UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of:	:	
PAUL M. CHEEKS and PAUL CHEEKS ARCHITECTS,	:	HUDBCA No. 84-872-D32 (Docket No. 84-946-DB)
Respondents	:	

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DETERMINATION

Statement of the Case

By letter dated December 21, 1983, Paul M. Cheeks, the Respondent, and his affiliate, Paul Cheeks-Architects (collectively, "Respondents"), were notified by Assistant Secretary Maurice L. Barksdale, that because of information indicating possible irregularities of a serious nature in his business dealings with the Government and his indictment charging him with violations of 18 U.S.C. §§1001, 1503 and 2, Respondents were suspended from participation in HUD programs pursuant to 24 C.F.R. §§24.13(a)(1)(iii) and 24.13(c). In a subsequent letter dated April 2, 1984, Assistant Secretary Barksdale notified the Respondents that their debarment was under consideration because of Cheeks' conviction in the United States District Court for the Northern District of Ohio for violations of 18 U.S.C. §§1001 and 1503. The Respondents were advised that the proposed period of debarment was five years from the date of the suspension on December 21, 1983. The Government has treated notice filed by Owen L. Heggs as counsel on behalf of Cheeks, which was received April 30, 1984, as timely. No separate representation of the

affiliate, Paul Cheeks-Architects, of which Cheeks is President, has been indicated. An identity of interest can be reasonably assumed in the context of this record.

Cheeks has submitted an unsworn statement explaining the circumstances leading to his conviction, and twenty-six letters attesting to his professional competence and his good character. The Government has submitted a brief with documentary evidence consisting only of copies of the notice of proposed debarment, the judgment of conviction, and the indictment. The brief cited 24 C.F.R. §24.6(a)(4), (5), (6), and (9) as causes for the proposed sanction. The Government's Response to Respondent's Submission provided additional argument but no additional evidence.

By letter dated October 25, 1984, the parties had been notified that, absent notice to the contrary, the case would be deemed submitted on the record as it stood on November 2, 1984. However, several of the letters submitted on behalf of Cheeks and the Government's response were submitted thereafter without objection by either party and, therefore, have been included in the record upon which this decision is rendered.

Findings of Fact

On November 9, 1983, Cheeks, while assisted by counsel, pleaded guilty and was convicted of Counts 1 and 4 of a multiple count indictment returned against him and another defendant. The counts to which he pleaded charged him with violations of 18 U.S.C. §1001, fraud against the Government, and 18 U.S.C. §1503, influencing a witness. Cheeks was sentenced to three years imprisonment, the first six months to be served in custody and the balance on probation. He was ordered to make restitution in the amount of $10,948, which approximates the amount he was charged with falsely reporting having paid out. The remaining counts of the indictment against him were dismissed.

The two counts of the indictment to which Cheeks pleaded guilty recite facts which constitute evidence because they are admitted. The first of these counts establishes that, in violation of 18 U.S.C. §1001, on or about January 22, 1982, Cheeks willfully and knowingly made or caused to be made a false statement of material facts in the Schedule of Disbursements for the month of December 1981, of Longwood Cooperative, Inc. (L.C.I.), a non-profit multifamily project subject to a mortgage held by HUD. This monthly schedule was required to be routinely submitted to HUD. Cheeks was Chairman of the Board of Trustees of L.C.I. The false statement of which Cheeks was convicted represented that $4,448 had been disbursed by L.C.I. to [redacted] Horodysky during the month of December, 1981, although Cheeks knew that Horodysky had performed no services for L.C.I. justifying the disbursement and that approximately $4,388 of the $4,488 had been disbursed to Cheeks.

The second count, Count 4, charged that from on or about January 5, 1983, to on or about February 16, 1983, Cheeks, in violation of 18 U.S.C. §1503, attempted to influence, obstruct and impede the due administration of justice in the United States District Court for the Northern District of Ohio, Eastern Division, by having urged, advised, and persuaded Horodysky to give false testimony before the Grand Jury in relation to the false statements charged when he knew that Horodysky had received a subpoena to appear before the Grand Jury inquiring into possible violations of 18 U.S.C. §1001.

