Debarment is a measure which may be invoked by HUD to exclude or disqualify a contractor or grantee lacking present responsibility from participation in HUD programs. The length of the debarment period should reflect an assessment of projected business risk as a measure of the duration necessary to protect the public.

The basic issue before me is whether Markey currently possesses the requisite responsibility for participation in Government programs. Responsibility is a term of art in Government contract law which has been defined to include not only the ability to complete a contract successfully, but also the honesty and the integrity of the contractor. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976). 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1964). Although the test for debarment is present responsibility of a 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.C. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967).

Markey has been convicted of an offense indicating a serious lack of business integrity and honesty which may directly affect Appellant's present responsibility as a participant in HUD programs. In mitigation, Markey has advanced little argument and no supporting evidence to substantiate his contention that his debarment is not justified to protect the public interest. In view of Markey's conviction for the serious offenses involved in this matter and the lack of any evidence in mitigation, I find that the imposition of a substantial period of debarment of Markey is in the interest of the Department and is warranted to protect the public.

The issues raised by the Appellants relating to adequate notice, to the propriety of the temporary suspensions, and to Appellants' right to an oral hearing have all been decided in favor of the Government. The remaining bulk of the argument in Appellants' briefs is directed toward the propriety of the proposal to debar coextensively the affiliates, Roary and Be-Mark. Appellants argue primarily that since neither Be-Mark nor Roary were indicted or convicted, and since there is no evidence that either Be-Mark or Roary had any knowledge of or participated in Markey's illegal conduct, the Government has given unfair weight to the association of Markey with Roary and

with Be-Mark. Appellants further contend that the proposed debarments of Roary and Be-Mark will not result in protection of the public and are not in the best interest of the Government (Brief of Roy C. Markey and Be-Mark Homes, pp. 23-29; Brief of the Roary Company, pp. 6-10).

The Government asserts that the debarment of Markey and his affiliates, Be-Mark and the Roary Company, will protect the Department, is in the public interest, and that even though the affiliates were not involved in Markey's criminal offense, the Government "should not be constrained solely to pray that Mr. Markey will not involve his affiliates irresponsibly in Department programs." (Government's Brief in Opposition to Appellants' Motion and in Reply to Appellants' Brief, p. 12.)

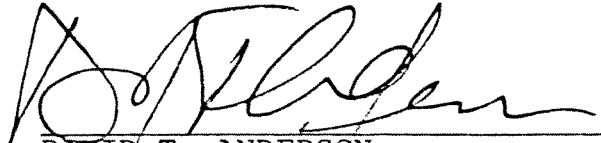
The Government's position with respect to the affiliates in this case is well-founded. The Appellants erroneously believe that the proposed debarments of the affiliates Be-Mark and Roary arise from their contested status as "contractors and grantees" pursuant to 24 C.F.R. §24.4(f), but it is their affiliated status with Markey, pursuant to the definition set forth in 24 C.F.R. §24.4(d), which subjects them to debarment given the propriety of the debarment of Markey. The Government's determination of the affiliated status of Be-Mark and Roary with Markey, as described in the Government's Brief in Support of Debarment, was the basis of that part of the April 21, 1982 notification letter to Markey informing him of the Departmental action against his affiliates, Be-Mark and Roary.

The Appellants have objected to the imposition of the debarments of the affiliates on the premise that the affiliates, having no knowledge of Markey's criminal conduct and having unblemished reputations in their own right, should not be subject to the imposition of debarment. However, what is determinative in this proceeding is the well established fact that the Department may exercise its discretionary authority to propose the debarment of affiliated business concerns over which an individual, subject to proposed debarment by the Department, exerts control. 24 C.F.R. §24.0; 24 C.F.R. §24.4(d); 24 C.F.R. §24.5(a); Arthur A. Padula, et al., HUDBCA 78-284-D30 (June 27, 1979). It is uncontroverted that Markey, at all relevant times, exerted such control over Be-Mark and Roary. I thus conclude that the Department's exercise of this authority in proposing the debarment of Markey's affiliates, Be-Mark and Roary, was proper.

Conclusion

Having found that a substantial period of debarment of Roy C. Markey is warranted to protect the public interest and that it is also in the interest of the Department to debar Roy C. Markey, I find that the Government's proposed debarment of the named affiliates is similarly warranted as long as the Roary Company

and Be-Mark Homes continue in an affiliated status with Roy C. Markey. Therefore, it is my determination that Roy C. Markey, the Roary Company, and Be-Mark Homes be debarred from participation in Departmental programs for a period of three years up to and including April 21, 1985, credit being given for the Appellants' period of suspension from April 21, 1982.



DAVID T. ANDERSON
Administrative Judge

Dated: This 18th day of July, 1983.