

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

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In the Matter of: :

DENNIS W. PLUNK, :

Respondent :

HUDBCA No. 85-915-D6
(Docket No. 84-983-DB)

_____ :
Dennis W. Plunk, Esquire
Hopper & Plunk
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Savannah, Tennessee 38372

Pro se

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For the Government

DETERMINATION

Statement of the Case

By letter dated October, 25, 1984, Maurice L. Barksdale, Assistant Secretary for Housing, notified Dennis W. Plunk, Esquire ("Plunk"), that the U.S. Department of Housing and Urban Development ("HUD") was considering debarring him from participating in HUD programs for a period of four years. This action resulted from Respondent's conviction for violation of 18 U.S.C. §1001 and 2 (false statements). Pending a final determination of the issues involved in this matter, Plunk was temporarily suspended from further participation in HUD programs.

Findings of Fact

1. On or about May 29, 1980, Dennis W. Plunk acted as attorney at the closing of a purchase of a property with a mortgage to be insured by HUD. At the closing, Plunk allowed a false sale price for the property to be entered on the settlement statement, knowing it to be false. The settlement statement was relied upon by HUD in insuring the mortgage. (Govt. Exh. C.)

2. In May, 1980, Plunk had been a licensed attorney in the State of Tennessee for approximately thirty months (Brief of Respondent).

3. In the fall of 1980, ██████████ Sylvester, of the HUD Office of Inspector General, conducted an audit of Plunk's books and records of HUD-insured mortgages on which Plunk had acted as a closing attorney. Sylvester informed Plunk at that time that some of the procedures being used by him were in violation of HUD regulations. (Respondent's Answer, at ¶6.)

4. Between June, 1980 and August, 1984, Plunk closed over 100 loans insured by HUD, of which no irregularities have been charged or established (Respondent's Reply Brief).

5. A Federal Grand Jury convened for the Western District of Tennessee returned an indictment charging Plunk and others with making false statements in violation of 18 U.S.C. §1001 and §2. The indictment was based on the transaction of May 29, 1980, among others. (Govt. Exh. C.)

6. On August 27, 1984, Plunk entered a plea of guilty to knowingly and willfully representing to HUD on the settlement statement dated May 29, 1980, a false and fraudulent sale price. All other counts in the indictment against him were dismissed as part of the plea bargain. Based upon his plea, Plunk was convicted of violation of one count of violation of 18 U.S.C. §1001 and §2. Plunk received a suspended sentence of incarceration, was placed on probation for one year, and was ordered to pay a fine of \$1,000. (Govt. Exh. B.)

7. On September 4, 1984, the Federal District Court for the Western District of Tennessee suspended Plunk from the practice of law in that court (Govt. Exh. D).

Discussion

The Department is authorized to debar contractors or grantees who are not presently responsible when it is determined that such a measure is necessary to protect the public. 24 C.F.R. § 24.0, §24.5. Plunk contends that he is not a contractor or grantee as defined by 24 C.F.R. §24.4(f) because he had never, directly or indirectly, done business with HUD. His contention is without merit.

24 C.F.R. §24.4(f) defines contractors or grantees as:

Individuals, state and local governments and public or private organizations that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources including, but not limited to, borrowers, builders, mortgagees, real estate agents and brokers, area management brokers,

management and marketing agents, or those in business relationship with such recipients, including, but not limited to, consultants, architects, engineers and attorneys; all participants, or contractors with participants, in programs where HUD is the guarantor or insurer; and Federally assisted construction contractors. (Emphasis supplied.)

Plunk admitted that he was the closing attorney for a number of HUD-insured home mortgage transactions. Through that business relationship, he received economic benefit. Furthermore, 24 C.F.R. §24.4(f) specifically names "attorneys" in business relationships with recipients of HUD funds in its broad definition of "contractors or grantees." Consequently, I conclude that Plunk is a contractor or grantee as defined by 24 C.F.R. §24.4(f).

