UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of:	:	
RAMSEY A. AGAN,	:	HUDBCA No. 83-773-D17
Appellant	:	

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DETERMINATION

Statement of the Case

By letter dated November 18, 1982, Assistant Secretary for Housing Philip Abrams notified Appellant Ramsey S. Agan that the Department of Housing and Urban Development ("HUD" or the "Department") was considering debarring him and his affiliates, with the specific exception of Adana Mortgage Bankers, Inc. ("Adana"), for cause under 24 C.F.R. §24.6 from participating in HUD programs for an indefinite period of at least five years from the date of the letter. Appellant was also advised that he was suspended immediately from further participation in HUD programs pending final determination of the issues involved. The notice of temporary suspension and proposed debarment cited Appellant's conviction in the United States District Court for the Northern District of Georgia for violation of 18 U.S.C. §1014, which proscribes making false statements to a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation. The Government's brief cited 24 C.F.R. §24.6(a)(1), (4), (5) and (9) as enumerated causes for the proposed debarment.

By letter dated December 2, 1982, Appellant made a timely request for a hearing on the proposed debarment which, because the action is based on a conviction, is limited under 24 C.F.R. §24.5(c)(2) to submission of documentary evidence and briefs. In his request for hearing, the Appellant reserved his objection to the debarment procedure followed by the Department, asserting that it does not comply with applicable regulations and is in violation of the due process clauses of the Fifth and Fourteenth Amendments with regard to the rights of Appellant and Adana. Appellant sought to expedite this determination, contending by correspondence dated February 23, 1983, that the period of temporary suspension without a hearing or decision on the merits was excessive. In response, an expedited schedule for submission of the Government's reply brief and for issuance of this determination was agreed upon.

The documentary evidence filed with the Government's brief consists of copies of the Assistant Secretary's notice of proposed debarment and temporary suspension dated November 17, 1982 (Exhibit A); the Judgment and Commitment Order (Exhibit B); the Conditions of Probation filed July 22, 1982; the Criminal Information (Exhibit C); and the Negotiated Plea (Exhibit D).

The documentary evidence filed with the Appellant's brief consists of the notice from the Chairman of HUD's Mortgagee Review Board ("MRB") of permanent withdrawal of the HUD-FHA mortgagee approval of Adana; the affidavits of Ramsey S. Agan, Alan W. Dailey, and Hasan Kelekci; a letter from Royce F. West; notice of GNMA's reinstatement of Adana; a Review of Servicing Activities, HUD-Insured Mortgages, dated November 22, 1982, and cover letter dated January 12, 1983, issued by the Atlanta Regional Office of the Department, and two related letters.

This Determination is based upon the record as submitted, considered as a whole. The matter of the withdrawal of Adana's HUD/FHA mortgagee approval by the Mortgagee Review Board is not within the scope of this Determination. No known affiliate except Adana has been identified in the record.

Statement of Facts

On July 20, 1982, Appellant entered a negotiated plea of guilty to a two count Criminal Information filed in the United States District Court for the Northern District of Georgia, Docket No. CR 82-205A. The Criminal Information charged:

COUNT I

> That on or about the 30th day of December 1979 within the Northern District of Georgia, the defendant, RAMSEY AGAN, President of Adana Mortgage Bankers, Inc., did knowingly make a false statement for the purpose of influencing the

action of a bank, the deposits of which were then and there insured by the Federal Deposit Insurance Corporation, in that in connection with a line of credit and loan, he submitted and caused to be submitted to The First National Bank of Atlanta a balance sheet of Adana Mortgage Bankers, Inc., which substantially misstated the nature of Adana's assets, in violation of Title 18, United States Code, Section 1014.

COUNT II

That from between on or about January 1, 1979 and until on or about February 1980 within the Northern District of Georgia, the defendant RAMSEY AGAN, President of Adana Mortgage Bankers, Inc., did knowingly make false statements for the purpose of influencing the action of a bank, the deposits of which were then and there insured by the Federal Deposit Insurance Corporation, in that in connection with a line of credit for Adana Mortgage Bankers, Inc., he stated to representatives of The First National Bank of Atlanta that Adana Mortgage Bankers, Inc., had not received the proceeds from certain specified mortgages placed in a Government National Mortgage Association pool, when in truth and fact, as he then and there well knew, Adana Mortgage Bankers, Inc., had in fact received the proceeds, in violation of Title 18, United States Code, Section 1014.

