UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of: SARGENT ELECTRIC COMPANY, FREDERICK B. SARGENT, and RALPH D. VRYENHOEK, Respondents	HUDBCA No. 84-895-D47 (Docket No. 84-967-DB)

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DETERMINATION

Statement of the Case

These consolidated previous participation review and proposed debarment actions were initiated by a notice of July 12, 1984, to the Chairman of Sargent Electric Company ("the company"). The notice advised the company that approval of its Form 2530 Certificate relating to its previous participation in HUD programs was being withheld by HUD's Multifamily Participation Review Committee ("MPRC") pursuant to 24 C.F.R. §200.229 pending a determination by the Assistant Secretary for Public and Indian Housing whether to propose the debarment of the company and two of its principals (collectively, the "Respondents") who had been convicted of bid rigging under the Sherman Act, 15 U.S.C. §1, in the United States District Court for the Western District of Pennsylvania.

When the Assistant Secretary gave notice of the proposed debarment of the company and Frederick B. Sargent ("Sargent"), its Vice-Chairman, the MPRC changed its action to a disapproval pursuant to 24 C.F.R. §§200.228-200.230. The company appealed the withholding and disapproval actions by the MPRC as allowed by 24 C.F.R. §200.241. By letter dated September 5, 1984, counsel for the company and Sargent requested a hearing on the proposed debarment and requested further that it be consolidated with the hearing on the action by the MPRC. By a subsequent notice the Assistant Secretary proposed to debar Ralph D. Vryenhoek, the President of the company. The record does not disclose a specific request by Vryenhoek for a hearing. The Respondents were temporarily suspended pending the outcome of the administrative proceedings against them.

The debarment action was not assigned a separate docket number when it was consolidated with the appeal from the adverse participation clearance determinations. The Government consented to a consolidation of these actions for all purposes, and a hearing was conducted in Pittsburgh, Pennsylvania on October 10 and 11, 1984. Neither Sargent nor Vryenhoek, (collectively, the "officers") appeared at the hearing, although the administrative sanctions against them were contested, and neither presented a defense apart from the company's. Since the officers are similarly situated for the purposes of this determination, and since I find there is no prejudice to the parties, I have treated Vryenhoek as a respondent in the context of this proceeding. The officers were represented by counsel for the company.

The Hearing Officer's responsibilities related to the request for hearing on the MPRC's action are limited to a determination of the facts and the law relevant to the issues to be reported to the MPRC and to the principals as prescribed by 24 C.F.R. §200.245. The Hearing Officer's responsibilities related to the debarment action are defined by 24 C.F.R., Part 24. The limitation of the debarment record to the submission of written briefs and documentary evidence has been waived.

Findings of Fact

Sargent Electric is a Pennsylvania corporation which is an electrical construction contractor. It was the lowest responsive bidder on an electrical construction contract for modernization of McKees Rock Terrace, a public housing project operated by the Housing Authority of Allegheny County, Pennsylvania. Funding for the modernization of the project was provided by HUD by means of an Annual Contributions Contract (ACC).

As the successful bidder on the McKees Rock Terrace project, a public housing modernization project assisted by HUD, Sargent Electric Company and its principals were required to obtain clearance of their participation in the project through the previous participation review procedure as provided by HUD

regulations. 24 C.F.R., Subpart H, §200.217. The Form 2530 certificate submitted by the company and its principals in accordance with this procedure disclosed their convictions under 15 U.S.C. §1. (Exh. G-1.)

In its Form 2530 Certificate submitted to HUD for review and participation clearance as of June 1, 1984, Sargent Electric Company declared that it would serve as the prime contractor on the McKees Rocks Terrace project. It also disclosed that Vryenhoek was President and a Director, and Sargent was Vice-Chairman, a Director, and a shareholder of the company. It identified ten previous projects the company had performed for the Housing Authority of the City of Pittsburgh and one project previously performed for the Allegheny County Housing Authority. These projects were assisted under HUD multifamily housing programs. (Exh. G-1.)

