

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

In the Matter of: :
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HAROLD ESTES and, : HUDBCA No. 83-793-D24
ESTES PLUMBING, : (Docket No. 83-880-DB)
: :
Appellants :
:

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DETERMINATION

Statement of the Case

By letter dated March 8, 1983, Assistant Secretary Philip Abrams notified Appellant, Harold Estes, that the Department of Housing and Urban Development ("HUD") was considering debarring him and his affiliate, Estes Plumbing, from further participation in HUD programs for a period of two years. The stated basis for the debarment action under 24 C.F.R. §24.6 was Estes' alleged demand for and receipt of kickback payments from compensation of employees in violation of the Federal Anti-Kickback Act. Appellants were temporarily suspended from further participation in HUD programs as of March 8, 1983, pending final determination of the issues in this matter.

Appellants filed a timely request for a hearing on March 18, 1983. A hearing was held on August 17 and 18, 1983, to determine the rights of the parties. The record was held open at the request of Appellants for submission of additional documentary evidence. Appellants failed to submit any additional evidence.

Findings of Fact

1. Harold Estes, doing business as Estes Plumbing, entered into a subcontract with AMJ Corporation ("AMJ") for plumbing work on a HUD-insured multifamily construction project known as Rancho Niguel, for which AMJ was the prime contractor (Tr. 139).

2. As a condition of his contract with AMJ, Estes was required to comply with a number of Federal labor relations statutes, including the Davis-Bacon Act and the Federal Anti-Kickback Act, also known as the Copeland Act. The Davis-Bacon Act required Estes to pay his employees in accordance with prevailing wage rates determined by the U. S. Department of Labor. (Exhs. G-2, G-3.)

3. The prevailing wage rates determined by the U. S. Department of Labor were substantially higher than the rates Estes paid his employees for work on non-Federal contracts. Many of the men employed by Estes were not journeyman plumbers. Even though they were untrained, they were to receive the prevailing "union rate" for journeyman plumbers while they worked at Rancho Niguel because Estes listed them as journeymen plumbers on his weekly wage certifications. (Exh. G-9; Tr. 107, 109-110.)

4. It is undisputed that Estes' wife collected money on Estes' behalf each payday from some of the men employed at Rancho Niguel. The payments made by those employees, including [REDACTED] Cheung, [REDACTED] Schisler, [REDACTED] Lopez and [REDACTED] Behrens, varied from \$75 to \$150 per week. (Exhs. G-4, 5, 6, 10; Tr. 19, 76, 152-154 .)

5. Many of Estes' employees assigned to Rancho Niguel filed complaints with state and Federal agencies to the effect that kickbacks from wages were demanded by Estes from all of the men employed by him at Rancho Niguel. Those complaints and the investigative reports of the complaints indicate that the demand for payments was communicated by Estes through his foremen, [REDACTED] Behrens and [REDACTED] Oliver, and the collection was made each payday by Mrs. Estes after the men had cashed their paychecks. The complaints and investigative reports further indicate that some of the men refused to or otherwise avoided making the demanded payments. (Exhs. G-4, 5, 6, 10; Tr. 19, 76.)

6. Estes did not dispute that Cheung, Schisler, Behrens and Lopez were paying money to Mrs. Estes each payday. He testified that those weekly payments were for repayment of loans made by him to those employees for the purchase of plumbing tools and equipment ordered by them on Estes' account. I find that Estes' testimony concerning the weekly collection of a portion of his employees' pay did not provide a credible explanation for either the amount and extent of the money collected or the overwhelming belief of his employees that the money collected was for wage kickbacks. The copies of weekly wage statements attached to the

written complaint filed with HUD by Schisler make clear that the deductions for tools purchased on Estes' account were marked on the wage statements, and were separate and distinct from the amounts each employee "kicked back" to Estes. I find that Estes did demand and collect kickbacks from his employees while they were employed at the Rancho Niguel project. (Exh. G-5; Tr. 152-154.)

7. Estes did not demand any kickback from his employees until their wages were increased substantially as a result of the wage requirements of the contract between AMJ and Estes. The written complaints filed by individual employees indicate, and I find, that the reason why Estes was demanding the kickbacks was to recover the approximate difference between the Federally determined prevailing wage rate he had to pay on Rancho Niguel and the non-Federal rate he ordinarily paid his employees. Schisler's complaint stated that "In C. ESTES' words, the \$100 was for union benefits that he, as a non-union contractor, did not have to pay. Thus, he wanted the money back in cash." Cheung's written complaint stated that "Eddy Barons [sic] told the rest of us laborers that Harold Estes was giving us union wages. But the catch was that I and the others had to give \$75 which then increased to \$125 back to Estes after taxes and after he signed the payroll ledger, because our skills were not worth the hourly union rate." (Exhs. G-4, 5, 6; Tr. 102, 108.)

8. Although no evidence was offered that any employee was actually fired as a result of refusing to make payment to Estes, ██████████ Cheung testified that he continued to make the weekly payments because he believed that he would be fired if he did not do so. Behrens gave a statement to the FBI that Estes told him the men would have to find another place to work if they did not agree to make the payments. Although Estes denied that he ever coerced a return of part of the paycheck of his employees, I find that his testimony was not credible when compared to the extent of reliable documentary evidence to the contrary and the testimony of ██████████ Cheung. Based upon a preponderance of the evidence, I find that Estes did coerce his employees assigned to Rancho Niguel into "kicking back" part of their pay checks to him each payday. (Tr. 105, 112, Exhs. G-4, 5, 6, 7, 10.)

