

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

In the Matters of:

MILO L. PIKE,
PIKE INDUSTRIES, INC.,
and BRUCE A. HOMER,

Respondents

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:
: HUDBCA No. 84-885-D41 and
: 84-886-D42
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For the Government

DETERMINATION

Statement of the Case

By letters dated June 18, 1984, Respondents Milo L. Pike, Pike Industries, Inc. and Bruce A. Homer were notified by the U.S. Department of Housing and Urban Development ("HUD") that it intended to debar them from participation in Departmental programs for a period of three years based on each of their convictions of violations of 15 U.S.C. §1 and 18 U.S.C. §1341. Respondents were temporarily suspended pending determination of their proposed debarments.

Respondents filed timely requests for an opportunity to submit documentary evidence and briefs on their proposed debarments pursuant to 24 C.F.R. §24.5(c)(2). By subsequent motion and order, the cases were consolidated for decision. This Determination is based upon the briefs and documentary evidence submitted by the parties in support of their respective positions.

Findings of Fact

1. Pike Industries, Inc. is a closely-held New Hampshire corporation engaged in highway construction. Milo L. Pike is the President of Pike Industries, Inc. Bruce A. Homer is the Executive Vice President of Pike Industries, Inc. (Govt. Exhs. E, F; Resp. Exh. 2.)

2. Pike Industries, Inc. performed three contracts funded by Community Development Block Grants ("CDBG") from HUD, CDBG Nos. ██████-33-0005, ██████-33-0001, and ██████-33-0001, awarded between August 1, 1983 and September 15, 1984 (Govt. Exh. G).

3. Between 1976 and 1982, Respondents engaged in a conspiracy with Frank W. Whitcomb Construction Corporation ("Whitcomb") to allocate between Pike Industries and Frank W. Whitcomb Construction Company federally assisted highway construction contracts by submitting collusive, rigged bids on those contracts. The contracts were funded in part by the Federal Highway Administration under the Federal-Aid Highway Act, 23 U.S.C. §101 et seq., together with the Vermont Transportation Agency. (Govt. Exh. E, F.)

4. Respondents colluded with Whitcomb to designate which company would be the successful low bidder on the contracts let for bid, and submitted intentionally high or low bids to ensure that the designated company would be awarded the contract at stake as the low bidder. The bid proposals submitted contained false statements. (Govt. Exhs. E, F.)

5. Two of the highway construction contracts for which Respondents submitted rigged, collusive bids were Bolton-Richmond IR 89-2, awarded to Whitcomb on May 6, 1981; and Essex-Jericho-Underhill FR 030-1, awarded to Pike Industries, Inc., on June 8, 1981. (Govt. Exh. F.) Documents used to further the conspiracy to submit rigged bids on these two contracts were sent via the United States Postal Service. (Govt. Exhs. E, F.)

6. On July 14, 1983, a Grand Jury convened for the United States District Court, District of Vermont, returned a three-count indictment against Respondents, charging them with violations of 15 U.S.C. §1 (the Sherman Act) for conspiring to unreasonably restrain interstate trade and commerce, and 18 U.S.C. §1341 (mail fraud) (Govt. Exhs. E, F).

7. After a trial, Respondents were found guilty on all three counts in the indictment. Pike Industries was sentenced on April 13, 1984 to pay a fine of \$250,000. Milo Pike was sentenced on April 13, 1984 to serve three years probation in lieu of all but 30 days of imprisonment and was fined \$25,000. Bruce Homer was sentenced on April 13, 1984 to three years probation and fined \$25,000. (Govt. Exhs. C, D, E.)

8. In 1984, Pike Industries, Inc. prepared an eight-page document entitled "Guidelines for Compliance with the Anti-Trust Laws", which outlined in detail the requirements of state and Federal anti-trust laws and the consequences of violations of those laws. The document cautioned about conduct that could possibly be construed as violations of those laws. The acknowledgment form on page 8 of the Guidelines indicated that employees of Pike Industries, Inc. received the Guidelines in May 1984, had to sign for their receipt, and would be disciplined for violation of the Guidelines. (Resp. Exh. 3.)

9. On May 11, 1984, the Federal Highway Administration proposed the debarment of Respondents for a period of two years based on their convictions (Resp. Exh. 4, 5).

10. On September 11, 1984, the Department of the Army debarred Pike Industries, Inc. Government-wide until June 24, 1986, a period of two years from the date the debarment was proposed by the Army, based on the conviction of Pike Industries, Inc. The debarment decision issued by the Army indicated that it did not debar Pike Industries, Inc. for the maximum period of three years because of the lapse of time since the crimes were committed, mitigating circumstances presented concerning the corporation, and implementation of procedures designed to prevent future recurrence of unlawful activity. (Resp. Exh. A.)