On March 7, 1984, after a jury trial, Sargent Electric Company, Sargent, and Vryenhoek were convicted along with other defendants of bid rigging in violation of the Sherman Act, 15 U.S.C. §1. Judgment of Conviction was entered and the company was sentenced to pay a fine of $1,000,000 and one-seventh of the cost of prosecution on or before May 21, 1984. Sargent and Vryenhoek were each sentenced to two years of imprisonment, three months to be served in confinement, the remainder suspended, subject to four years probation, a $50,000 fine, one-seventh of the costs of prosecution, and compliance with all local, state and federal laws. The Respondents' convictions have been appealed (Exhs. G-1, G-4, G-5; Tr. 34).

The single count indictment of which the company and the officers were convicted charged them, five other electrical construction contractors, and three other individual defendants engaged in the electrical construction business with a conspiratorial bid rigging scheme to allocate among themselves electrical construction projects at the Western Pennsylvania Works of the United States Steel Corporation ("U.S. Steel") from 1974 to 1981. The scheme involved fixing bid prices, which were expected and required to be competitive, and rigging bids in order to designate the lowest bidding firm and the prices at which bids would be submitted.

By letter dated July 12, 1984, Bruce J. Weichmann, Executive Secretary of the MPRC, notified Edward Sargent, Chairman, Sargent Electric Company, that, after review of the Form 2530 Previous Participation Certificate filed by Sargent Electric and its principals for participation in the McKees Rock Terrace project (PA 6-2), the MPRC had voted to withhold approval of participation by the company and its principals pending a review by the Assistant Secretary for Public and Indian Housing for possible debarment action under 24 C.F.R., Part 24. The recent convictions of Sargent Electric and its two officers, under the Sherman Act, 15 U.S.C. §1, were specifically cited. The letter

contained an advice of the rights of appeal under 24 C.F.R., Part 200. (Exh. G-1, G-2.) In response, counsel for the company, by letter dated July 19, 1984, requested an administrative hearing in regard to the decision. A Notice of Docketing and Order was issued by the undersigned on August 2, 1984.

By letter dated August 27, 1984, the Assistant Secretary for Public and Indian Housing, Warren T. Lindquist, gave notice that the Department proposed to debar Sargent and the company under 24 C.F.R. §§24.6(a)(2) and (4) because of their convictions. Sargent and the company were also notified of their temporary suspension from participation in HUD programs pending determination of the debarment action. (Exh. G-6; Tr. 116.) By a similar letter dated September 24, 1984, Vryenhoek was advised that the Department proposed to debar him for five years from the date of the notice and that he was also temporarily suspended from participation in HUD programs pending determination of the debarment action (Exh. G-7).

By order dated September 14, 1984, Edward Sargent was dismissed from the Form 2530 case, as an erroneously named party to the actions by the MPRC. By the same order, with the consent of the parties, the debarment action against Sargent Electric Company and its two officers was consolidated for all purposes with the appeal from the actions of the MPRC.

By letter also dated September 24, 1984, the Executive Secretary of the MPRC advised Edward Sargent, as Chairman of Sargent Electric Company, that, as a result of the Assistant Secretary's determination to consider debarment of Sargent and the company, the participation of the company and its officers in the McKees Rock Terrace project was disapproved under applicable Form 2530 procedures (Exh. G-8).

After the withholding action by the MPRC, the convictions of the company and the officers and certain related matters were reviewed on behalf of the Assistant Secretary for Public and Indian Housing by Jon Will Pitts, Director of the Participation and Compliance Division, Office of Management, under the Assistant Secretary for Housing--Federal Housing Commissioner and his staff (Tr. 40-41). Pitts was also a member of the MPRC (Exh. G-2).

In making the determination to recommend to the Assistant Secretary the debarment of the company and its two officers, Pitts testified that he considered only the fact of the convictions and the nature of the crime as described in the indictment, including the duration of the conspiracy and the necessarily conscious effort of high company officials to accomplish it. Pitts did not ask his staff to obtain any information other than copies of the indictment and judgments of conviction. There was no investigative report which they considered. The actual investigation upon which Pitts relied had

been concluded with a memorandum from the HUD field office to the MPRC dated June 19, 1984. (Resp. Exh. C; Tr. 36-38, 42-43, 50-58, 73-74, 76-77, 92-97, 100-03, 107-08.)

