

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

In the Matter of:	:	
	:	
THOMAS G. FIORICA,	:	HUDBCA No. 85-929-D15
	:	(Docket No. 85-995-DB)
Respondent	:	
	:	

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For the Respondent

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U.S. Department of Housing
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Washington, D. C. 20410

For the Government

DETERMINATION

Statement of the Case

By letter dated December 18, 1984, Thomas G. Fiorica ("Fiorica") was notified by the U.S. Department of Housing and Urban Development ("HUD") that it intended to debar him from participation in departmental programs for a period of three years. The proposed debarment is based on Fiorica's conviction in the Superior Court of the State of Maine for solicitation to commit arson. Fiorica was temporarily suspended pending determination of debarment.

The letter notice of proposed debarment stated that it would serve as the Government's Complaint in the event that Fiorica requested an opportunity to submit documentary evidence and a written brief on the proposed debarment, in accordance with 24 C.F.R. §24.5(c)(2) and 24 C.F.R. Part 26. Fiorica requested the opportunity to file a written submission. This Determination is based on the briefs and documentary evidence submitted by the parties.

Findings of Fact

1. Thomas G. Fiorica, a medical doctor, is the Managing General Partner of Pomeroy Hill Associates, which owns and operates a nursing home funded with a mortgage insured by HUD through its Section 232 program. Fiorica was also a member of the Town of Jay Planning Board until 1983. The Planning Board is a recipient of HUD funds through a Community Development Block Grant. (Govt. Exhs. B and F; Resp. Reply to Govt. Brief.)

2. In 1979, Fiorica was charged with the crime of arson in the Superior Court of Androscoggin, Maine. His trial on the arson charge ended in a mistrial because of a hung jury. Subsequently, a plea bargain was arranged in lieu of a new trial. On February 18, 1983, Fiorica entered a plea of guilty in the Superior Court of Androscoggin, to an Information charging him with solicitation to commit arson, in violation of Title 17-A M.R.S.A. §802,153. The Information stated that on or about January 20, 1979, Fiorica solicited and made partial payment to Charles Watson, Jr. to cause a fire on a property owned by Fiorica for the purpose of enabling Fiorica to collect the insurance proceeds for the loss caused by the fire. (Govt. Exhs. C and D; Resp. Answer.)

3. Fiorica was convicted of solicitation to commit arson based on his plea of guilty. He was fined \$2,500 and was charged \$7,500 in court costs. He was also ordered to perform 200 hours of public service in the medical profession other than at a medical facility or nursing home in which he had a financial interest. (Govt. Exh. C.)

Discussion

The purpose of debarment is to ensure that the Government does business only with responsible contractors and grantees. 24 C.F.R. §24.0. Debarment is not to be used for punitive purposes, but to protect the public interest. 24 C.F.R. §24.5(a).

The Government cites Fiorica's conviction for solicitation to commit arson as cause for his debarment pursuant to 24 C.F.R. §24.6(a)(9). That provision of the regulations applicable to debarment states that "the Department may debar a contractor or grantee in the public interest for ... conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility." "Responsibility" as used in the regulation is a term of art. It connotes the honesty and integrity of the contractor as much as the ability to acceptably perform a contract or grant. Arthur H. Padula, et al., HUDBCA 78-284-D30 (June 27, 1979), citing 48 Comp. Gen. 769 (1969).

The Government's notice of proposed debarment, which it declared to be its Complaint, stated that Fiorica was a "contractor or grantee" pursuant to 24 C.F.R. §24.4(f) because of his role on the Town of Jay Planning Board. Fiorica contended in his Answer that he is not a HUD "contractor or grantee" because he did not receive HUD funds directly or indirectly as a member of the Town of Jay Planning Board. In response to Fiorica's Answer, the Government offered additional evidence of Fiorica's status as a HUD "contractor or grantee" by introduction of evidence of the Section 232 mortgage insurance for the nursing home owned and operated by Pomeroy Hill Associates, of which Fiorica is the Managing General Partner. Fiorica had an opportunity to rebut that evidence but chose to argue instead that it would be a denial of due process for me to consider that evidence. I do not find Fiorica's argument to be compelling. The proposed debarment is based on Fiorica's conviction for solicitation to commit arson, not his role on the Town of Jay Planning Board. The Government has merely submitted evidence of another contractual nexus between HUD and Fiorica to establish that he is a contractor or grantee in whom HUD and the public it represents have a legitimate present interest. I find it appropriate to consider that evidence.

