

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of:

ALAN ROBERT TUNKEL and  
URBAN REDEVELOPMENT  
CORPORATION,

Appellants

HUDBCA No. 84-835-D7  
(Docket No. 83-914-DB)

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For the Government

DETERMINATION

Statement of the Case

By letter dated October 5, 1983, Alan Robert Tunkel ("Tunkel") was notified that the Department of Housing and Urban Development ("HUD") intended to debar him and Urban Redevelopment Corporation ("URC") from participation in Departmental programs for a period of one year, based on a plea of guilty entered by Tunkel as agent for URC to violation of 18 U.S.C. §1012. The notice of proposed debarment stated that Tunkel admitted responsibility for commission of the corporation's offense.

In cases of proposed debarment based upon a criminal conviction, a hearing is limited to submission of written briefs and documentary evidence. 24 C.F.R. §24.5(c)(2). A timely request for an opportunity to be heard was made on behalf of Tunkel and his affiliate, URC. Briefs and documentary evidence were received from Appellants and the Government after an

extended period in which this case was held in abeyance to allow the parties to explore the possibility of settlement. This determination is based on the record established by the parties.

#### Findings of Fact

1. On June 16, 1983, a Grand Jury convened in the United States District Court for the Western District of Virginia returned a seven-count indictment against URC, charging it with making false statements to HUD in violation of 18 U.S.C. §1012. Each count recited an instance occurring between 1981 and 1982 in which URC knowingly and with intent to defraud submitted false billing information from its subcontractors to the Lynchburg Housing and Redevelopment Corporation ("LHRC"). The LHRC was a financial conduit for HUD funds and an agent of HUD. (Government Exhibit C.)

2. Alan Robert Tunkel is the President of URC. The Grand Jury charged in the Preamble of the Indictment returned against URC that Tunkel, acting as agent for URC, caused false billing invoices to be submitted to the LHRC. The LHRC was administering two renovation projects funded by HUD. The false invoices were submitted in connection with those two projects. The Indictment charged that the billings submitted by Tunkel on behalf of URC falsely represented the costs incurred by the subcontractors by inflating them 20 percent in order to circumvent the HUD retainage of 20 percent of contract payments. (Govt. Exh. C.)

3. On June 21, 1983, Tunkel entered into an Agreement for Pre-Trial Diversion with the United States Attorney for the Western District of Virginia. The Agreement, signed by Tunkel, states that he accepts responsibility for making or causing to be made false statements concerning billing information that was submitted to the LHRC. The Agreement provided that the Government would defer prosecution of Tunkel for a period of one year on charges of violation of 18 U.S.C. §§1001 and 1012. If Tunkel completed his period of supervision under the Agreement, no prosecution would be instituted against him. (Govt. Exh. D.)

4. It is assumed in the absence of evidence to the contrary that Tunkel successfully completed the terms of the Agreement for Pre-Trial Diversion.

5. On June 21, 1983, Tunkel entered a plea of guilty on behalf of URC to all seven counts of the Indictment. URC was convicted based on the plea. The court ordered URC to pay a fine of \$1,000 on each count, but suspended execution of payment of one half of the fine, and placed URC on probation for eighteen months. As a special condition of probation, the Preamble of the Indictment was ordered to be stricken from the Indictment. (Govt. Exh. B.)

6. Tunkel and URC have voluntarily not participated in new HUD programs for over one year. HUD loaned URC additional funds for the HUD project in connection with which the false statements were submitted, and that loan was made after the plea of guilty was entered by Tunkel on behalf of URC. (Appellants' Brief at 3.)

### Discussion

The purpose of debarment is to assure the Government that it only does business with responsible contractors and grantees. 24 C.F.R. §24.0. Debarment is to be used to protect the public and not for punitive purposes. 24 C.F.R. §24.5(a). Responsibility is a term of art in Government contract law. It has been defined to include the honesty and integrity of the contractor, not merely the ability to successfully complete a contract. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976). Although the present responsibility of the contractor is the critical test of whether debarment is necessary to protect the public, present lack of responsibility 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 (D.C. D.C. 1980).

Appellants admitted in their brief that URC is a "contractor or grantee" within the meaning of the regulation applicable to debarment. However, they contend that Tunkel is not a contractor or grantee because he is "an individual and not a 'Business Concern' .... The Board of URC, not its President, is responsible for the operation of the Corporation." No evidence was submitted to substantiate the contention that Tunkel is not responsible for the operation of URC. Individuals are specifically included within the regulatory definition of "contractor or grantee." 24 C.F.R. §24.4(f). Tunkel has offered no evidence that his salary as a corporate official was not paid in part with the HUD funds received by URC from the LHRC for work on the HUD-funded renovation project. I find that Tunkel is a "contractor or grantee" within the meaning of the regulation because he received HUD funds indirectly through the LHRC, a non-Federal source. Ibid.