Judgment was entered against the Appellant on July 20, 1982. Appellant was sentenced to concurrent sentences of two years of confinement on each count, but execution of the sentence was suspended and Appellant was placed on probation for concurrent periods of two years on each count. The court also imposed a fine of $5,000 on each count, a total fine of $10,000, as a special condition of the probation. The terms of confinement and the amounts of the fines were in each case the maximum permitted by the applicable provision of the Code. The terms of the negotiated plea limited confinement, if imposed, to six months, committed the Government to silence on sentencing, and barred the Government from Appellant's prosecution "for false statements made to banks or otherwise within federal jurisdiction of which the Government has knowledge, other than those appearing in the Criminal Information herein."

Appellant was President of Adana at all times relevant to this Determination. According to Appellant, he is an experienced mortgage banker, who started his career in Atlanta in the mid-1950's, developed contacts in the growing Atlanta business community, and founded Adana in 1971. In due course, Adana

obtained the relevant FHA, VA, FNMA and GNMA approvals necessary to participation in Government sponsored and insured programs. The business prospered through the mid-1970's, which were characterized by relatively stable mortgage interest rates. However, when the mortgage interest rates became volatile from 1976-79, creating radical changes in the interest rate market, Adana suffered unanticipated losses in connection with the sales of the loan pools it had been assembling.

Appellant denies the Government's version of the facts underlying the two counts of the Criminal Information. Appellant, however, while denying that Adana's assets were overstated, admits in his affidavit, in relation to the first count of the Criminal Information that the mix and composition of the assets were misstated on the relevant balance sheet submitted to the First National Bank of Atlanta ("FNBA"). The charge in the MRB's November 22, 1982, notice to Adana that Appellant had submitted false financial statements indicating a positive net worth of $500,000 at a time when Adana's indicated actual net worth was a negative $900,000, is not supported by evidence or mentioned in the Government's brief. Thus, lacking evidence that contradicts Appellant's admission, I find that the misstatement related to mix and composition. In reliance on Appellant's plea of guilty, I also find that such misstatement as occurred was for the purpose of influencing the action of the FNBA in connection with Adana's line of credit and loan.

Appellant also admits that the recurring communications referred to in the second count of the Criminal Information involved his failure to advise the FNBA periodically that Adana was suffering losses and that the proceeds of the sale of the GNMA mortgage pools were not sufficient to pay and discharge the outstanding warehouse loans. Appellant denies that he made any affirmative representations to the FNBA in this regard, but admits that he knew that if he pointed out to the bank that its security was diminishing, the bank would cut off the line of credit and, he believed, put Adana out of business. Accordingly, I find that for a period of over a year Appellant effected a series of misleading, unwritten communications to the FNBA that were intended to cause and did cause the FNBA to believe that its line of credit was at all times well secured when in fact it was not. These communications also misled the FNBA into believing that Adana had not received the proceeds of certain specified mortgages placed in the GNMA pool, when Adana had, in fact, received such proceeds.

The transactions relevant to the false financial statements and false representations regarding mortgage proceeds involved a line of credit of up to $4.3 million which was extended to Adana by FNBA. This line of credit was established to permit Adana to close mortgage loans by drawing on the line of credit and "warehousing" the mortgage loans that were closed in this manner until a sufficient number could be accumulated to close a $1 million pool in conformity with GNMA requirements. In the ordinary and proper course of business, Adana would then have applied the proceeds from such GNMA mortgage pool sales to repay the borrowings from FNBA under the line of credit. However, when the GNMA pool sales resulted in losses, Adana was unable to pay some of its outstanding warehoused loans. At that time, Adana also suffered losses from the differentials between high fluctuating interest rates it paid for advances under the line of credit, and the lower fixed interest rates it received from its warehoused loans. These circumstances created the incentives for Appellant's misrepresentations.

