

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:	:	
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HAROLD FARRELL,	:	HUDBCA No. 85-954-D29
	:	(Docket No. 85-1014-DB)
Respondent	:	
	:	

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John P. Hume, Esquire  
Krooth & Altman  
2101 L Street, NW.  
Washington, D. C. 20037

For the Respondent

Mitchel Kider, Esquire  
Room 10266  
Office of General Counsel  
U.S. Department of Housing  
and Urban Development  
Washington, D. C. 20410

For the Government

DETERMINATION

Statement of the Case

By letter dated April 26, 1985, Shirley McVay Wiseman, General Deputy Assistant Secretary, U.S. Department of Housing and Urban Development ("HUD") notified Harold Farrell ("Respondent") that, pursuant to 24 C.F.R. §24.6(a)(1), (4) and (9), HUD was considering debarring Respondent for a period of three years from further participation in HUD programs. The proposed debarment was based on a conviction entered by the Supreme Court of the State of New York, County of New York, for violation of New York Penal Law §190.60. Respondent was notified in the letter that, pending a final determination on the proposed debarment, he was being suspended from further participation in HUD programs. By letter dated May 2, 1985, Respondent, through his counsel, made a timely request for a hearing on the proposed debarment. Since the proposed debarment is based upon Respondent's conviction, this hearing is limited under 24 C.F.R. §24.5(c)(2) to the submission of documentary evidence and briefs. This determination is based on the record considered as a whole.

### Findings of Facts

On January 4, 1985, a grand jury, convened for the Supreme Court of the State of New York, County of New York, returned a two-count indictment against Respondent (Govt. Exh. D). The indictment charged that the Respondent, from about February, 1983 to about March, 1984, engaged in a "systematic ongoing course of conduct with intent to defraud more than one person and to obtain property from more than one person by false and fraudulent pretenses, representations, and promises and thereby obtained property from one or more of such persons." (Govt. Exh. D.)

Respondent's illegal conduct involved: (1) the payment of \$25,000 to a director of the Port Authority of New York and New Jersey Federal Credit Union in exchange for the director's role in securing a \$550,000 loan from the Credit Union for a business associate of Respondent; and, (2) in an effort to obtain financing from Prudential-Bache Securities for the same business associate, Respondent, as agent for this associate, knowingly submitted a false contract for the sale of real property which stated a sale price of \$15,500,000 when, in fact, the actual sale price was only \$11,986,155.18. (Govt. Exh. D.)

The indictment also charged Respondent with the illegal practice of law. On January 30, 1967, Respondent was disbarred from the practice of law for the illegal payment of money on two separate occasions to an official of the New York State Liquor Authority in order to influence actions of that Authority. Although Respondent was accused of bribery and admitted making these illegal payments, he was granted immunity from prosecution in exchange for cooperation with the State District Attorney. (Govt. Exhs. D and E.)

On January 7, 1985, pursuant to a plea bargaining agreement, Respondent pleaded guilty to a misdemeanor, "a scheme to defraud in the second degree." Respondent was sentenced to a three-year period of probation and fined one thousand dollars. (Govt. Exhs. B and C; Resp. Answer, at 2).

### Discussion

It is uncontroverted that the Respondent is a contractor as defined by 24 C.F.R. §24.5(f) and is subject to the regulations of HUD relating to debarment. The purpose of debarment is to assure that the Department only does business with responsible contractors or grantees. 24 C.F.R. §24.0. It is a measure to be invoked for the purpose of protecting the public, and is not to be employed for punitive purposes. 24 C.F.R. §24.5(a). The record in this case clearly establishes a cause for debarment under 24 C.F.R. §24.6(a)(1), (4), and (9). However, even if cause for debarment is established, the existence of a cause does not necessarily require that a contractor or grantee be excluded from departmental programs. 24 C.F.R. §24.6(b)(1). All mitigating factors must be considered in determining the

seriousness of the offense, and present responsibility must be evaluated in determining whether the sanction is necessary to protect the public interest and whether its imposition is in the best interests of the Government. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976); 24 C.F.R. §24.6(b)(1).

The Government has proposed a three-year debarment. Respondent "does not challenge either the authority of the Government to bring, or the basis for, the instant action." (Resp. Answer, at 2.) The only issue contested by the Respondent is the period of the debarment.

Respondent argues that his criminal conduct and resulting conviction for a misdemeanor do not support the imposition of a three-year debarment to protect the public interest, and that a three-year debarment would be "unreasonable, disproportionate to the severity of the crime that he committed, and tantamount to punitive action contrary to 24 C.F.R. §24.5(a)(1984)." Citing Thomas Ruden Post, HUDBCA 83-765-D10 (Sept. 20, 1983), Respondent argues that "evidence of the character of the offense which Appellant has been convicted as well as the circumstances surrounding the conviction must be evaluated in determining whether the Appellant lacks present responsibility." According to Respondent, because his criminal conduct resulted in a misdemeanor conviction as opposed to a felony conviction or a multiple misdemeanor conviction, his debarment should be proportionally shorter than that necessary for more serious crimes.

While the conduct of a contractor convicted of a serious crime may be the basis of the Department's imposition of a lengthy debarment period for the protection of the public, this is true only to the extent that the serious crime may involve conduct which demonstrates a more manifest lack of personal responsibility and professional integrity. It does not follow that a misdemeanor conviction, ipso facto, will necessarily result in the imposition of a relatively shorter term of debarment than a felony conviction, and the Government rightfully argues that HUD debarment regulations make no distinction between felonies and misdemeanors as they may relate to the period of debarment.

