

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

Washington, D. C.

In the Matter of:

ANDREW J. FRICK,

Appellant

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: HUDBCA No. 82-719-D39
:
:
:

Mr. Andrew J. Frick

Pro se

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

For the Government

DETERMINATION

By letter dated May 4, 1982, Philip Abrams, General Deputy Assistant Secretary for Housing, on behalf of the Department of Housing and Urban Development, notified Andrew Joseph Frick ("Appellant") that the Department proposed to debar him from further participation in HUD programs for a period of five years. The letter stated that his conviction in the United States District Court for the District of Kansas for violation of 18 U.S.C. Section 1012 was cause for debarment, and that, in accordance with 24 C.F.R. 24.5(c)(2) and 24 C.F.R. 24.7, Appellant's hearing, if requested, would be limited to the submission of documentary evidence and written briefs. Pending the request to submit documentary evidence and the final determination, Appellant was advised that he would be temporarily suspended from participation in HUD programs. By letter dated May 19, 1982, Appellant requested a hearing in conjunction with the proposed debarment.

Findings of Fact

1. In September of 1979, Appellant was the owner and authorized agent of Barbron Service Co. (a/k/a Barbron Heating and Cooling Co., a/k/a Barbron H/C, hereinafter referred to as "Barbron") a small contracting firm engaged in the business of

providing air conditioning and heating installation and service in the Kansas City area.

2. By agreement dated September 10, 1979, Barbron contracted, at a cost of \$11,530, to furnish and install a "20 x 40 vinyl" swimming pool with two ladders, heater, light, filter, and other features on residential property located [REDACTED] Heritage Circle, Stilwell, Kansas, on behalf of the owners of that property, [REDACTED] Filley and [REDACTED] Newby. The contract, executed by Frick, Filley and Newby, indicates that Barbron would receive a \$5,530 down payment and that the balance of \$6,000 would be paid from the proceeds of a five-year loan from the FHA Title I [Home Improvement] Program (Exhibit D of Government's Brief in Support of Debarment). This HUD program provides low interest loans to eligible individuals for the purpose of rehabilitating or improving residential properties.

3. Appellant then telephoned a Mr. Nichols, presumably a banker, who advised Appellant that "he would not take a pool." (Pre-sentence Investigation, FRICK, Andrew Joseph, P. 4, attached as Exhibit to Letter of Appellant dated July 24, 1982 in opposition to proposed debarment.)

4. Appellant asserted that at that time he had no knowledge that a "swimming pool was not an approved home improvement item..." under the Title I Property Improvement Loan Program. Appellant represented that in light of his strained financial situation and difficulties with a banker, "to pass \$12,000 worth of business ... was unacceptable." (Pre-sentence Investigation, FRICK, Andrew Joseph, P. 4, attached as Exhibit to Letter of Appellant dated July 24, 1982 in opposition to proposed debarment).

5. By agreement also dated September 10, 1979, Barbron contracted at a cost of \$6,000 to install an air conditioner, inclusive of piping and wiring, on behalf of Filley and Newby. The agreement stated that payment to Barbron for labor and materials for such work would be made by Filley and Newby from the proceeds of a five year FHA Title I loan. (Exhibit D, Government's Brief in Support of Debarment.)

6. Filley and Newby each completed a standard HUD Credit Application for Property Improvement Loan, each dated September 10, 1979 and indicating that the purpose of the loan application was the installation of an air conditioning system. An FHA Title I loan was subsequently approved for this purpose, but Barbron instead constructed the swimming pool for Filley and Newby as previously agreed. For this work, Barbron was paid in part with the proceeds of the FHA Title I loan.

7. On August 4, 1981, a Federal Grand Jury returned an indictment against Newby, Filley, and Frick (Exhibit C,

Government's Brief in Support of Debarment) charging them with violation of 18 U.S.C. §1010 and 18 U.S.C. §2.

8. On November 2, 1981 Appellant pleaded guilty to a "1-count Information" of "making a false statement to the Department of Housing and Urban Development in violation of 18 U.S.C. §1012" (Exhibit B, Government's Brief in Support of Debarment).

9. On November 3, 1981, Appellant received a one year sentence and was fined a sum of \$1,000. The U. S. District Court placed certain conditions on the execution of the sentence. First, Appellant would serve thirty days in "a jail type or treatment institution," and the remaining sentence would be suspended. Second, the Appellant would be placed on probation for a period of two years commencing from the date of his release from confinement. Third, Appellant would "not participate in HUD or Federal Government financed projects for a period of five (5) years." (Exhibit B, Government's Brief in Support of Debarment.)

