

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

In the Matter of:

ALEXANDER & ALEXANDER,
LTD.,

Appellant

HUDBCA No. 82-727-D46

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DETERMINATION

Statement of the Case

By letter dated June 9, 1982, Philip Abrams, General Deputy Assistant Secretary of this Department of Housing and Urban Development ("HUD"), advised John Turner, President of Alexander & Alexander, Ltd., that the Department had information indicating possible irregularities of a serious nature in the Appellant company's dealing with the Government. He also advised Turner that the Department had been informed that the Appellant had been named in an indictment issued by a Federal Grand Jury for the District of Hawaii charging the Appellant with violations of specified sections of the U. S. Criminal Code. As a result, Abrams advised Turner that, pending resolution of the subject matter of the indictment and any administrative review which might ensue, the Appellant would be suspended from participation in HUD programs pursuant to 24 C.F.R. §24.13(c).

Appellant was duly advised of its rights to a hearing under 24 C.F.R. §§24.16(a)(4) and 24.5(c)(2), which, because the action was based upon an indictment, would be limited to submission of documentary evidence and written briefs. Each party has

submitted a timely brief with attachments. The Government filed a reply brief on January 7, 1983. The question presented is whether the Appellant's indictment, subsequently followed by a conviction, constitutes "adequate evidence" to support the Department's action suspending Appellant notwithstanding Appellant's contentions that the grounds for the Department's action no longer exist because (1) such action was based upon wrongful acts by a terminated employee, and (2) there is no evidence of subsequent improper conduct by the Appellant.

Findings of Fact

1. Appellant, Alexander & Alexander, Ltd., was indicted on March 25, 1982, with two other defendants, Marvin B. Awaya and Ike T. Odachi on eight counts charging them under Title 18, U.S.C. with conspiracy, (§371), mail fraud (§1341), concealment of a material fact (§1001), embezzlement, conversion of public money (§641), and extortion (§1951).
2. The co-defendant Awaya was the Housing Program Analyst for the Hawaii Housing Authority, and the co-defendant Odachi was Vice President of the Appellant during the time when the offenses charged in the indictment were alleged to have taken place.
3. Odachi left Appellant's employ on or about June 22, 1979, after the offenses charged, to go into the real estate appraisal business for himself. He continued to do business with the State of Hawaii thereafter.
4. Appellant, incorporated in Hawaii, was at relevant times engaged in the business of commercial real estate appraising in Hawaii. Its president and chief executive officer, John R. Turner, a professional appraiser, was one of its two stockholders.
5. The Hawaii Housing Authority ("HHA") is an agency of the State of Hawaii and was at relevant times engaged in the administration of the Housing Assistance Payments Program, using funds provided for that purpose by HUD.
6. The transaction which was the subject of the indictment involved a contract from the HHA to Appellant for a Section 8 Rental Assistance Survey. A related subcontract was awarded by Appellant to Pacific Area Computer Services, Inc. ("PACS") for computer services. The contract was funded with payments made pursuant to the Housing Assistance Payments Program, which flowed in part to the subcontractor and subsequently in part to agents for the designated political candidates.
7. Odachi, who was Appellant's agent in charge of state contracts, had primary responsibility for negotiation and performance of the HHA Rental Assistance Survey contract.

8. The offenses involved a conspiracy pursuant to which Awaya extorted a subcontract bid from PACS that was inflated by at least \$6,000. The subcontract was negotiated and executed on behalf of Appellant by Odachi, who was well aware of all the circumstances and acted in furtherance of the conspiracy as charged. The purpose of the inflated bid was to provide funds that PACS could "kickback" as contributions to three designated election candidates, one for governor of Hawaii, one for Hawaii State Senator, and one for Hawaii State House of Representatives in the October 7, 1978, primary election and the November 1978 general election. Part of the incentive for these contributions was that the candidate for State Senate was Chairman of the Senate Housing and Hawaiian Homes Committee, and the candidate for State Representative was Chairman of the House of Representatives Housing Committee. The PACS representatives, however, reported the extortion to the FBI, which, with PACS cooperation, undertook an investigation which resulted in the joint indictment of Appellant, Odachi, and Awaya.

9. Odachi discussed with Turner the necessity for political contributions as a means of obtaining and keeping business with the state at or about the time of the transaction which is the subject of the indictment. Appellant itself also issued three checks as political contributions to the designated candidates on October 3, 1978 and March 22, 1979.

10. The subcontract was in fact wrongfully inflated, and payments were made pursuant thereto, and the excess amounts diverted to the three candidates or their agents pursuant to the conspiracy as Odachi had specified. Records and notations of the related transactions were reflected in Appellant's files and ledgers. Appellant appears to have performed the contract and profited therefrom.