The Government has alleged in its brief that Appellant misrepresented to the FNBA over a period of fourteen months that certain mortgages had not been put into GNMA pools when, in fact, they had. There is no evidence which specifically supports that allegation. Nor is there evidence which supports the Government's allegation that, by falsely representing, in addition, that Adana had not received the proceeds from the mortgages, Appellant was able to delay repaying advances under the line of credit and to use the funds retained to purchase additional mortgages. Although these details might be plausible, they are disputed by the explanation of a complex series of transactions in Appellant's affidavit, which is evidence.

In his affidavit, Appellant asserts that regular audits of Adana disclosed no evidence that money of a bank or other party has been misappropriated or improperly dealt with in any fashion. He also asserts that the bank's audit confirmed that every loan sold through GNMA bonds resulted in the proceeds going directly to the bank to pay off warehoused loans. The audit referred to is not in evidence, however, nor is any other documentary evidence which would corroborate these assertions.

There is also no evidence in the record which corroborates Appellant's assertion that Adana's actual total assets and net worth were understated rather than overstated, or his assertion as to the values at various times of certain of those assets. The Government has not disputed Appellant's assertion that after a subsequent Chapter 11 Bankruptcy proceeding was concluded, with Adana's reorganization having been unanimously accepted by the affected creditors, FNBA was paid in full. I note that on July 1, 1982, Adana was reinstated as an issuer of GNMA guaranteed

mortgage backed securities, but that the suspension and reinstatement by GNMA were not related to Appellant's conviction.

Neither has the Government disputed Appellant's assertion that no Government audit or other investigation has disclosed any impropriety in Appellant's or Adana's handling of the escrow funds for which Adana was responsible or the GNMA pools which it serviced. With the exception of the criminal conduct charged in the Criminal Information to which Appellant entered his plea of guilty, the Government has not taken specific issue with Appellant's contention that he and Adana have a history of compliance with HUD requirements, or that Adana's affairs have been found "fundamentally" in order and that the company has been rated as above average in connection with various FNMA examinations to which it has been subjected. The Government has not contested Appellant's assertions that neither Appellant nor Adana has previously been either suspended or debarred, that Appellant has no prior criminal record, or that his suspended sentence reflects a favorable review by the U.S. Probation Office.

Appellant also contends, in substance, that he entered his plea of guilty, even though the charge was untrue in that he did not overstate the assets of Adana, because of the risk inherent in a prosecution. He states that he entered his plea, with the advice of counsel, to avoid the expense, anguish, and loss of time that would result from contesting the prosecution, and that he would not have entered his plea of guilty if he had known that the plea would affect the agencies with which he and his company have dealt. Appellant has filed two affidavits and a letter attesting to his good character and reputation in both the general and the mortgage banking communities. The affidavit of Alan W. Dailey orients its assessment up to and including the time of financial troubles with FNBA in 1979 and 1980 and since. The other affidavit and the letter do not mention these problems. None of these documents mentions Appellant's conviction.

Discussion

The 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 "all participants or contractors with participants, in programs where HUD is the guarantor or insurer ...." As President of Adana, a HUD/FHA approved mortgagee dealing with HUD/FHA insured mortgages in a business which has been totally dependent upon governmental programs, Appellant clearly falls within the scope of that definition.

Appellant asserts at the threshold that the Department's debarment procedure as applied to him violates the Fifth and Fourteenth Amendments' requirements for due process. I lack

jurisdiction to consider the constitutional challenge so framed, because as Hearing Officer, I have authority only as provided by HUD's debarment regulations, 24 C.F.R. Part 24. However, these regulations and debarment regulations of similar character, including the concept of summary temporary suspension pending disposition of debarment proceedings, have been repeatedly sustained against challenges of a similar nature. See Transco Sec., Inc. of Ohio v. Freeman, 639 F. 2d 318 (6th Cir. 1981); Horne Bros. v. Laird, 463 F. 2d 1268 (D.C. Cir. 1972); Gonzales v. Freeman, 334 F. 2d 570 (D.C. Cir. 1964); Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958); American Fidelity Fire Ins. Co. v. Harris, 456 F. Supp. 606 (D. D.C. 1978); Adamo Wrecking Co. v. Dep't of Hous. & Urban Dev., 414 F. Supp. 877 (D. D.C. 1976).