Pitts was aware from the Form 2530 certificate that the company had performed eleven contracts on HUD-assisted projects. He had been advised by the HUD field office that the company had "performed their contract requirements in a range of very good to excellent in all areas of operation." He did not investigate the characteristics or experiences of the individual projects. Pitts attributed no importance to the fact that the company had done approximately $2,000,000 of HUD-assisted work since 1981. He testified, however, that the company's performance record involving HUD-assisted projects of which he was aware caused him to recommend a five-year debarment rather than an indefinite debarment period of not less than five years. (Exh. G-1; Resp. Exh. C; Tr. 37, 61-66, 69-72, 94-96.)

Under questioning by Respondents' counsel Pitts also testified that the fact that the convicted officers might have had no involvement with the bidding, estimating, completion, or supervision of HUD-sponsored jobs would not have affected his decision. He did not attribute any significance to the allegedly favorable view of U.S. Steel, the victim of the bid rigging conspiracy, toward the company, or the small percentage of the company's contracts actually shown to be involved in the conspiracy, or the suggestion that the actual economic impact of the conspiracy might have been small. Pitts and his staff did not consider the company's financial responsibility or its competitive experience in relation to other bidders on HUD-assisted projects. He was not aware that the company had signed the required anti-collusion statement accompanying submission of all bids for HUD work, or that there was such a requirement. He had no knowledge of any price-fixing involvement of the company on any HUD-sponsored job (Tr. 72-76, 79-81, 84, 85, 94-96, 119).

It was not disputed that Sargent Electric Company is a competent electrical construction contractor with an excellent and well recognized contract performance record (Resp. Exh. C; Tr. 64, 69-70, 140-42, 164-67, 170-72, 174-77). It was not disputed that Sargent Electric Company's after-tax profit of approximately 2.17 percent during the year in which the bid rigging occurred was a reasonable level of profit in the industry; that the percentage of the company's gross volume of business involved in the conspiracy was approximately six percent; or that nearly half of those contracts had resulted in losses to the company (Resp. Exh. F; Tr. 73-74, 128-29, 133-36). There is no adverse information in the record regarding the performance of the eleven identified HUD-assisted projects on which the company performed contracts after 1981. The Government has not disputed Respondents' representation that the company's minimal involvement with HUD-assisted work prior to 1981

consisted only of one contract late in 1980 and a small contract for $28,000 somewhat earlier (Tr. 16-17). Since the company has been a frequent bidder on HUD projects and has completed a substantial number of such projects in the past, its suspended status and the restrictions which would be placed upon its activities were it to be debarred would have a significantly adverse impact upon the conduct of its business (Tr. 82-85).

Sargent Electric Company is a relatively small company of two hundred employees or fewer (Tr. 158-59). It appears to be closely held and managed in significant part by persons with family ties, as the coincidence of the company's name and the surname of both its Chairman and Vice-Chairman suggest. (Exh. G-1, G-6, G-7, G-8; Resp. Exh. E; Tr. 137-38). The company's "service maintenance division" consists of about thirty people and at relevant times has performed all of the company's work related to HUD-assisted projects. The division has been managed for approximately seven years by Albert G. Moletz in an autonomous manner and without actual involvement by either Sargent or Vryenhoek in its HUD-sponsored work. Although Moletz was involved with the bidding of the U.S. Steel contracts during the time of the conspiracy, he has denied under oath any involvement or knowledge of the bid rigging conspiracy. Moletz testified that if he currently became aware of bid rigging within the company, he would report it to Vryenhoek, his immediate supervisor, and would feel responsible to report it outside the company. (Tr. 144-49, 155-59.)

The "Pittsburgh industrial division", which was involved in the bid rigging conspiracy, has been managed by different officers and has "absolutely nothing" to do with HUD-sponsored projects (Tr. 126-27, 144-49, 151-52, 156-59, 159-63). Vryenhoek is the Chief Executive Officer of the electrical construction branch of the company's business and, although he is not directly involved with the service maintenance division, he is ultimately responsible for that division's actions (Tr. 138). Sargent was once the chief executive officer of Sargent Electric Company, but since June 1982 has had overall responsibility for the management of the "Gray communications division" involved with telephones, and apparently no further involvement with the company's electrical construction business (Tr. 139, 163).