In Post, Judge Miller stated "that Appellant was previously ignorant of the criminal laws governing mortgage payment ... [, was] unlikely to repeat his offense ... [, and] to impose a five-year debarment against Appellant would appear to be excessive and would appear to penalize the contractor for past misconduct." The record before me reveals no evidence of business ignorance on the part of Respondent. In the instant case, Respondent was an experienced businessman who had the benefit of a legal education and career, and who clearly knew the probable consequences of his criminal acts. Nevertheless, Respondent deliberately chose to violate the law. 24 C.F.R.

§24.4 authorizes the imposition of a debarment "for a specified period of time commensurate with the seriousness of the offense ... generally not to exceed five years" and for an indefinite period "because of egregious and willful improper conduct." The fact that other cases, involving criminal conduct more offensive than that committed by Respondent, often result in three year debarments may only reflect this Department's apparent practice that only the most serious conduct by a contractor will result in a debarment in excess of three years. It should not be inferred that Respondent, given the circumstances of this case, is being treated more severely than he should be.

Respondent alleges that his conduct evidences a less serious lack of responsibility because his acts were neither perpetuated against nor involved HUD. Respondent believes that his "responsibility to participate in HUD programs would more seriously be in question if HUD itself was defrauded by Respondent, which it was not." (Resp. Reply to Govt. Brief, at 4.) I find this argument to be totally without merit. 24 C.F.R. §24.6(a)(9) relates to criminal acts which indicate a "lack of business integrity or honesty, which seriously and directly affects the question of present responsibility." This regulation and others set forth in 24 C.F.R. §24.6 which define the causes for which a contractor may be debarred, do not distinguish between crimes perpetuated against or involving HUD and crimes perpetuated against or involving other public or private entities. The fact that Respondent's criminal conduct was not perpetuated against HUD is not a mitigating factor; the fact that Respondent believes that it should be a mitigating factor is evidence that he lacks present responsibility. It is no comfort that Respondent has demonstrated a lack of responsibility against parties other than HUD.

Respondent avers that the criminal conduct which is the subject of this appeal occurred over two years ago, and that, since then, he has made full disclosure to, and acted in good faith towards, the Government with respect to the proceedings related to his conviction. According to Respondent, his cooperation with the Government indicates present responsibility. While the record does not include any evidence of the nature or extent of this cooperation with the Government, such cooperation, unsupported by additional evidence of responsibility since the conviction, renders the Respondent's arguments that he is presently responsible unpersuasive.

Passage of time is considered a mitigating factor under the rationale that present responsibility, although it can be inferred from past acts, is a finding that must view the contractor's responsibility in the present, as opposed to the past. Although past acts may lose, with the passage of time, probative value with respect to present issues, Respondent's criminal acts are not sufficiently remote to make the passage of time, per se, a mitigating factor. I find that Respondent's

criminal behavior and resulting conviction, which are relatively recent events, are relevant indicia of Respondent's lack of present responsibility, and these indicia have not been rebutted by adequate evidence of Respondent's present responsibility.

Respondent avers in mitigation that he has "no previous criminal record" (Resp. Answer, at 3; and at 5). In response to this assertion, the Government submitted documentation which established that in 1967, Respondent was accused of, and did admit to, paying, on two separate occasions, bribes to an official of the State Liquor Authority. This criminal conduct did not result in a conviction because Respondent was granted immunity by the District Attorney for cooperating with the Government. (Govt. Exh. E.) While I find that Respondent's conduct of nineteen years ago, which led to Respondent's disbarment from the practice of law, is totally irrelevant to the issue of present responsibility, Respondent's misleading characterization of his "previous criminal record" seriously impairs his credibility, demonstrates an unpalatable lack of candor, and reflects a lack of present responsibility.

Respondent argues that his debarment should not be more severe than the action taken against a business associate, John Zaccaro. (Resp. Answer, at 6.) Zaccaro was charged and convicted along with Respondent. Respondent suggests that the present proceeding is analogous to a proceeding in the State of New York wherein Zaccaro's New York real estate license was suspended for three months. Respondent does not describe the adjudicatory body or the nature of the proceeding in New York against Zaccaro. In any event, the standards applied by a state agency in suspending Zaccaro's real estate license are not relevant to this proceeding. The conclusions reached in the proceeding against Zaccaro are immaterial to the conclusions reached in this matter as they relate to the Respondent. This proceeding is only concerned with Respondent's acts as they reflect upon his present responsibility.

Respondent contends that while no party suffered economic injury due to his acts, he "was deprived of commissions he rightfully earned, incurred legal fees, suffered the embarrassment of negative nationwide publicity, and now must defend himself in the instant proceedings." (Respondent's Answer, at 3.) This defense misconstrues the purpose of debarment. Whether or not a debarment should be imposed essentially has nothing to do with the extent of economic loss or social anguish suffered by the affected contractor. A debarment is justified whenever there is a need to protect the Government and the public from doing business with contractors lacking responsibility. 24 C.F.R. §24.0.

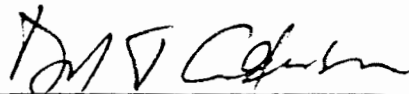
In conclusion, Respondent argues that he was deprived of commissions that he "rightfully earned." The record in this case establishes that in order to gain certain commissions, Respondent

engaged in the criminal conduct which is the subject of this case. The fact that Respondent feels himself victimized for not being able to collect these allegedly "rightfully earned" commissions lead me to believe that Respondent does not as yet fully understand the wrongfulness of his acts.

Respondent's allegations relating to his wife's health problems, which I accept as true, are unfortunate, but quite irrelevant to the determination of this case.

Conclusion

For the reasons stated above, I find that a three-year debarment of the Respondent is warranted. Respondent shall be debarred from this date through April 26, 1988, credit being given for the period of Respondent's suspension from April 26, 1985.



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DAVID T. ANDERSON  
Administrative Judge

May 30, 1986