

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

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In the Matter of:

THOMAS RUDEN POST,

Appellant

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: HUDBCA No. 83-765-D10  
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DETERMINATION

Statement of the Case

By letter dated November 5, 1982, Assistant Secretary Philip Abrams notified Appellant, Thomas Ruden Post, 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. No affiliate was named in the notice, and no appearance was entered in behalf of any affiliate in this action. The stated basis of HUD's debarment action under 24 C.F.R. §24.6 was the Appellant's conviction in the United States District Court for the Southern District of Florida for violation of 18 U.S.C. §1012. Appellant was temporarily suspended as of November 5, 1982, pending final determination of the issues in this matter.

The Appellant filed a timely request for hearing dated November 15, 1982. Since the debarment action is based upon a prior conviction, Appellant is limited under 24 C.F.R. §24.5(c)(2) to the submission of documentary evidence and written briefs to the Hearing Officer. The documentary evidence

submitted with the Government's brief consisted of two pre-information agreements, one between Appellant and the Government and one between Ambid Corporation ("Ambid") and the Government; an information charging Appellant with a single count under 18 U.S.C. §1012; an information charging Ambid with four counts under 18 U.S.C. §1012; and copies of the judgments against Appellant and Ambid. The documentary evidence submitted with Appellant's brief included this same material. In addition, a report of polygraph examinations taken by Appellant, and certain correspondence between Appellant and ARCS Mortgage Corporation accompanied Appellant's brief.

### Findings of Fact

Appellant, an experienced businessman and attorney, entered guilty pleas individually to one misdemeanor count, and on behalf of Ambid, of which the Appellant was president and sole shareholder, to four misdemeanor counts, charging them with violations of 18 U.S.C. §1012. That statute provides:

§1012. Department of Housing and Urban Development transactions

Whoever, with intent to defraud, makes any false entry in any book of the Department of Housing and Urban Development or makes any false report or statement to or for such Department; or

Whoever receives any compensation, rebate, or reward, with intent to defraud such Department or with intent unlawfully to defeat its purposes; or

Whoever induces or influences such Department to purchase or acquire any property or to enter into any contract and willfully fails to disclose any interest which he has in such property or in the property to which such contract relates, or any special benefit which he expects to receive as a result of such contract--

Shall be fined not more than \$1,000 or imprisoned not more than one year or both.

The guilty pleas and convictions were the result of two pre-information agreements between Appellant and the Government, and by Appellant on behalf of Ambid, which was the Appellant's corporate alter ego. Pursuant to these agreements, and with the advice of counsel, Appellant undertook on behalf of Ambid to make restitution to HUD in the amount of \$10,000 and to plead guilty to the four count information, which charged Ambid with having received compensation in four specified amounts with intent to defeat the purposes of HUD. This amount of restitution was substantially in excess of the total of \$3,049.40 and \$1,517.53

which were the amounts specified as misapplied in the informations filed against Ambid and the Appellant, respectively. Appellant also agreed while represented by counsel to plead guilty to a single count information containing a similar charge. Judgment was entered against Appellant on July 14, 1982 in the United States District Court for the Southern District of Florida and the Court imposed a \$1,000 fine. On the same date, judgment was entered against Ambid in four counts, and the Court imposed a \$1,000 fine on each count, for a total of \$4,000.

The relevant conduct occurred in connection with Ambid's acquisition of real property in Miami, Florida. In June, 1976, Ambid purchased a property consisting of several rental units covered by an FHA-insured mortgage. Thereafter, in July and October of the same year, Ambid acquired two additional rental properties which were also secured by FHA-insured mortgages. These mortgages, however, unlike that covering the first property, were delinquent at the times of purchase.

Following the acquisitions, Appellant caused Ambid to undertake repair work on various structural and electrical defects in the properties which Appellant maintains were not apparent at the time of acquisition (App. Brief at 1-2). The cost of this repair work does not appear in the record. During this time, several units remained vacant and Ambid experienced occasional difficulty in collecting rent from some tenants. It became apparent, prior to the acquisition of the last two properties, that the rental proceeds would be insufficient to meet the full amount of mortgage and repair expenses. During this period Ambid failed to cure the existing mortgage delinquencies. In its brief, the Government asserts that Ambid also failed to make any payments at all on the mortgages, but has provided no evidence in support of that assertion.