Discussion

HUD's Previous Participation Review Procedures Applies to Respondents

Sargent Electric Company's competence and reliability as an electrical contractor is not in dispute. It has performed repairs and other electrical work under contract on HUD-assisted public housing projects for the Allegheny County Housing Authority and the Pittsburgh Housing Authority over an extensive period of time.

Under the applicable Participation and Compliance Requirements specified in 24 C.F.R., Subpart H, the MPRC is charged with implementing HUD's policy of insuring under uniform standards that participants in its housing programs are responsible individuals and organizations who will honor their legal, financial and contractual obligations. Under the definition in 24 C.F.R. §200.215(e)(1) and (2) a "principal" includes "[a]n individual, ... [or] corporation ... proposing to participate, or participating, in a project as ... prime contractor ...." and, if the principal is a private corporation, the directors and the officers directly responsible to the Board of Directors. The MPRC is obligated to examine the principals' past performance as well as other aspects of their records as disclosed in a Form 2530 previous participation certificate. 24 C.F.R. §200.210. The content of such a certificate is specified in 24 C.F.R. §200.219, and includes the identification of all "principals" and a disclosure of all past participation experience in HUD programs, any criminal conviction, pending indictments, and relevant administrative sanctions.

Acceptance of the company's low bid on the HUD-assisted McKees Rocks Terrace modernization project for the Allegheny County Housing Authority was properly subjected to review and clearance under HUD's Previous Participation Review procedures. 24 C.F.R. §200.213. As a corporation, it necessarily acts through its officers and directors, who are among its principals whose previous participation is also subject to review and clearance under 24 C.F.R., Subpart H.

Previous Participation Clearance Was Lawfully Withheld

The MPRC, after review of the company's Form 2530 certificate, is authorized to withhold approval of a principal for a "period not to exceed 120 days when such action is deemed necessary to secure additional information upon which to base a final action including a determination as to whether a suspension or debarment action will be taken." 24 C.F.R. §200.229. By its letter dated July 12, 1984, the MPRC withheld approval of Sargent Electric Company's participation in the McKees Rock Terrace project because of the disclosure that the company and its two officers had been convicted under the Sherman Act. The withholding period did not exceed the authorized 120 days, because the withheld approval was superseded by a disapproval, of which notice was given by the MPRC's letter dated September 24, 1984. Although the MPRC's own investigation was completed by approximately June 19, 1984, the MPRC was advised during that time that approval was withheld that the Assistant Secretary for Public and Indian Housing would propose the Respondents' suspension and debarment. Such information is explicitly within the scope of additional information which would justify withholding approval under the applicable regulation. The regulation does not require that any other additional or particular investigation be conducted during the period when

approval is withheld. The MPRC, therefore, acted in compliance with 24 C.F.R. §200.229 when it withheld approval of the company for less than 120 days, pending the Assistant Secretary's decision.

MPRC's Disapproval of Sargent Electric Company's Participation Was Authorized

When the MPRC received notice that the Assistant Secretary would propose Respondents' debarment and that the Respondents were temporarily suspended from participation in HUD programs pending determination of the debarment action, it converted the withheld approval to a disapproval of the company's participation in the McKees Rock Terrace project. That timely action was mandated by 24 C.F.R. §200.230(a), which requires disapproval of the requested clearance if a principal has been suspended, debarred, or otherwise restricted by HUD under 24 C.F.R., Part 24. The MPRC's disapproval action, therefore, was proper, provided that the Assistant Secretary's actions suspending the company and proposing its debarment are sustained.