Appellant contends that his immediate temporary suspension pending disposition of the debarment action caused him to be "subjected to a summary debarment with no investigation, no hearing and no record" in violation of the standards enunciated in Gonzales v. Freeman, supra. Appellant's reliance upon Gonzales, however, is misplaced. Gonzales explicitly countenances such temporary suspensions, while indicating the permissible length of a temporary suspension would depend upon the particular circumstances. Id. at 579, n. 19. Thus, while a suspension of no more than thirty days without a hearing might be impermissible under certain circumstances, this constraint does not apply where, as here, the suspension is imposed upon a contractor who has been convicted of any of a broad range of offenses which are designated as causes for suspension and debarment under the applicable regulations. Appellant admits the felony convictions which are the basis for both the temporary suspension and the proposed debarment, and he complains of no deficiency as to the notice of cause for the Government's action, which was clearly grounded on Appellant's conviction. Appellant has been given prompt and specific notice that the conviction is the basis for the temporary suspension and has been given a reasonably scheduled opportunity to be heard. 24 C.F.R. §24.13(c). See Transco Sec., Inc. of Ohio v. Freeman, supra; Horne Bros. v. Laird, supra; Schlesinger v. Gates, supra; American Fidelity Fire Ins. Co. v. Harris, supra; Adamo Wrecking Co. v. Dep't of Hous. & Urban Dev., supra.

24 C.F.R. 24.5(c)(2) is dispositive of Appellant's claim before me that he is entitled to an oral hearing. Under that regulation, because the temporary suspension and the debarment action are based upon a conviction, Appellant's hearing is limited to the submission of documentary evidence and written briefs in accordance with established and approved practice of this Department. See, e.g., William R. Absalom, HUDBCA 82-746-D45 (Mar. 22, 1983); Roy C. Markey/The Roary Co./Be-Mark Homes, HUDBCA 82-712-D33 (Nov. 18, 1982) (Decision on Motion for Due Process Hearing); David L. Hamilton, HUDALJ 82-827-DB (Aug. 2, 1982); Donald G. Bettis, HUDBCA

79-381-D31 (June 29, 1979); Langston Walker, HUDBCA 78-320-D50 (Jan. 22, 1979); Dennis Paul Sherrell, HUD 78-324-D53 (Jan. 19, 1979). Indeed, Gonzales v. Freeman, supra, upon which Appellant relies, specifically recognizes that, "To suggest the need for procedural safeguards does not mean that the full trial-type panoply of due process is commanded in all cases." Id. at 580, n. 21. See Transco Sec., Inc. of Ohio v. Freeman, supra; Washburn v. Shapiro, 409 F. Supp. 3 (S.D. Fla. 1976).

Appellant complains that the Assistant Secretary's action against him, which effected his immediate temporary suspension pending disposition of the proposed debarment, was tantamount to a peremptory debarment by the Assistant Secretary acting in the triple capacity of "accuser, prosecutor and judge." The contention conflicts with settled law and is without merit. Washburn v. Shapiro, supra. A debarment effected by the same individual who proposed the debarment has been implicitly approved in Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976). However, the instant case does not involve such a situation. The procedure whereby the Assistant Secretary has disqualified Appellant from participation in HUD programs for a temporary period of time is specifically authorized by the applicable HUD regulations. 24 C.F.R. §§24.4(a) and (b), 24.5(a), and 24.6. Because Appellant's conviction is adequate evidence of his having engaged in criminal, fraudulent, or seriously improper conduct, the Assistant Secretary has properly suspended him temporarily pending determination of the debarment proposed for the purpose of protecting the public interest.