Discussion

The basis for the proposed debarment is Estes' alleged violation of the Federal Anti-Kickback Act, 18 U.S.C. §874, which provides that:

Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from

the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

The major goal of Congress in passing the Federal Anti-Kickback Act was to ensure the enforcement of Federally determined wage standards in Federally subsidized or insured projects. United States v. Carbone, 327 U.S. 633, 637 (1945); Slater v. United States, 562 F. 2d 58, 61 (1st Cir. 1976). The legislative history of the Act indicates that Congress intended to suppress "the kickback racket", in which contractors on Federal projects would force employees to remit a portion of their wages through intimidation and threats. See S. Rep. No. 803, F. 3d Cong., 2nd Sess. (1934); H. Rep. No. 1750, F. 3d Cong., 2nd Sess. (1934).

The Supreme Court, in construing the Federal Anti-Kickback Act in United States v. Laudani, 320 U.S. 543 (1943), found that its purpose was to ensure that Federal funds provided for workers should actually be received by them. The only exceptions were in situations where funds were diverted under authority of law or through a worker's voluntary agreement. *Id.* at 547. It is against this language that Estes' conduct must be judged. The Supreme Court has cautioned that "not every person or act falling within the literal sweep of the language of the Kickback Act need necessarily come within its intent and purpose." Slater v. United States, *supra* at 49. It is to be applied in light of the evils which gave rise to the statute and Congress' intent. United States v. Carbone, *supra* at 637. The coercive element was clearly considered of paramount importance in Laudani because voluntary agreements were treated by the Court as outside the scope of the Act.

Estes' defense was that his employees voluntarily made payments to him pursuant to an oral agreement that he would advance them credit for the purchase of necessary plumbing tools if they would pay him a portion of their debt each payday until the debt was paid in full. If indeed that was a complete and true explanation of the weekly collections of cash from Estes' employees, such a practice would not be in violation of the Federal Anti-Kickback Act because it was voluntary and non-coercive. United States v. Laudani, *supra*.

However, I have rejected Estes' explanation of the weekly cash collections as not credible because of the volume of credible documentary and testimonial evidence to the contrary. Estes did advance his employees credit to purchase tools and equipment on his account. Documentary evidence offered by the Government bore out the truth of that assertion. However, it did not explain the kickbacks, which were collected over and beyond the legitimate debts of the employees for tool and equipment purchases.

The record is clear that no demand for kickbacks was made prior to the dramatic wage increases required by the Rancho Niguel contract. However, the credit advances for tool purchases did not begin with the Rancho Niguel contract. The sheer numbers of Estes' employees who filed credible complaints with various Government agencies all alleging the same practice, but without indication of collusion, outweighs the testimony of Estes. Even though the written complaints were not subject to cross examination, and the Government only produced one complainant as a live witness, the weight I have accorded that evidence is high because of its detailed specific nature, the fact that the investigators who collected the complaints did examine the complainants for veracity, and the explanation given by Estes was simply not credible under the circumstances. The Government produced not only statements of employees who were told to pay kickbacks but summaries of interviews with, and statements of, the foremen to the effect that they made the demands on Estes' behalf. Furthermore, one of those written complaints contained copies of weekly wage statements that refuted Estes' contention that the tool accounts were the only basis for the weekly cash collections. The preponderance of the reliable evidence led to an inescapable conclusion that Estes was demanding wage kickbacks.

I also concluded that intimidation, if not outright threats, were the means by which Estes exacted the kickbacks. The newer and less secure employees, such as ██████ Cheung, believed that they would indeed lose their jobs if they did not cooperate. They were told that by ██████ Behrens on behalf of Estes. The employees who did not cooperate took almost immediate action to file complaints. I find that Estes violated the Federal Anti-Kickback Act by demanding and obtaining from certain employees part of their wages that were due them through intimidation and demands that implied the employees would suffer if they refused to cooperate. The fact that his attempts at coercion were not successful with all of his employees does not change the nature of his methods.

The purpose of debarment is to assure the Government that it only need do business with responsible contractors and grantees. 24 C.F.R. §24.0. Estes is a "contractor or grantee" within the meaning of the regulation applicable to debarment because he was a subcontractor on a Federally-insured construction contract. 24 C.F.R. §24.4(f). Estes deliberately breached his contractual obligation to comply with the Federal Anti-Kickback Act. It was a serious breach, calculated to subvert and evade a Congressional mandate central to Government contracts. This was not a mere technical violation of a statute, or an inadvertent one. It required planning, organization and enforcement. Estes' conduct in extracting kickbacks from his employees is evidence of a

serious lack of responsibility as a Government contractor. His disingenuous testimony at the hearing and lack of understanding of the seriousness of his conduct is evidence that he is not presently responsible.

I find that a period of debarment is warranted to protect the public interest. The Government has proposed a two-year period of debarment. Estes has been temporarily suspended from participation in all Departmental programs since March 8, 1983. He will be given credit for that period of non-participation because he was on notice of his suspension and no evidence was offered that he violated the terms of it.

Conclusion

It is in the best interests of the public and the Government that HAROLD ESTES and ESTES PLUMBING be debarred from this date up to and including March 7, 1985.


JEAN S. COOPER
Administrative Judge

Issued at Washington, D. C.
March 30, 1984.