Administrative Sanctions Are Not Prevented by Appeal of Convictions on Which They Are Based

The fact that the Respondents' convictions have been appealed does not affect the validity or propriety of the administrative sanctions imposed to protect the public interest in a case such as this. See Sanford A. Prudoff, HUDBCA 81-692-D34 (Oct. 23, 1981). There is no presumption of invalidity which attends a relevant criminal conviction while it is being appealed. While the appeal is pending, there nevertheless is the record of a conviction, as in this case, based upon evidence which has convinced a jury of the Respondents' guilt beyond a reasonable doubt. That standard in the criminal action is more stringent than the standard which applies to these administrative sanctions intended to protect the public interest. Moreover, the applicable regulations provide a remedial procedure for a debarred contractor to obtain reinstatement if the conviction on appeal is subsequently invalidated. 24 C.F.R. §24.11(c).

Respondents' Suspension Was Authorized

It is not disputed that the company is a "contractor or grantee" as defined in 24 C.F.R. §24.4(f). It has performed electrical construction contracts on HUD-assisted public housing projects, and, if it were awarded the McKees Rock Terrace contract as low bidder, it would be an indirect recipient of HUD funds through the responsible housing authority. It is also not disputed that the convicted officers of the company, as its agents are "contractors or grantees" as defined in 24 C.F.R. §24.4(f).

The Government properly relied upon 24 C.F.R. §24.13(c) as cause for the Respondents' temporary suspension pending resolution of the debarment action. That section provides, in relevant part:

> An outstanding indictment of a contractor or grantee, ... is adequate evidence of suspected criminal conduct and may be the basis for imposition of a suspension. Conviction of a contractor or grantee is adequate evidence to warrant imposition of a suspension pending debarment.

The Government had reliable documentation of the Respondents' respective convictions. The crime underlying the convictions was the serious and manifestly non-responsible offense of bid rigging in violation of the Sherman Act. The Assistant Secretary acted accordingly, recognizing the risk to the Government of dealing with contractors when such adequate evidence of nonresponsibility exists. Since the suspension of the company and its two principals was appropriate under 24.13(c), I need not decide whether the suspension would also have been justified under 24 C.F.R. §24.13(a)(1)(i) or §24.18(a)(2), which were also relied upon by the Government.

A Five Year Debarment of the Respondents Is in the Public Interest

The applicable HUD regulations state that the purpose of debarment is the protection of the public interest by 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 ultimate issues related to this proposed debarment are whether the past bid rigging involvement of the company and the two officers establishes by inference such a lack of present responsibility as to require the debarment of the company and/or the officers 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 of time which is based upon projected business risk. *Roemer* v. *Hoffman*, *supra*; *Stanko Packing Company, Inc.* v. *Bergland*, *supra*. Any mitigating

circumstances affecting responsibility must be considered. Roemer v. Hoffman, supra. Therefore, debarment would be inappropriate if the affected participants can demonstrate that, notwithstanding any past nonresponsible conduct, they no longer constitute a business risk to the Government. 24 C.F.R. §§24.0 and 24.6(b)(1).

The convictions of the Respondents under the single count indictment were established by documentary proof and were not in dispute. The notices of proposed debarment transmitted to the Respondents by the Assistant Secretary referred to causes for debarment, based on the convictions, under 24 C.F.R. §§24.6(a)(2) and (4), but not §24.6(a)(1), which was cited for the first time in the Government's brief. That brief does not refer to 24 C.F.R. §24.6(a)(4). This omission suggests that the general cause was abandoned in favor of the more specific cause under 24 C.F.R. §24.6(a)(2) readily establishable by proof of the bid rigging conviction. Since there has been no notice by the Assistant Secretary citing 24 C.F.R. §24.6(a)(1) as cause for debarment, this ground is improperly before me and cannot be considered. See Samuel T. Isaac & Assoc., HUDBCA 80-452-M2, 80-485-D29 (Ruling on Appellants' Motion To Strike, Mar. 3, 1981); Arthur H. Padula, HUDBCA 78-284-D30 (June 27, 1979); Leslie J. Hadden, HUDBCA 77-238-D59 (Sept. 25, 1978).