Appellant has secured his right explicitly provided under HUD's debarment regulations to an impartial hearing de novo before a duly-appointed impartial Hearing Officer with no prior involvement with the case. The Hearing Officer, and not the Assistant Secretary, is charged with determining, upon the basis of a written record supplied by the parties, whether sufficient cause exists for the imposition of any sanction and whether Appellant is presently responsible. 24 C.F.R. §§24.5(b) and (c), 24.6(b), 24.7, 24.8. See Robert F. Hayter, supra; Roy C. Markey/The Roary Co./Be-Mark Homes, supra. Appellant, thus, has no basis for such a complaint against the action of the Assistant Sectetary in this regard.

The action by the Assistant Secretary, where there has been a timely request for a hearing, initiates the proposed action and provides notice of the action and the basis for it to the contractor. A temporary suspension without a hearing invoked to protect the public pending resolution of the issues involved in the proposed debarment based on a criminal conviction is justifiable, because redundant hearings on first the suspension, closely followed by one on the debarment normally would not serve the substantial interests of either party and would normally be burdensome to both. The standard for imposition of a temporary suspension is analogous to "probable cause" in a criminal

proceeding. Horne v. Laird, supra. Were Appellant's suspension not based on "adequate evidence" so conclusive as the record of two felony convictions manifesting a lack of business integrity and honesty, or if the opportunity for a hearing were unreasonably delayed, especially in a doubtful case, the need for an immediate hearing to determine the validity of the suspension might well outweigh the burdens of redundancy. See Horne v. Laird, supra. But neither circumstance obtains in this case.

The Government's brief enumerates 24 C.F.R. §§24.6(a)(1), (4), (5) and (9) as the causes upon which it relies in proposing Appellant's debarment. Proof of a criminal conviction establishes the existence of cause which gives the discretion to debar to the appropriate official under 24 C.F.R. §24.6(a)(1). 24 C.F.R. §24.6(b)(2). That regulation provides that the Department may debar a contractor or grantee who 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)(5) authorizes debarment for "Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance or guarantee or to the performance of obligations incurred pursuant to a grant of financial assistance, or conditional or final commitment to insure or guarantee." §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." "Financial assistance" is defined as "Assistance through grant or contractual arrangements; assistance in the form of loans, loan guarantees or insurance; and in addition, award of procurement contracts notwithstanding any quid pro quo given or whether the Department gives anything of value in return." 24 C.F.R. §24.4(g).

Proof of Appellant's conviction is sufficient evidence as a matter of law to establish cause for debarment under §24.6(a)(1). 24 C.F.R. §24.6(b)(2). By analogy, because of the inherent nature of the offenses involved, such proof is sufficient to establish cause for debarment under §24.6(a)(9). Robert F. Hayter, supra; Louis DeNaples, HUDBCA 78-312-D46, 80-2 BCA ¶14,719; Edward G. Venable, HUDBCA 77-232-D54, 80-2 BCA ¶14,718; see Tempo Trucking & Transfer Corp. v. Dickson, 405 F. Supp. 506 (E.D. N.Y. 1975); see also, Willie J. Hope, HUD 80-712-DB (Determination by the Secretary). Appellant's reliance upon Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'r, 534 F. Supp.

1139 (D. D.C. 1982) reflects a fundamental misconception of the relationship between proof of cause for debarment and the determination that a contractor lacks present responsibility, which are both essential to a sound discretionary determination to debar a contractor. A stipulation by the parties in Kiewit avoided the necessity for the court to analyze this crucial relationship. In addition, Kiewit's extraordinary and manifestly distinguishable facts involved, inter alia, as a basis for the challenge to the Government's debarment action, a conviction based upon a plea of nolo contendere, which does not, like Appellant's plea of guilty, constitute an admission of the offenses as charged. Thus, Appellant's reliance on Kiewit is misplaced.