Appellant admitted to a polygraph examiner that not only did he apply the rental income from the properties to the cost of substantial repairs, but he also applied it to pay legal fees to himself for a variety of services, not all, apparently, related to the properties involved in this case. \*/ He also admitted that he used the rental income for trips to Europe, Brazil, Germany, Japan, and Austria, allegedly in search of investors.

Ambid was eventually notified that the mortgage on the first property was in default. In an effort to avert foreclosure, Appellant attempted to assign the mortgage to HUD through the Department's direct assignment program. An August 6, 1976 letter from ARCS Mortgage Corporation alerted Appellant to HUD requirements which condition assignment of mortgages in serious

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\*/ Appellant submitted a polygraph examination report to substantiate his claim that he did not knowingly intend to defraud the Government (App. Brief, Exh. B).

default on the mortgagor's use of the property as a primary residence. Appellant was cautioned that foreclosure would proceed immediately unless he contacted HUD to consider his case. However, it was not until after Ambid's last acquisition in October 1976 that Appellant determined that none of the properties would qualify under the HUD direct assignment program.

Failing to meet mortgage payments, Ambid eventually defaulted on all three mortgages. This precipitated foreclosure of these properties, whereupon HUD, as insurer, paid out mortgage insurance benefits of \$145,586. In an attempt to determine whether foreclosure might have been averted, the U.S. Attorney's Office, in 1980, began an inquiry into the use of rental income received by Ambid. The Government has not disputed Appellant's assertion that total income from all three properties which were purchased on May 15, 1977, and January 6 and October 13, 1978, was less than \$15,000. Although apparently initially contemplating a felony prosecution for equity skimming, the prosecutor reduced the charges to misdemeanors. Appellant asserts that this decision was based upon the results of a polygraph examination, the results of which Appellant contends confirm Appellant's lack of intent knowingly or intentionally to defraud the Government. This contention is not disputed by the Government. He also denies that he knew it was a crime not to make the requisite mortgage payments on the HUD-insured mortgages on the properties he had acquired, and asserts that he had been advised by counsel that such non-payment was not illegal. The Government has offered no evidence or argument to the contrary.

#### Discussion

The Government contends that the nature of the offenses which led to Appellant's conviction demonstrates a serious lack of responsibility on the part of a HUD contractor or grantee. This conduct alone, it maintains, provides cause for debarment under the provisions of 24 C.F.R. §24.6(a)(1) and the inference of a continuing and present lack of responsibility. As a result, the Government recommends that the Appellant be debarred for a period of five years.

The Appellant does not deny that he is a "contractor or grantee" within the meaning of 24 C.F.R. §24.4(f). The definition encompasses "all participants, or contractors with participants, in programs where HUD is the grantor or insurer ...". Through the acquisition of properties subject to FHA-insured mortgages, Ambid, and Appellant, its president and sole shareholder, became participants in a program in which HUD is the insurer.

24 C.F.R. §24.6(a)(1) provides that cause for debarment of a contractor or grantee in the public interest is "conviction for commission of a criminal offense as an incident to obtaining or

attempting to obtain a public or private contract, ... or in the performance of such contract ..." The Government has offered undisputed proof of Appellant's conviction arising out of Appellant's performance of work involving contracts for mortgage insurance provided by HUD.

The regulations state that a debarment's purpose is the protection of the public interest, ensuring that the Department does not do business with contractors or grantees that 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 can be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958); Stanko Packing Company, Inc. v. Bergland, 489 F. Supp. 947, 949 (D. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967).

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. 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).

Where a proposed debarment is based, as here, upon a conviction, evidence of the character of the offense for which Appellant has been convicted as well as the circumstance surrounding the conviction must be evaluated in determining whether the Appellant lacks present responsibility. A debarment for a maximum five-year period presupposes past conduct of such character as to compel the inference that the lack of responsibility manifest in the conduct, and therefore the business risk to the Government, will continue for an extended period of five years.