The Government contends that "bid rigging [is] a serious offense going to the very heart of HUD's requirements for competitive bidding in procurement activities." (Govt. Brief at 4.) See Norman D. Wilhelm, HUDBCA 82-679-D15, 82-2 BCA ¶16,002; cf. Rea Constr. Co., HUDBCA 81-550-D6, 83-1 BCA ¶16,380. The convictions of the Respondents under the Sherman Act for the inherently serious misconduct of bid rigging clearly manifest a lack of responsibility under applicable law, and provide cause for their debarment. I must decide, therefore, whether the evidence submitted by the Respondents in mitigation so negates the inference of a continuing lack of responsibility that the proposed five year debarment period should be reduced. The Government contends that, since the determination of projected business risk is inherently speculative, an Assistant Secretary should be allowed reasonable administrative discretion in making this projection, so long as the period of debarment proposed is in the best interests of the Government and is commensurate with the seriousness of the offense or violation. See Larry W. Smith, HUDBCA 81-620-D32 at 4. The Assistant Secretary's determination is significant, but he did not have before him the record as it has been developed at the hearing.

The Government's only witness, Jon Will Pitts, acting on behalf of the Assistant Secretary for Public and Indian Housing, relied almost exclusively upon the Respondents' Sherman Act convictions for bid rigging as cause for the five-year debarment of the company and its officers. The conduct revealed in the indictment does reflect a serious lack of responsibility on the

part of the perpetrators of the offenses charged. The nature of these past acts supports a strong inference that the lack of responsibility would be likely to continue, and that HUD would need protection from doing business with such potential participants in its programs for a period of not less than five years. Pitts, who considered the offenses egregious, obviously drew that inference on behalf of the Assistant Secretary.

The company's record of apparently satisfactory previous participation disclosed by the Form 2530 certificate caused Pitts to limit the debarment period to the maximum permissible finite term of five years. Otherwise, Pitts did not look beyond the documentary evidence comprised of the indictment and the court's judgment of conviction in making his assessment and recommendation. There is no record that the company submitted any evidence of mitigating circumstances to the MPRC while approval of the company's participation was being withheld. Had any such evidence been produced, it could also have been made available to the Assistant Secretary, because Pitts, in his capacity as Director of the Participation and Compliance Division, was both a member of the MPRC and the Assistant Secretary's designee who was responsible for recommending the Respondents' suspension and debarment. The Respondents, however, have now had an adequate opportunity to present such information in mitigation at the consolidated de novo hearing which has produced the record upon which this determination has been made.

Pitts testified that, for the most part, he considered the evidence that the Respondents contended should be considered in mitigation to be irrelevant and that it would not have affected his decision to recommend the Respondents' debarment. Consideration of information in mitigation is mandated by Roemer v. Hoffman, supra. I find on the record before me that the evidence the Respondents have presented does not refute the compelling inference stemming from the serious nature of the bid rigging conviction described in the indictment. I find that the Respondents, since their convictions, have not been and are unlikely to be responsible contractors qualified to do business with the Government in less than approximately five years from the dates of their respective notices. I recognize that the company has performed a substantial amount of HUD assisted electrical construction work under contract since the bid rigging conspiracy allegedly terminated in 1981. However, that fact does not, in relation to the Respondent's present and future responsibility, outweigh the total lack of evidence of remedial action by the company to purge the offending personnel through whom the offenses were conducted or otherwise to act to prevent a repetition of such activity.

The list of contracts performed, apparently satisfactorily, for HUD-assisted projects, and the favorable assessments of several appropriately experienced employees of the Housing Authority of the City of Pittsburgh for whom most of the work had

been performed are uncontradicted. I recognize that, if the company were debarred, HUD could lose the benefits of a professionally competent competitive bidder for its work. Such considerations, however, are not dispositive of the requirement that a contractor, to be presently responsible, must have honesty and integrity in addition to the ability to complete its Government contracts satisfactorily. See Roemer v. Hoffman, supra; 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). Respondents' evidence has not satisfied this requirement. I find that the conviction of the company and its two high ranking officers for bid rigging inevitably tainted the integrity of the company, regardless of the way in which the company may have been internally organized and managed. I find the inference to be compelling that the resulting lack of responsibility would persist, absent clear and comprehensive remedial action.