Since Appellant's conviction on each of the two counts is for a separate but related offense, each of which by its nature "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 descriptions of the offenses as recited in the two counts of the Criminal Information bring the offenses within the scope of §24.6(a)(1), because they were obviously committed as an "incident to obtaining or attempting to obtain a public or private contract or subcontract thereunder or in the performance of such contract or subcontract." These offenses are also inherently "of such compelling nature, affecting responsibility" as would support a determination by the Assistant Secretary that they warrant Appellant's debarment under §24.6(a)(4). Appellant's false representations to the FNBA, whose deposits are insured by the FDIC, in connection with Appellant's dealings related to the GNMA mortgage backed securities program would inevitably constitute one or more legal, regulatory, and procedural violations constituting cause for debarment under 24 C.F.R. §24.6(a)(5). Misrepresentations to a lender intended to mislead it in connection with its loan administration inherently indicate a lack of business integrity or honesty, which seriously, directly and adversely affects the question of present responsibility under 24 C.F.R. §24.6(a)(9). Thus, Appellant's contention that the Government has failed to establish a prima facie case is rejected.

The remaining principal issues related to this proposed debarment, therefore, are whether 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 applicable standard of present responsibility, a contractor or grantee may be excluded from HUD programs for a period based upon projected business risk. See Roemer v. Hoffman, supra; Stanko Packing Company, Inc. v. Bergland, 489 F. Supp. 947, 949 (D. D.C. 1980). Since present responsibility is the applicable standard,

any mitigating circumstances affecting responsibility must be considered under the holding of Roemer v. Hoffman, supra. Therefore, debarment is inappropriate if the affected participant can demonstrate that, notwithstanding any past nonresponsible conduct, he does not constitute a business risk. Cf. 24 C.F.R. §24.0.

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). See Stanko Packing Co. v. Bergland, supra. "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, supra; 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. See Schlesinger v. Gates, supra; Gonzales v. Freeman, supra; Stanko Packing Co. v. Bergland, supra; 49 Comp. Gen. 139 (1969); 46 Comp. Gen. 651, 658-59 (1967). Integrity is central to a contractor's responsibility in performing a business duty toward the Government. 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954).

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, supra. 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 a decision to debar is to be rendered in the best interest of the Government. 24 C.F.R. §24.6(b)(1).

The Government's brief elaborates upon the charges specified in the Criminal Information, by reciting what purport to be additional facts underlying the Appellant's conviction. However, despite the ease with which the Government could no doubt have supplied at least an affidavit by a witness with personal knowledge of circumstances surrounding the violations charged, there is no evidence of record to support those detailed allegations. The recitals contained in the two counts of the Criminal Information do not evidence such details. The plea of guilty to the two counts of the Criminal Information, of course, constitute an admission of the criminal charges as specified. They may be relied upon as evidence, not only of the conviction itself as cause for the sanction, but generally as to such facts relating to the offenses as are recited in the two counts. See Tempo Trucking & Transfer Corp. v. Dickson, supra. The recitations and assertions in the Government's brief, however, are not evidence and have no probative value, since they clearly are contested by the Appellant.

Neither are the recitations and assertions in the Appellant's brief evidence, notwithstanding the voucher of Appellant's counsel that he is familiar with the matters and events in question and that certain factual recitations in the brief made by him are true and accurate. Certain material submitted by the Appellant in his brief, however, provides some additional context for this decision to the extent that it is not disputed.

The Government has sought the maximum debarment sanction permitted by the regulations--debarment for an indefinite period of not less than five years. The Government, however, has relied exclusively upon the fact of Appellant's conviction which of itself may constitute cause for debarment and the implicit admission of the facts recited in the two counts of the Criminal Information, which derives from Appellant's plea of guilty. The Government has provided no supplementary evidence which would tend to show that Appellant's conviction reflects such "egregious and willful improper conduct" as contemplated by the regulatory standard that the exclusion resulting from the debarment should be for an indefinite period and exceed "a reasonable, specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance generally not to exceed five years." 24 C.F.R. §24.4(a). There is no evidence in the record, for example, that supports the Government's allegation in its brief that Adana was able to delay repaying the advances under the line of credit by falsely stating that certain mortgages had not been placed in GNMA pools, when, in fact, they had. A convincing and detailed exposition of underlying or additional facts would normally be necessary to provide the basis for such a finding of extraordinarily reprehensible conduct to support the maximum sanction available under the applicable regulations, at least where it is not revealed in greater detail than in this case by the relevant court documents.