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 not to be used for punitive purposes but for protecting the public interest. 24 C.F.R. §24.5(a). Responsibility is a term of art in Government contract law. It has been defined to include not only the ability to satisfactorily complete a contract, but the integrity and honesty of the contractor or grantee. 49 Comp. Gen. 139 (1969).

Pike Industries, Inc., Bruce Homer, and Milo Pike are all "contractors or grantees" within the meaning of the Departmental regulation applicable to debarment because they are federally assisted construction contractors, receiving HUD funds indirectly through Community Development Block Grants. 24 C.F.R. §24.4(f). Conviction under the Federal Antitrust Statutes arising out of the submission of bids or proposals is a ground for debarment, 24 C.F.R. §24.6(a)(2), as is fraudulent use of the mail in connection with falsification of records or any other offense indicating a lack of business integrity or honesty, 24 C.F.R. §24.6(a)(9). Respondents' convictions are cause for debarment on these grounds.

Nonetheless, even if cause for debarment has been established, debarment is not automatically mandated. All mitigating factors are to be considered in determining whether

and for how long debarment is warranted. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976); 24 C.F.R. §24.6(b)(1). The test for the necessity of debarment is the present responsibility of the contractor or grantee. Roemer v. Hoffman, supra. However, present lack of responsibility can be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957).

I find that Respondents have exhibited a serious lack of responsibility by engaging in a collusive system to rig construction contract bids over a six-year period. I cannot agree with Respondents' assertion that their involvement in the bid rigging was "limited." Respondents' involvement in seven million dollars worth of contracts obtained through fraudulent bidding practices over a six-year period is hardly evidence of a limited involvement. The substantial fines levied upon Respondents indicate the seriousness with which the sentencing court viewed their conduct.

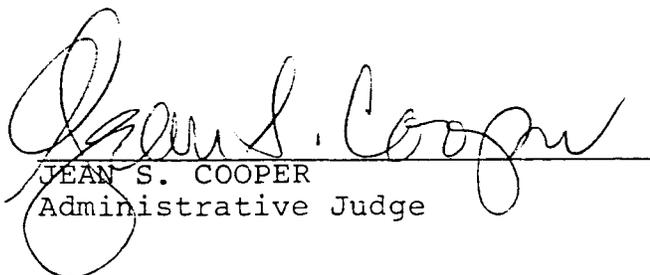
I remain concerned with Respondents' rather lackadaisical attitude toward their activities, at least as expressed in their written submission. Blame is attributed to their partners in collusion and only incidentally to themselves. Respondents' conduct struck at the very heart of the public procurement system because it removed the elements of competition and cost containment. To conspire to artificially inflate bids on public contracts is an economic and social affront to the taxpaying public and the state and Federal governments charged with administration of an effect and fair procurement policy. See In the Matter of REA Construction, HUDBCA 81-550-D6 at 6. It is the American taxpayer who bears the financial burden of a non-competitive, rigged bidding process. See In the Matter of Norman Wilhelm, HUDBCA 82-679-D15 at 4.

The most heartening evidence in the record is the preparation and circulation of the "Guidelines for Compliance with the Anti-trust Laws." I find that document to be an excellent tool for rehabilitating a corporation infected by a belief that the antitrust laws were written for others. In fact, the Guidelines provided to every employee of the corporation are the best evidence in the record that Pike Industries, Inc. is striving to become a responsible contractor. A corporation acts through its officers. Pike is the President and chief executive officer of Pike Industries, Inc. Homer is his second-in-command. Therefore, I attribute the positive nature of this evidence to Pike and Homer personally, as well. If present responsibility is indeed the appropriate test for debarment, I believe that Respondents have made progress in reestablishing their institutional and personal integrity. The Guidelines, and what they communicate to the corporation's employees and the outside world, counterbalance to a certain extent the concerns raised by the tone of Respondents' submission.

Respondents have been debarred Government-wide for a period of two years as a result of the action taken by the Department of the Army. On balance, I cannot find that HUD and the public it serves need more than a two-year period of debarment to protect their interests. Respondents have operated under their Guidelines for a year. In another year, they should be fully responsible. Debarment is a prospective sanction. Respondents have been suspended since June 18, 1984, and I find it appropriate to give credit for the suspension period already served. A period of debarment from this date up to and including June 17, 1986 is warranted.

Conclusion

For the foregoing reasons, MILO L. PIKE, PIKE INDUSTRIES, INC. AND BRUCE A. HOMER, shall be debarred from this date up to and including June 17, 1986.


JEAN S. COOPER
Administrative Judge

Issued at Washington, D.C.
June 27, 1985