The company has not been shown to be so large or disparate that the conviction of its Vice-Chairman of the Board of Directors and its President would not have affected the integrity of its overall operations or pervaded the standards by which it has operated. Indeed, the record suggests that the company is a relatively small, closely held corporation, with significant managerial positions staffed by persons with family ties. Moletz's testimony describing the insulation and autonomy of the service and maintenance division of the company, which he had headed for seven years, is not detached enough to convince me that the company, as the sum of its parts, is presently responsible, even if it were possible to isolate the performance of HUD contracts from the overall responsibility of the company. Even if the two officers have not been involved with the operations of the service and maintenance division of the company in the past, it would appear that they have a continuing ability to become so involved, so long as they occupy responsible positions in the company. Vryenhoek's authority as President and Moletz's immediate superior, especially, cannot be disregarded.

I find that the absence of any evidence whatever of remedial steps by the company to avoid a repetition of the bid rigging practices of which it has been accused and convicted is ultimately of controlling significance on this record. The importance of such remedial measures, or their absence, is well recognized. See Norman D. Wilhelm, supra; Rea Constr. Co., supra; see also, Peter Kiewit Sons' Co. v. United States Army Corps of Eng'rs., 534 F. Supp. 1139 (D. D.C.), reversed on other grounds, 714 F. 2d 163 (D.C. Cir. 1982). Even though the Respondents' convictions are on appeal and they have made no concession of guilt under the applicable regulations, the convictions are cause for the application of administrative sanctions. In this case the Respondents have not convinced me that the imposition of the debarment sanction is inappropriate or unnecessary, under the circumstances, to protect the public interest from the risk of doing business with contractors whose

present lack of responsibility is likely to continue into the foreseeable future. If the convictions were reversed, the Respondents would, of course, have the right to seek prompt reinstatement. 24 C.F.R. §24.11. In the meantime, the officers remain in positions of responsibility. Their noninterference in the management of the division doing HUD-related work depends only upon their voluntary restraint, and nothing in the record has been shown to bar a change of their responsibilities.

Judge Cooper's observation in Rea Constr. Co., *supra*, 83-1 BCA at 81,443 applies in material respects to this case:

> The debarment of [these Respondents is proposed to be] based on the criminal conviction of the company for participation in a scheme that corrupted the competitive system of Government contracts. Bid rigging is no mere "cost of business" activity that happens to be illegal. It is extremely serious. To participate in such an obviously destructive and illegal practice required a corporate state of mind that laws are made to be broken and the company was somehow above the law. To change that state of mind requires not just memoranda from the President of the company and compliance with a consent judgment but additional actions such as internal audits, the removal of those who engaged in the illegal activities from positions of responsibility, and closely audited controls to eliminate any vestige of the mentality that led the company and its officials to believe that its illegal activities were either necessary or excusable.
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> The fact that no one, apparently, was dismissed from the company for engaging in the bid rigging appears to signal that an internal company decision was made to "reform" its employees rather than clean house. Internal reform, when wrongdoers are not removed, is likely to be a long process and one that requires considerable monitoring beyond memos and consultation sessions.

Some remedial measures were adopted by the Rea Constr. Co.; by contrast, none whatever have been shown to have been adopted by Sargent Electric Company. *A fortiori*, the considerations that required a substantial period of debarment in that case apply in this case. The reasonableness or modesty of the company's profits, or the fact that it suffered losses, in relation to the rigged contracts is obviously not proof of the company's honesty or integrity. Nor is proof that the rigged contracts only constituted a small portion of the company's gross business. Proof of the company's financial strength, likewise, does not go to its integrity. Regardless of the economic significance of the

misconduct, bid rigging entails the corruption of principles which are fundamental to the integrity of the company. I find that a five year debarment of these Respondents is appropriate and necessary in the public interest. Credit should be given for the time the Respondents have been suspended. No substantive reason has been shown to extend Vryenhoek's debarment beyond the term of the other Respondents.

Conclusion

The Respondents, SARGENT ELECTRIC COMPANY, FREDERICK B. SARGENT, and RALPH D. VRYENHOEK shall be debarred until August 27, 1989. Credit has been given for the time that the Respondents have been suspended from participation in HUD programs. The facts and law supporting this determination shall be reported to the MPRC by copy of the determination in accordance with 24 C.F.R. §200.245.

EDWARD TERHUNE MILLER
Administrative Judge

February 4, 1985