The Appellant has asserted that because his business is entirely dependent upon HUD's approval, his debarment, indeed his continued suspension, will, in effect, put him out of business with predicably adverse effects upon him and his employees. This is obviously a serious consequence. He has argued that his false representations were not affirmative in nature, but rather were in the nature of failures to disclose adverse circumstances caused by economic conditions beyond his control in order to protect himself from his creditors. He denies that he overstated the value of his assets, but admits that he described them falsely, presumably to protect his company from anticipated adverse action by the FNBA. He contends that except for this mistake in judgment, for which he has paid his debt to society, he has an unblemished record and a favorable reputation in both the general and mortgage banking communities. Appellant also asserts that FNBA ultimately suffered no financial loss as a result of his conduct.

Some of these contentions are not addressed by the Government. Some are not refuted with evidence. There is no contradiction of Appellant's assertion that FNBA ultimately incurred no loss as a result of Appellant's conduct and that Adana was able to regain financial stability as a result of a bankruptcy proceeding which allowed Adana, among other things, to obtain reinstatement as an issuer of GNMA mortgage-backed securities on July 1, 1982. Except for whatever limited inference might be allowable from Appellant's false statements evidenced in the second count of the Criminal Information, the Government's allegations also do not disprove Appellant's contentions that there is no evidence that the money of the FNBA or any other party had been misappropriated or improperly dealt with in any fashion and that every loan sold through GNMA bonds resulted in proceeds going directly to the bank to pay off loans which Appellant was warehousing. Because the Appellant has not adduced evidence that corroborates his assertions, even though the Government has not, for the most part, directly contradicted them, I am reluctant to accept them generally at face value in the context of this case. In any event, they are not persuasive enough in mitigation to overcome the inference of past and continuing lack of responsibility that may legitimately be drawn from Appellant's conviction. His contentions nevertheless highlight the paucity of evidence upon which the Government relies to establish such an egregious and willful improper course of conduct as would justify an indefinite period of debarment.

Appellant's contentions in mitigation seem calculated to deny substantive elements of the offenses as stated in the two counts of the Criminal Information to which he entered his plea of guilty. His plea, however, constitutes an admission of guilt of the offenses as charged. Thus, it is inappropriate, if not impermissible, for me to go behind the conviction to determine the merits of Appellant's contention to the extent that they deny the validity of the plea as entered. See Tempo Trucking and Transfer Corp. v. Dickson, supra; Robert F. Hayter, supra; Roy C. Markey/The Roary Co./Be-Mark Homes, supra. Since it is axiomatic that I am without authority to consider any challenge to the validity of the conviction itself, and Appellant is estopped from collaterally attacking the validity of his criminal conviction in this debarment proceeding, I have not considered contentions in mitigation to the extent that their acceptance would be necessarily premised upon impeachment of the validity of Appellant's conviction. See Washburn v. Shapiro, supra; Louis DeNaples, supra; Robert F. Hayter, supra. I also note the fact that Appellant has been convicted for making false statements, which tends to impeach the credibility of statements he has made, especially to the extent that they are uncorroborated and to the extent they are disputed by the Government.

The fact that the FNBA might have escaped its dealings with Appellant without serious financial loss is not a benefit that should accrue to this Appellant. Cf. Eric Crabtree, HUDBCA

81-630-D35 (Jan. 21, 1982). I also give little weight to the two affidavits and the letter which Appellant has submitted as character references. They are unsworn statements, few in number, lacking in specificity, and make no reference to Appellant's conviction, which is the basis for the instant proceeding. I know nothing of the declarants which would permit me to assess their credibility or judgment of character. Thus, neither the substance, context, or any extrinsic proof of the qualifications or reliability of the affiants or author of the letter provide me with any substantial basis for reliance upon such representations. The limited value of such evidence in mitigation has been recognized elsewhere, although it may, of course, be given weight where the quantity or quality of such communications is much more substantial and impressive than in this case. See Robert F. Hayter, supra; David L. Hamilton, HUDALJ 82-827-DB (Aug. 2, 1982); Michael F. Koury and Maxine Koury, HUDBCA 81-618-D30, 81-619-D31 (Sep. 18, 1981); Larry W. Smith, HUDBCA 81-620-D32 (Sep. 14, 1981); Louis DeNaples, supra.