The Government urges that the nature of the offenses committed by Appellant indicates a lack of the responsibility and integrity which HUD should expect of those with whom it deals. Actions and omissions by Appellant and his corporation have

resulted in a sizeable loss to the Government, in spite of the fact that Appellant made restitution of \$10,000. The Government maintains that the seriousness of the offenses is compounded by the fact that Appellant, as both an attorney and experienced businessman, should have been more aware of HUD program requirements concerning mortgagor responsibilities. The Government also contends in its brief that a felony conviction of Ambid ought to be attributed to Appellant under the doctrine of respondeat superior. The Government recommends that to deter such behavior, Appellant should be debarred for a period of five years, the maximum debarment finite period authorized under the regulations.

In mitigation the Appellant has argued that the amounts of income that were misapplied were relatively small, that the failure to apply that income to the mortgages was not the result of fraudulent intent, and that substantial restitution was made. He also has cited the decision of the U.S. Attorney to proceed with a misdemeanor rather than a felony prosecution. The lesser charges, however, may or may not reflect the prosecutor's assessment of the violations as of less than egregious character. The conviction of Ambid was for misdemeanors, not for a felony as the Government mistakenly asserts, but the Appellant may be held responsible for the conduct of the Corporation of which he is president and sole shareholder. See Harry Naiman/Fabcraft, Inc./Fabco, HUDCA 81-548-D4 (Sept. 30, 1982) and cases cited therein.

Appellant has also shown that, while the offenses committed were injurious to HUD, the sum of money that should be deemed to be involved is actually much less than that suggested by the Government as the basis of Appellant's debarment. HUD, as insurer of all three mortgages, was required to pay out in excess of \$145,000 as a result of their default and to take assignment of the properties. However, Appellant's actions or omissions do not appear to be the only cause for HUD's loss, the full extent of which is not disclosed by the record. There is no evidence of the value of the properties HUD acquired, or what disposition, if any, has been made of them.

Appellant and Ambid were charged with improperly receiving compensation of \$1,517.53 and \$3,049.40, respectively. The Appellant contends that even if these proceeds had been applied toward the delinquent mortgages, foreclosure would not have been averted, because the rental sums received were insufficient to satisfy the mortgage payments. This assertion is not contested by the Government.

Appellant has also argued that his conduct, while culpable, was not a part of an elaborate scheme to defraud the Department. He points out in this regard that it was not he, but another mortgagor who initiated the FHA-insured mortgages. Appellant merely assumed the mortgages, two of which were already

delinquent at time of purchase. Unforeseen maintenance and repair expenses and problems in rent collection worsened the situation, bringing on the imminent threat of foreclosure. Faced with this prospect, Appellant sought to assign the mortgages, only to learn that the mortgages did not qualify under HUD's direct assignment program.

Assuming that Appellant was previously ignorant of the criminal laws governing mortgage payment of which he ran afoul, it would appear that he is now informed and is unlikely to repeat his offense. In addition, Ambid has fully paid the restitution required by the pre-information agreement. In contrast, the Government has provided little detailed background information against which to evaluate the seriousness of the offenses or the basis for its contention that the misconduct actually led to a loss of more than \$145,000. Nor has the Government made a persuasive case that the inferrable lack of present responsibility is likely to constitute a business risk to the Department for the proposed five years. The Government has not established by a preponderance of the evidence that this Appellant's purposes were knowingly fraudulent or were part of an equity skimming scheme or similar enterprise. It is not possible to determine on this record to what extent the erroneous attribution of felonious conduct to Ambid, and thus Appellant, may have exaggerated the proposed debarment period.

On this record, therefore, to impose a five-year debarment against Appellant would appear to be excessive and would appear to penalize the contractor for past misconduct. 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 (1944); Gonzales v. Freeman, 344 F. 2d 570 (D.C. Cir. 1964). Debarments are appropriate to protect the Government and the public against current and future misconduct. Thus, evidence of the misconduct underlying Appellant's conviction, while sufficient to require some period of debarment to protect the public interest and to deter nonresponsible behavior, does not establish the need for a debarment of five years.

#### Conclusion

I have therefore determined that Appellant's debarment for a period of three years will adequately protect the public interest. Appellant shall be debarred through November 4, 1985,

credit having been given for the time during which the Appellant has remained in suspended status.

*Edward Terhune Miller*

Edward Terhune Miller  
Administrative Judge

Dated: September <sup>20</sup>~~19~~, 1983