Discussion

The purpose of HUD debarments is to protect the public interest by ensuring that the Department only do business with contractors and grantees who are responsible. 24 C.F.R. §24.0 and 24.5(a). Debarment is not penal in nature, but a means by the Government to effectuate its statutory obligation effectively to protect the public. See, L.P. Steuart & Bros. v. Bowles, 332 U.S. 398 (1944); Gonzales v. Freeman, 344 F. 2d 570 (D.C. Cir. 1964). The Appellant is clearly within the definition of "contractors or grantees" in that he received HUD funds indirectly through non-Federal sources. 24 C.F.R. §24.4(f).

Count I of the Indictment essentially charged the Appellant with willfully and knowingly attempting to influence the actions of the Department in the use of materially false statements on a Title I Property Improvement loan application. The Government in its Brief cites 24 C.F.R. 24.6 as the regulatory authority for the proposed debarment. Under that provision, as specified in the Government's brief, HUD "... 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 as an incident to obtaining or attempting to obtain a public or private contract.

* * *

(4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.

* * *

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

* * *

(9) ... [C]onviction of any other offense indicating a lack of business integrity or honesty, which affect the question of present responsibility and establish a basis for debarment.

Appellant has not objected to the manner in which the Government has defined the causes upon which it has relied as the specific basis for this debarment action. However, Appellant, argues that the proposed administrative sanction is unnecessary since he has been adequately punished for his poor business judgment and since he has not participated for over two years in HUD programs. Appellant further contends that any additional sanction or continuance of a sanction would be punitive in nature and not beneficial to the public's interest.

There is no substantial dispute or question on the record that Appellant did in fact falsify a HUD document. The principal question to be decided in this proceeding is whether Appellant's actions are evidence of such a serious lack of present responsibility as to require his debarment for five years. "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); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). The test for debarment is the "present responsibility" of the contractor, and the absence of such responsibility 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); 47 Comp. Gen. 651, 568-59 (1967).

The Government's evidence against Appellant consists of a conviction for the violation of the terms and intent of HUD's Title I Property Improvement Loan Program. It is clear that Appellant willfully committed a fraud upon the Department by representing that he would install an air conditioning system, an approved home improvement item, when he intended to install, and did in fact install, a swimming pool, an unapproved home improvement item, in direct violation of HUD rules and regulations. While Filley and Newby may have welcomed the contractual option which Appellant presented to keep them from sweltering during a hot Kansas summer, the criminal plan concocted by Appellant was truly a brazen and despicable scheme reflecting a serious lack of personal and business ethics.

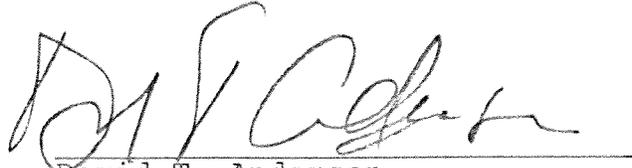
Appellant, in mitigation, argues that business and personal pressures contributed to his inability to comprehend the seriousness of his crime at the time of its commission. This argument is summarily rejected. He then asserts that he had no prior knowledge that a swimming pool was not an approved home improvement item. I find this hardly credible in light of the fact that the Appellant had participated extensively in this program as a rehabilitation contractor and had "some 300 original Title I contracts ... dated from March 1, 1977 through approximately November 1, 1980" (Appellant's letter dated July 24, 1982). Moreover, Appellant was advised by a bank official that the Title I loan application could not be approved for the construction of a swimming pool. Despite this admonition, Appellant proceeded to carry out his devious plan to circumvent this restriction.

Appellant contends that he "ha[s] already been punished enough" and that no money was stolen, no bids were rigged and no bribes were made. He states, "No one was a victim in this case." This egregious statement and Appellant's ameliorating characterizations of his misdeeds highlight Appellant's wanton disregard of the purpose of this program and of the eligible beneficiaries to be served by this program. Appellant does not yet realize that among his victims were the program, the governmental agency responsible for administering the program, and the public.

Appellant's mitigating evidence is fundamentally deficient in form and substance and neither presents nor addresses the issue of present responsibility. I am not persuaded by Appellant's self-serving statement dramatizing the crisis surrounding the acquisition and later survival of his business. Success or failure of a business is a risk borne by the person or persons undertaking that risk. Unfavorable economic conditions do not justify committing crimes. I find that the facts in the record disclose a course of illegal conduct reflecting a serious lack of integrity and honesty. Such conduct indicates a lack of present responsibility and constitutes sufficient cause for the debarment of Appellant in the public interest.

Recognizing that the Government's concern in seeking the debarment of Appellant can be distinguished from the punitive aspects inherent in the sentencing function of the Court, the proposed debarment is clearly appropriate and not at variance with the condition imposed upon Appellant in the November 3, 1981 sentence of the U.S. District Court. In view of the fact that the Appellant has been effectively denied participation in departmental programs since November 3, 1981, there is no convincing reason why the period of debarment should not conform with the date established by the Court in its sentence of Appellant.

The Appellant is hereby debarred up to and including
November 3, 1986.



David T. Anderson
Administrative Judge
Board of Contract Appeals

Dated: This 7th day of February, 1983.