Cheeks submitted an unsworn statement, which was signed with his name by his attorney, in opposition to his debarment. He submitted no brief. The statement asserts that Cheeks has been involved with numerous HUD projects over nearly twenty years. He served on the Board of L.C.I. from the early 1970's until 1984. He was elected chairman by the tenants of L.C.I. in 1975. When HUD initiated foreclosure, the L.C.I. board attempted to sell the project to a sympathetic developer. This required a preliminary evaluation of the extent and costs of its rehabilitation. Since L.C.I. could not afford the $25,000 estimated cost of such an undertaking, Cheeks engaged Horodysky, a prior professional associate, who agreed to undertake the project for $10,000 using some of Cheeks' staff. After the evaluation was started and a partial report was submitted for review and direction, Horodysky decided that he would not be able to complete the report. Under the pressure of impending foreclosure, Cheeks completed the study project. He submitted the report to the board of L.C.I., to interested developers, and to HUD. There is no evidence which disputes any of these assertions.

A subsequent FBI investigation questioned the fee for the study. Cheeks contacted Horodysky, who had been contacted by the FBI, and was subsequently indicted for the false reports of payments to Horodysky and for attempting to influence Horodysky's testimony before a Grand Jury. Cheeks also represents in this unsworn statement that he pleaded guilty to the two counts of the indictment to avoid the exposure to a much more severe sentence after a trial if it resulted in a guilty verdict. He admits that he signed the month-end financial statement for L.C.I. knowing that Horodysky was being paid for a job he was not performing and that he now realizes that he should have gone to the board of L.C.I. and requested permission for his firm to complete the work. He admits meeting with Horodysky but denies attempting to influence his testimony. He also claims that he was not charged with receiving any money for doing the report, although the indictment recites that he received most of the money in connection with the conspiracy, and he denies that he received any money for doing the report.

In addition to his unsworn statement, Cheeks submitted twenty-six letters from a broad spectrum of sources including public officials and both present and former professional colleagues and clients. Several, although on different letterheads, contain nearly identical texts and may have been prepared in draft by the Respondent or his attorney. Most of the letters appear to have been prepared in connection with an application for reinstatement of Cheek's license to practice architecture. I find that in most instances, though not all letters make specific reference to Respondent's problems, the authors of the letters were generally aware of the Respondent's difficulties and of his conviction, which would have led to the revocation of his license to practice architecture.

The submitted letters are predictably general in nature and are not sworn statements. Many recite prior long-term and relatively close professional relationships spanning ten to twenty years. The number of these letters and their general tone of warmth, support, seriousness of purpose, and specificity regarding prior relationships convey an impression that the Respondent has been held in high regard for his professional ability and his integrity in the architectural and related business community, and I so find. They cite Cheeks' substantial and varied record of public service. They also indicate that the respect for Cheeks has been generally maintained, notwithstanding knowledge on the part of the writers of the difficulties which resulted in the revocation of his license to practice, and I so find.

Discussion

At the time of the offenses of which he was convicted, Cheeks was chairman of the board of trustees of a multifamily cooperative apartment project whose mortgage was held by HUD and which was obligated to account to HUD with monthly financial statements. He had served in this position without compensation for many years. Cheeks was also an architect who had been involved with numerous HUD-assisted projects throughout his career. It is not contested that under such circumstances he was a "contractor or grantee" within the definition of 24 C.F.R. §24.4(f). Neither is it disputed on this record that Paul Checks - Architects, the architectural firm which bears Respondent's name and of which Cheeks was President, is an "affiliate" of Cheeks, within the definition of 24 C.F.R. §24.4(d).

A written record prescribed by 24 C.F.R. §24.5(c)(2) in cases involving convictions imposes severe constraints upon an evaluation of the necessity for the term of debarment proposed by the Government. Because Cheeks has pleaded guilty and been convicted of serious charges which I find adversely reflect upon his responsibility, a period of debarment is clearly necessary in the public interest. The offenses described in the indictment and to which the Respondent pleaded guilty, constitute cause for

debarment under 24 C.F.R. 24.6(a)(4), (5), (6) and (9) cited by the Government.