Debarment is a sanction used by an executive agency to protect the public interest by ensuring that the Government does no business with contractors or grantees that are not responsible. 24 C.F.R. §24.0. Debarment cannot be used for punitive purposes. 24 C.F.R. §24.5(a). Plunk contends that his proposed debarment has punitive purposes. He alleges, in substance, that the Department knew the facts surrounding the criminal indictment since the HUD Inspector General audited his books in 1980, but took no action. If the Department had believed, Plunk asserts, that the public interest was in jeopardy, some action would have been taken at that time. Thus, in bringing the debarment action now, he argues, the Department is reacting not to Plunk's acts, but to his conviction. Plunk further emphatically denied knowingly, intentionally and willfully making false representations, directly or indirectly, to HUD even though he admitted those violations in his guilty plea.

Plunk's arguments are unpersuasive. The ground for the Government's debarment action against him is his criminal conviction for making false statements to HUD. Under departmental regulation 24 C.F.R. §24.6(a), HUD may debar a contractor or grantee upon any of the following causes:

(4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.

(5) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance, or guarantee or to the performance of obligations incurred pursuant to a grant of financial assistance, or conditional or final commitment to insure or guarantee.

(6) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.

* * *

(9) Conviction under the Organized Crime Control Act of 1970, 18 U.S.C. §1961 et seq. or conviction of the commission of the offense of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, fraudulent use of the mail in connection with commission of such offenses, or conviction of any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility. (Emphasis added.)

Plunk's criminal conviction for making false statements to HUD is cause for debarment under the Department's regulations. He cannot now deny the very admission of criminal conduct that permitted him to benefit from the plea bargaining mechanism. Plunk's answer states that he did not make intentional false misrepresentations. I cannot reconcile that statement with his admission of the conduct in a criminal proceeding. Furthermore, although the HUD Inspector General did audit Plunk's books in late 1980, the record is not conclusive that the extent or criminal nature of Plunk's conduct at the May 29, 1980 closing was fully revealed by the audit. Therefore, I cannot conclude that the Government had full knowledge of the facts that led to Plunk's eventual indictment and conviction, or that it has acted punitively by "sitting on its rights" until Plunk was convicted.

"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, 419 F. Supp. 130 (D.C. D.C. 1976). Any mitigating circumstances affecting responsibility must be considered. Id. Debarment is inappropriate if the affected participant can demonstrate that, notwithstanding any past non-responsible conduct, he no longer constitutes a business risk. 24 C.F.R. §§24.0 and 24.6(b)(1). The ultimate issue before me is whether Respondent currently possesses the requisite responsibility for participation in Government programs.

Plunk may have been a young, inexperienced attorney at the time of his criminal conduct, but that does not change the fact that he knowingly allowed a false and fraudulent statement to appear on a document on which HUD relied. I find, however, that because Plunk has been suspended from the practice of law in the Federal District Court, he presently poses somewhat less of a threat to the public interest in that role. Furthermore, as of this date he has had four additional years of experience during

which he was involved in over 100 violation-free, HUD-related transactions. I find that both the time that has elapsed, and Respondent's improvement in his conduct during these four years, are mitigating factors to be considered. 24 C.F.R. §24.6(b)(1).

Nonetheless, I do not find that Plunk is presently responsible, even if I give full weight to the mitigating evidence. I am particularly concerned about Plunk's continued affirmation that he did nothing really wrong and that no one was hurt by his actions in 1980. He has not yet fully realized that by allowing a false statement to be submitted to HUD, one on which HUD made a financial commitment, he undermined a major Government program and placed public funds at increased financial risk.

In balance, I conclude that a period of debarment of two years is warranted. Plunk has been temporarily suspended since October 25, 1984, and I credit that period in determining that he should be debarred from this date until October 25, 1986.

Conclusion

For the foregoing reasons, DENNIS W. PLUNK shall be debarred from this date until October 25, 1986, credit being given from the time of his suspension.



JEAN S. COOPER
Administrative Judge

Issued at Washington, D.C.
July 1, 1985