

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

In the Matter of:	:	
	:	
MARVIN B. AWAYA,	:	HUDBCA No. 84-834-D6
	:	(Docket No. 83-913-DB)
Respondent	:	
	:	

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DETERMINATION

Statement of the Case

By letter dated June 10, 1982, Philip Abrams, Assistant Secretary for Housing, notified Marvin B. Awaya (Respondent) that the U. S. Department of Housing and Urban Development (HUD), was temporarily suspending him from participation in HUD programs. This followed Respondent's April 26, 1982 indictment for violations of 18 U.S.C. Sections 371, 641-642, 1001-1002, 1341-1342, and 1941-1942. On September 27, 1982, Respondent pleaded guilty to violating 18 U.S.C. 371, 1001-1002, and 1341-1342. On September 28, 1983, he was notified that the Department was considering debaring him from participation in HUD programs for three years from the date of his suspension. Respondent requested a hearing on his proposed debarment which was limited, under 24 C.F.R. §24.5(c)(2), to the submission of documentary evidence and written briefs.

Findings of Fact

1. Respondent, Marvin B. Awaya, was indicted on March 25, 1982, with two other defendants, Ike T. Odachi and Alexander & Alexander, Ltd., on eight counts of violation of Title 18 of the United States Code.

2. On September 27, 1982, Awaya pleaded guilty to five counts of violations of Title 18, conspiracy to defraud the United States (§371), mail fraud (§§1341-2), and concealment of a material fact within the jurisdiction of the Department of Housing and Urban Development, an agency of the United States (§§1001-2). Awaya was subsequently sentenced to six months incarceration and placed on five years probation to commence upon his release from confinement. He also received a five-year suspended sentence. The remaining charges against Awaya were dismissed.

3. At the time the offenses were committed, Awaya was employed by the Hawaii Housing Authority as a Housing Program Analyst.

4. The Hawaii Housing Authority 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.

5. The offenses for which Awaya was convicted involved a conspiracy pursuant to which Awaya advised Pacific Area Computer Services to increase by \$6,000 its bid on a subcontract with Alexander & Alexander under a contract sought from the Hawaii Housing Authority. The \$6,000 was to be used for campaign contributions for three candidates for political office in Hawaii.

6. Awaya is currently employed by Mark Development, Inc., which is in the business of developing and managing Government assisted housing for low and moderate income families. Such employment has involved duties directly affecting HUD-assisted projects and their management.

Discussion

There is no dispute as to the facts which resulted in the Respondent's conviction on five counts of an indictment. That criminal conduct constitutes a serious breach of a public trust while he served as an employee of the Hawaii Housing Authority. Respondent's conviction of offenses of such character provides ample cause for his debarment for a substantial period under 24 C.F.R. §§24.6(a)(1), (4), (5), (6) and (9). Such offenses reflect a manifest lack of business responsibility from

which an inference of a lack of present responsibility may be drawn.

"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 a contractor. Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). Although the test for debarment is whether the contractor is presently responsible, a lack of present responsibility may 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 Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967).

"Contractors and grantees" within the meaning of HUD debarment regulations include "individuals, state and local governments and public or private organizations" that are direct or indirect recipients of HUD funds "or those in a business relationship with such recipients." 24 C.F.R. §24.4(f). As an administrator in the Hawaii Housing Authority with authority over the disbursement of HUD funds at the time the offenses occurred, Respondent is a contractor within the meaning of 24 C.F.R. §24.4(f).

In order to ensure that Government funds are properly utilized, it is necessary that HUD do business only with responsible contractors and grantees. 24 C.F.R. §24.0. HUD is empowered to exclude or disqualify contractors and grantees from participation in HUD programs when it is determined that such a measure is necessary to protect the public. 24 C.F.R. §24.5(a). Debarment is a sanction to be imposed to protect the public by ensuring that the contractor or grantee is presently responsible, 24 C.F.R. §24.0, and not to punish a contractor or grantee for a past wrong. See L.P. Steuart & Bros. v. Bowles, 322 U.S. 398 (1964); Gonzales v. Freeman, 334 F. 2d 570, 577 (D.C. Cir. 1964). However, even if cause for debarment can be established under 24 C.F.R. §24.6(a), the decision as to whether or not debarment is warranted is discretionary. 24 C.F.R. §24.6(b). Moreover, consideration of significant mitigating factors offered by the contractor or grantee is mandated by Roemer v. Hoffman, supra. Having considered the entire record, including submissions in mitigation, I conclude that the proposed three-year period of debarment is appropriate and reasonable.

Respondent's contention that he derived no personal gain from his actions is without mitigating effect because his offenses reflect a serious breach of public trust. The fact that the offenses for which Respondent was convicted occurred approximately five years ago and that since that time, he has served a six-month prison sentence and remains on probation and under the supervision of a parole officer with suspended portions of his prison sentence held in abeyance is some evidence from

which present responsibility might be inferred. The tone and substance of his letter submitted in mitigation discloses appropriate contrition, awareness of the gravity and significance of his misdeeds, and concern with the need to reconstruct his life and find employment in his specialized field of Government assisted housing in order to support himself and his family. Awaya has already been suspended from participation in HUD programs for twenty-one months. His employer is obviously aware in detail of Awaya's past and has submitted a letter which is strongly supportive of Awaya and confident of his present responsibility. However, I find these considerations insufficient to overcome the inference of non-responsibility to be drawn from the nature of the offenses for which he was convicted.