The Government has chosen to rely exclusively upon evidence relating to the Respondent's present responsibility which consists of no more than the bare recitals in legalistic language of the two counts of the indictment to which Respondent pleaded guilty. There is no investigative report, which must have been available; there are no affidavits, or other supporting evidence to establish egregious background circumstances which would necessitate a five year debarment which is the maximum finite debarment period prescribed by applicable HUD regulations. Nor is Cheeks' unsworn statement, which was signed and submitted on his behalf by his lawyer, credible evidence which is entitled to substantial weight. A written record such as this offers no opportunity for cross-examination or evaluation of the demeanor of Cheeks or any other witness. Thus, Cheeks' statement is the only indication of the background facts available for evaluation of Cheeks present responsibility against the adverse inference to be drawn from proof of his past criminal conduct. Such an evaluation is critical to a reliable and reasonably fair assessment of the period of debarment which the public interest requires.

I find Cheeks' description of the circumstances which led to his indictment and plea generally plausible, even though his apparent denial that he received payment or that he actually attempted to influence the witness creates a credibility problem because it conflicts with his plea. The circumstances described are mitigating in effect to the extent that, if believed, they suggest a less than worst case of intentional and unreconstructed criminality which would necessitate or justify a maximum period of debarment. Cheeks' assertion in his statement that the L.C.I. Board and Government got the report that Horodysky was reported to have been paid for because Cheeks completed the job under the pressure of impending foreclosure stands uncontradicted. There is no evidence in this record that it was improper for Cheeks to have completed that undertaking. It may be inferred that the money ultimately went to Cheeks or his firm, rather than Horodysky as reported, to pay the costs for the preparation of the report that Cheeks rather than Horodysky prepared and which Cheeks claimed would have cost more than the $10,000 fee that Horodysky agreed to accept. If, as Cheeks asserts, L.C.I. got the services for which it contracted at the price to which it committed, and Respondent's firm performed those services in larger measure than planned as a stopgap measure without reporting the change, the violations take on a technical character which differs significantly from a corrupt conspiracy fraudulently to take payment for services that were not performed.

Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976) specifically mandates consideration, among other things, of

mitigating circumstances including those surrounding the commission of the offense. Information such as that included in Cheeks' statement give some perspective on an otherwise barren record susceptible of a range of hypotheses. Such information is necessary to a fair evaluation of the inference to be drawn from evidence of criminal conduct as to how long the lack of responsibility of the perpetrator is likely to continue. The strength of that inference dictates how long he should be precluded from doing business with the Government.

I have not credited any portions of Cheeks' statement which deny what Cheeks admitted by his plea of guilty. Because the narrative is plausible, however, and uncontradicted in most respects, I attribute enough credibility to it to conclude that a maximum term of debarment is not required. I recognize, however, that the statement contains little affirmative assurance that Cheeks understands the requirements of the statutes and the administrative rules and regulations and that he will comply with them in the future. The letters of recommendation which have been submitted provide some indication of character and responsibility. They are unsworn statements, but they are some evidence, on a written record such as this, of Cheeks' standing in the community and the evaluation of his peers of his future business responsibility.

The applicable HUD 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, supra; 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. 927, 949 (D. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967).

The principal issues related to this proposed debarment, therefore, are whether the Respondent's past conduct establishes 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. 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 offenses for which Respondent has been convicted as well as the circumstance surrounding the conviction must be evaluated in determining whether the Respondent lacks present responsibility. A debarment for a maximum finite five year period proposed by the Government 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. I am persuaded on this record that, giving credit for the approximately one year period during which the Respondent has been suspended, a prospective two year period of debarment is sufficient to protect the public against the risk of business dealings with this Respondent. See David L. Hamilton, HUDALJ No. 82-827-DB (Aug. 2, 1982).

Conclusion

Respondent and his affiliate, Paul Cheeks-Architects, shall be debarred until December 21, 1986, credit having been given for the period during which they have been suspended.

EDWARD TERHUNE MILLER
Administrative Judge

December 20, 1984