The ground for the Government's debarment action against Tunkel is that he accepted responsibility for the criminal acts of URC. The Pre-Trial Diversion program in which Tunkel participated for a year required that he admit personal responsibility for the corporation's criminal acts. I cannot allow Tunkel to now deny the very admission of irresponsible conduct that permitted him to benefit from the Pre-Trial Diversion program. Appellants' Brief states, with no attempt to offer the slightest evidence in support, that Tunkel did not prepare or submit the false statements to the LHRC. I cannot reconcile that unproven statement with Tunkel's admission of irresponsible conduct in a criminal proceeding.

One of the grounds for debarment is "[m]aking or procuring to be made any false statement for the purpose of influencing in any way the action of the Department." 24 C.F.R. §24.6(a)(6). Furthermore, "[a]ny other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary" may be a cause for debarment. 24 C.F.R. §24.6(a)(4). Tunkel, by admitting and accepting the blame for the criminal corporate acts, either failed in his duty as a corporate officer to stop or prevent the criminal acts, or was a player in the acts themselves. The evidence before me does not clearly establish the precise nature of Tunkel's conduct that led to his acceptance of blame for the corporate crimes. Nonetheless, either set of facts would be sufficient to establish a ground for debarment. The Mayer Co., Inc. and Carl A. Mayer, Jr., HUDBCA 81-544-D1, 82-1 BCA ¶15,473; John F. Azzarelli, HUDBCA 82-671-D12, 82-1 BCA ¶15,677. The record does not contain evidence of mitigating factors in regard to Tunkel. No evidence of any steps that Tunkel may have taken as President of URC to prevent a reoccurrence of the acts in question was submitted. In the absence of such evidence, I cannot conclude that Tunkel is presently responsible.

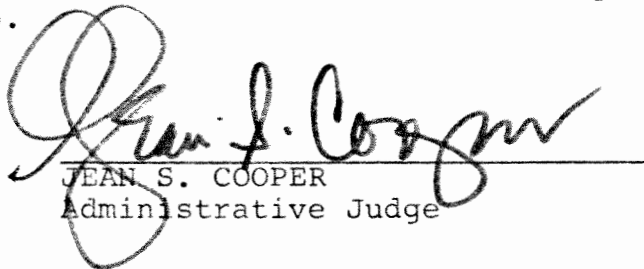
The corporation was convicted of the offense of submitting false statements for the purpose of defrauding HUD in the performance of a public contract. That is a ground for debarment pursuant to 24 C.F.R. §24.6(a)(1). Evidence of the corporation's conviction establishes the ground for its debarment, without requirement of further proof to establish a ground for the sanction. No mitigating evidence was submitted to show why the crimes committed do not pose a serious threat to the viability and sanctity of the Government's procurement program. The fact that additional HUD funds were advanced to URC through the LHRC to complete an ongoing project is not evidence of the present responsibility of the corporation, but of the need to get the project completed. Indeed, those criminal acts seriously undermined the contractual obligation of honest reporting, and were committed for the express purpose of evading a reasonable public and contractual purpose. I find no evidence in the record that Appellants appreciate the seriousness of those criminal acts. Furthermore, no evidence was submitted to indicate that the corporation is being run in such a way that similar acts would not reoccur. I find that the evidence in the record compels debarment of both URC and Tunkel to protect the public and is in the best interests of the Government.

Appellants' brief contains an unsupported statement that the plea entered on behalf of URC and the Pre-Trial Diversion agreement entered into by Tunkel were "in lieu of debarment." Neither the Pre-Trial Diversion agreement nor the judgment accepting the plea give any indication that the Government had agreed not to debar Appellants. I therefore do not credit that defense raised by Appellants.

I find that a period of debarment is warranted and appropriate in the case of both Tunkel and URC. I find little mitigation in the record presented. Considering the seriousness of the corporate crimes, at least as they appear in the record before me, whatever mitigating circumstances exist have already been taken into consideration by the Government because it is only asking for a one-year period of debarment. A period of debarment of one year from this date will be deemed to be sufficient to protect the best interests of the Government.

Conclusion

For the foregoing reasons, Alan Robert Tunkel and Urban Redevelopment Corporation shall be debarred from this date up to and including August 16, 1985.

  
JEAN S. COOPER  
Administrative Judge

August 17, 1984