Correspondence between Awaya's employer, Mark Development, Inc. and HUD, which the Government submitted with its reply brief, also suggests that Awaya has been employed during part of the period of his suspension by a company whose primary business is the management of Government-assisted housing, some of it assisted by HUD, and that Awaya's duties have included work directly on HUD-assisted projects. The Government contends in its reply brief that Awaya has violated the terms of his suspension. While such proof is not properly a ground for debarment because notice of such a violation was not included in the Assistant Secretary's notice of proposed debarment, it is relevant to mitigation and would tend to contradict evidence of present responsibility which might otherwise be inferred from the record. See Howard Bigelow, HUDBCA 80-467-D15, 82-2 BCA ¶15,798. Violation of the terms of the suspension would be evidence that Awaya is unable or unwilling to conform his conduct to HUD's requirements.

However, the limited written record in this case does not establish with reasonable certainty that Awaya has knowingly violated the conditions of his suspension. What it does show is that, in compliance with 24 C.F.R. §24.16(3), Awaya was advised in the notice of his suspension dated June 10, 1982, only that "During this temporary period bids and proposals for participation in any Department program will not be solicited from you and, if received, will not be considered for award unless determined to be in the best interest of the Government." This advice essentially repeats in pertinent part the "Restrictions during period of suspension" prescribed by 24 C.F.R. §24.15(a). In the subsequent notice of proposed debarment, Awaya was advised that "Pending final determination of the issues in this matter, you are temporarily suspended from further participation in HUD programs." While the pertinent regulations are hardly a model of clarity, it may

safely be said that the more sweeping sanction of which Awaya was notified in the Assistant Secretary's notice of proposed debarment derives from a very liberal and self-serving interpretation by the Government of the pertinent regulations. It does not track the language of any particular provision relating to scope and restrictions.

When Awaya was hired in late 1983, his employer immediately inquired of HUD by letter dated November 22, 1983, regarding the propriety of the employment and Awaya's responsibilities, at least some of which affected HUD-assisted projects, as follows:

Mark Development, Inc. has recently hired as an employee, Mr. Marvin B. Awaya, who is on your debarred (sic) list. We have not employed him as a contractor, subcontractor or grantee and therefore, believe that the above subject rules and regulations are not applicable.

Mr. Awaya has been hired by our firm to perform the following duties:

1. Process/interview tenants seeking admissions to housing projects we manage, except that Mr. Awaya does not certify tenant income and assets.
2. Work with project staff (resident manager, maintenance personnel) to solve project related maintenance and tenant problems.
3. Miscellaneous administrative work for Mark Development, Inc.

In our opinion, Mr. Awaya has not been assigned any duties which would make him responsible for the management of any HUD-assisted projects. He does not handle company, project, tenant or contractor funds nor negotiate or award jobs or grants to any contractor or subcontractor.

In our opinion, Mr. Awaya's employment does not affect our business integrity and does not reduce our responsibilities as a managing agent. We feel that his being employed by Mark Development should not penalize Mark Development in any way.

From our review of the HUD Rules and Regulations on debarment, it is not clear that the debarment applies to employees of a contractor, subcontractor or grantee.

Since Mr. Awaya is not a contractor, subcontractor, grantee or principal officer of these

entities, we do not believe that his debarment should affect his ability to be employed by Mark Development. His employment with our firm will continue until notified by HUD.

Robert K. Fukuda, Manager of HUD's Honolulu Office, responded to the inquiry by letter dated February 24, 1984, confirming a further telephone inquiry from the employer on February 23, in relevant part, as follows:

Mr. Awaya may be employed by Mark Development, Inc. in non-HUD related business. He may not be employed in any position which would result in his direct or indirect receipt of HUD funds, such as management of any HUD-assisted projects.

Please be informed that the continued employment of Mr. Awaya in HUD-assisted business is a violation of 24 CFR part 24.

This advice was ostensibly based upon a legal opinion from the General Counsel's Office of HUD dated January 27, 1984, which stated in pertinent part,

According to 24 C.F.R. § 24.23(a), "no financial assistance shall be made available directly or indirectly to any contractor or grantee" who is suspended or debarred. 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. (Emphasis added.) 24 C.F.R. § 24.4(g)

Under these provisions, Mr. Awaya may not be employed in any position which would result in his direct or indirect receipt of HUD funds. For example, he could not be involved in the management of any HUD-assisted project because such a position would clearly constitute doing business with the Department, and his salary may, at least in part, be indirectly paid with HUD funds.

If Awaya knowingly violated the terms of his suspension under the constraints authorized by HUD's published regulations, he should not be entitled to credit for the time he has been suspended. The inquiry by Awaya's employer, however, which required nearly three months for a response aided by an opinion of legal counsel, is merely illustrative of the problems of

regulatory interpretation which an affected party might have. I need not determine whether Aways actually violated the terms of his suspension, because I find that the Government has not established that, under the circumstances disclosed by this record, Aways actually knew or should have known that he was in violation of the suspension.

Conclusion

The Respondent is hereby ordered to be debarred for a period of three years through June 9, 1985. Credit is allowed for the period that Respondent has been suspended.



EDWARD TERHUNE MILLER
Administrative Judge

Issued at Washington, D. C.
May 8, 1984