As the managing General Partner of Pomeroy Hill Associates, Fiorica is a "contractor or grantee" as defined in 24 C.F.R. §24.4(f), because he is a borrower-participant in a program where HUD is the insurer. Although there is a less obvious nexus between Fiorica and HUD through Fiorica's membership on the Town of Jay Planning Board, that Board is a local government organization that receives HUD funds through a Community Development Block Grant. Fiorica was an official of that local government organization and certainly had an opportunity to affect the expenditure of block grant funds through his position. The concept behind the definition of "contractor or grantee" is precisely that: to identify persons or organizations who participate in, financially benefit from, or are in a position to influence the expenditure of HUD funds. I find that Fiorica is a "contractor or grantee" within the meaning of the regulation applicable to debarment. 24 C.F.R. §24.4(f).

Although the test for the need for debarment is present responsibility, a finding of lack of present responsibility can be based on past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957). I find solicitation to commit arson in order to collect insurance proceeds to be a most serious crime that has as its purpose a fraudulent taking. HUD has a particular cause for concern in this case because it is the insurer of the mortgage on the nursing home operated and partly owned by Fiorica. HUD should not have to do business with an individual who would seek to utilize arson to fraudulently obtain money from an insurer. Fiorica admitted the allegations in the Information charging him

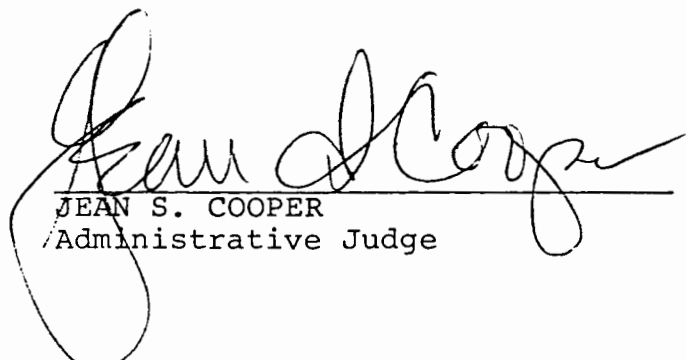
with solicitation to commit arson by entering his guilty plea. Despite Fiorica's protestations of innocence in this proceeding before me to the contrary, the fact remains that Fiorica was convicted of a serious crime indicating a lack of business integrity and honesty based on his own admissions to a court. It is inappropriate that I look behind that plea or the resulting conviction. The substantial fine and court costs levied by that court convince me that the judge who accepted the guilty plea did not consider it to be a mere technicality to avoid a retrial.

Fiorica's denial of culpability and the very serious nature of the crime of which he was convicted indicate to me that he is not presently a responsible contractor. I find little in the record to mitigate the seriousness of his crime. I do not consider the lapse of time between the initial prosecution in 1979 and the conviction in 1983 to be evidence of Fiorica's present responsibility. Rather, that lapse of time may be appropriately considered in determining the necessary duration of debarment. I find that debarment is warranted in this case to protect the public interest and HUD.

Fiorica has been temporarily suspended since December 18, 1984. Debarment is a prospective sanction and cannot be applied retroactively. I consider it appropriate to give credit for the time that Fiorica was suspended in determining the necessary duration of his debarment. In addition, the six-year passage of time since the criminal acts occurred, without evidence of more recent non-responsible behavior, convinces me that a three-year debarment at this time is no longer necessary to protect the public interest. I find that a period of debarment from this date until December 18, 1986 is warranted and appropriate.

Conclusion

For the foregoing reasons, THOMAS G. FIORICA shall be debarred from participation in HUD programs from this date up until December 18, 1986.



JEAN S. COOPER
Administrative Judge

Issued at Washington, D.C.
September 24, 1985