Because of the character of Appellant's business relationships and responsibilities, I deem it both fair and appropriate to consider the evidence bearing upon Appellant's present responsibility against the general compass and constraints of well recognized fiduciary standards. The level of confidence and trust which necessarily inheres in the relationship between HUD and Appellant, individually and as President of Adana, justifies such a view. Fiduciary constraints admittedly govern many of Appellant's dealings with third parties also. As a HUD/FHA approved mortgagee, the company and Appellant as its principal should have had an acute sense of responsibility to conduct themselves in general so as to satisfy those high standards, and so as not to reflect adversely in their general conduct upon the United States Government, or HUD in particular, with whose interests their interests are inextricably intertwined. This relationship of trust governs the general context in which the specific regulatory requirements imposed by HUD and accepted by HUD/FHA mortgagees such as Adana, must be adhered to. With the mantle of HUD's approval, such mortgagees are inevitably benefited in their business dealings with third parties who rely upon the implication of competence and trustworthiness which that mantle bestows.

In general, fiduciary relationships require adherence to standards of scrupulous fair dealings, full disclosure, and avoidance of conflicts of interest. Thus, while it is not entirely clear to what extent the relationship between Appellant and FNBA would be held to create particular fiduciary obligations on Appellant's part, Appellant's particular conduct as principal of Adana, a HUD/FHA approved mortgagee, should be evaluated for purposes of this determination in relation to well recognized fiduciary standards. See, e.g., Compagna v. United States, 474 F. Supp. 573 (D.C. N.J. 1979); W. A. McMichael v. D & W Properties, 356 So. 2d 1115 (La. App. 1978); cf. First National

Bank, Henrietta v. Small Business Administration, 429 F. 2d 280, 287 (5th Cir. 1970); United States v. Bernstein, 533 F. 2d 775, 796-97 (2d Cir.), cert. denied, 429 U.S. 998 (1976). Evaluation of Appellant's admitted serious criminal misconduct against such a context renders the contention that Appellant was generally in compliance with applicable norms virtually nugatory as a mitigating circumstance.

The record before me establishes a clear cause for debarment. I find that the Government is likely to be at risk and that the public interest will need protection from dealing with this Appellant. Since Appellant's case in mitigation is not compelling, the nature of the admitted offenses become the chief determinant of the inference to be drawn from those past acts regarding Appellant's present responsibility.

When evaluated against a fiduciary standard, Appellant's conduct clearly reflects an inexcusable lack of responsibility at the time it occurred, albeit Appellant may have been under serious economic pressure. That conduct extended over a significant span of time. The conduct was of such a nature that a continuing lack of present responsibility may be inferred from it. The fact that the Appellant did not also raid the accounts he held as fiduciary is hardly a matter of mitigation or a controlling demonstration of responsibility on the part of one so situated. I view conduct of the sort established by Appellant's pleas of guilty as a serious breach of trust which reflects a fundamental lack of responsibility on the part of one who has assumed the high degree of responsibility to the Government and to third parties dictated by its fiduciary relationships. There is nothing that overcomes the inference that such a lack of responsibility would continue in the future, or that compels an inference that it would change in the near future. For that reason, I believe a substantial period of debarment is appropriate to protect the interest of the Government.

Nevertheless, for the reasons stated, and without a more substantial record on which to base a determination, I do not find that the actual conduct in which this Appellant engaged is of such an inherently "egregious and willful improper" character as to support debarment for an indefinite period as opposed to a definite term.

Conclusion

Based upon the foregoing, I find that it is in the public interest and the best interests of the Department to debar Ramsey

S. Agan from this date up to and including November 17, 1987, credit being allowed for the prior period of suspension.

Edward Terhune Miller

EDWARD TERHUNE MILLER
Administrative Judge

Dated: This 21st day of April, 1983.