11. Odachi pleaded guilty to five counts of the indictment on August 24, 1982. Awaya was also convicted on a guilty plea to five counts of the indictment. Appellant was tried without a jury on stipulated facts and convicted on all counts by U.S. District Court Judge Samuel P. King on September 1, 1982. The primary defense was that the corporation was not criminally responsible for the actions of Odachi, its "wayward employee," who allegedly had acted exclusively in his own interest.

Discussion

Under applicable HUD regulations, an outstanding indictment of a "contractor or grantee" is deemed to be "adequate evidence" of suspected criminal conduct and may be the basis for the suspension of a "contractor or grantee" in the public interest. Likewise, conviction of a "contractor or grantee" is "adequate evidence" to warrant imposition of a suspension pending debarment. 24 C.F.R. §13(c). The sufficiency of an indictment

as the basis, without more, for a suspension has been repeatedly upheld. See, e.g., William Leigh and Madden, Inc., HUD 80-736-DB (May 19, 1981); Robert J. L'Hoste, HUD 78-570-DB (Mar. 28, 1978).

Appellant's contractual relationship as a commercial real estate appraiser with the Hawaii Housing Authority, for which it performed a rental assistance survey funded by HUD under the Housing Assistance Payments Program, establishes Appellant as a "contractor or grantee" within the ambit of 24 C.F.R. §24.4(f). As such, Appellant is subject to the sanction of suspension if application of the sanction is determined to be in the public interest and is otherwise effected in conformity to law.

The scope of the indictment and the conviction of offenses thereunder so clearly provide an ample basis for suspension under the causes listed in 24 C.F.R. §13(a) as to obviate the need for elaboration. Thus, the only issue which must be resolved is whether Appellant's proof that relations between Appellant and Odachi were severed in June 1979, and the Appellant's contention that Appellant has engaged in no further relevant misconduct since that time, is sufficient to overcome the adequate evidence derived from the indictment and subsequent conviction and, therefore, whether it is sufficient to preclude, or require termination of, Appellant's suspension.

Since it appears from Appellant's submissions that its indictment resulted in a conviction before Judge King, suspension pending debarment would clearly be warranted under 24 C.F.R. 24.13(c). That subparagraph provides, "Conviction of a contractor or grantee is adequate evidence to warrant imposition of a suspension pending debarment." In its reply brief, the Department has advised that it intends to propose such a debarment action. However, because the Department's action of record was based on Appellant's indictment, not the conviction, I am constrained in this case to make this determination pursuant to the notice of the action that the Appellant was actually provided by the Department.

There is no evidence that proves that Appellant's management was wholly insulated from Odachi's illicit activity. There is no showing that Odachi was not acting generally within the scope of his employment. His wrongful actions appear to have been intended for the benefit of the corporation. It appears that the corporation benefited, at least in the short run, from the compensation it received for performance of the rental assistance survey contract awarded by the Hawaii Housing Authority.

It also appears from the documentary evidence submitted by the Appellant that Odachi discussed with Turner the use of political contributions as a cost of doing business with the state at or about the time of the relevant offenses. It would be unlikely that Turner would have been wholly ignorant of the possible significance and implications of Odachi's activities

after such a discussion, though I do not doubt that Odachi was the primary actor on behalf of Appellant.


The results of Appellant's criminal trial establish that Odachi's actions were imputed to the corporation pursuant to the standard of proof applicable in criminal cases. That standard is more stringent than the "adequate evidence" standard which is properly applicable to this administrative proceeding. See Horne Brothers, Inc. v. Laird, 463 F. 2d 1268 (D.C. Cir. 1972). Appellant has not shown in this proceeding either that Odachi was acting clearly outside of his authority, or that his actions did not, and were not intended to, benefit the Appellant. There is simply no proof in this record that establishes that Appellant was insulated from the wrongful activities of Odachi.

It is well established that a lack of present responsibility attributable to Appellant in support of the suspension may 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). Thus, the absence of any proof in the record of subsequent malfeasance by Appellant is not dispositive in Appellant's favor. I also note that there is no evidence of remedial action by the Appellant after Odachi's malfeasance became known.

Accordingly, Appellant has not provided such a preponderance of evidence as would overcome the adequate evidence that derives from its indictment and subsequent conviction for very serious offenses, or that would otherwise require the suspension imposed in the public interest to be lifted before the related criminal and administrative reviews have been completed. See Horne Brothers, Inc. v. Laird, *supra*. The Department, however, should decide within a reasonable time whether to act to debar the Appellant, and proceed accordingly.

Conclusion

Based upon my review of the record, it is my Determination that the suspension of Appellant was based upon adequate evidence, so that it should be, and hereby is, sustained and should remain in full force and effect.



EDWARD TERHUNE MILLER
Administrative Judge

Dated: This 25th day of January, 1983.