

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

In the Matter of:	:	
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MICHAEL FACCHIANO, JR. and	:	HUDBCA No. 85-962-D33
FACCHIANO CONSTRUCTION	:	(Docket No. 85-1019-DB)
CO., INC.,	:	
	:	
	:	
Respondents	:	

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Washington, D. C. 20410

DETERMINATION
Statement of the Case

By letter dated May 15, 1985, Alfred C. Moran, Assistant Secretary for Community Planning and Development, U.S. Department of Housing and Urban Development ("HUD") notified Michael Facchiano, Jr. ("Facchiano" or "Respondent") and Facchiano Construction Co., Inc. ("Facchiano Construction," "company," or "Respondents") that, pursuant to 24 C.F.R. §24.6(a)(9), HUD was considering debaring Respondents from further participation in HUD programs for a period of three years. The proposed debarments were based on Respondents' convictions in by the U.S. District Court for the Western District of Pennsylvania for violations of Title 18 U.S.C. §§241 and 2 (Mail Fraud). Pending resolution of the debarment action, Respondents were suspended from further participation in HUD programs. Respondents made a timely request for an opportunity to submit documentary evidence and written briefs pursuant to 24 C.F.R. §24.5(c)(2). Respondents also requested an oral hearing on the proposed debarment.

Findings of Facts

1. Facchiano Construction is a Pennsylvania corporation engaged in the cement and construction business. (Respondents' Brief, at 1.) Facchiano is the secretary of Facchiano Construction and, at relevant times, was responsible for the certification of the company's wage and payroll records. (Respondents' Brief, at 2.)
2. Respondents are direct recipients of HUD funds (Respondents' Brief, at 2). As such, they are contractors or grantees as defined by 24 C.F.R. §24.4(f).
3. Respondents were involved in the performance of several HUD assisted contracts which required, in pertinent part, that individuals employed as laborers and mechanics be paid prevailing wage rates as determined by the Secretary of Labor, pursuant to HUD regulations and the Davis-Bacon Act, 40 U.S.C. §276(a) et seq. Respondents were required under the terms of these contracts to certify that these individuals had been paid the predetermined prevailing wage rates. (Govt. Brief, at 2; Govt. Exh. E.)
4. In the summer of 1984, the Department of Labor conducted an investigation of Respondents' employment practices and concluded that Respondents were in violation of the requirements of the Davis-Bacon Act. The investigation revealed that Respondents had submitted false payroll certifications stating that the required wages had been paid when, in fact, they had not. (Respondents' Brief, at 2-3.) Based upon the submission by Respondents of false payroll certifications over a period from about January 1, 1982 to about October 4, 1984, the Department of Labor determined that Respondents' employees had been defrauded of \$126,298.27. These false payroll certifications were mailed through the U.S. Postal Service to the United States or its agent. (Resp. Exhs., at 10a-15a.)
5. The Department of Labor referred the matter to the U.S. Attorney for the Western District of Pennsylvania and the Respondents were criminally charged in an Information filed January 24, 1985 with the U.S. District Court for the Western District of Pennsylvania. (Respondents' Brief, at 3; Govt. Exh. E.) On February 22, 1985, pursuant to a plea bargaining agreement, Respondents pleaded guilty to two counts of mail fraud in violation of 18 U.S.C. §§1341 and 2. The company was fined \$1,000 on each count. On count 1, Facchiano was given a 6-month prison sentence and fined \$1,000. On count 2, Facchiano was fined another \$1,000 and sentenced to a 5-year probation period. (Govt. Exh. C.)
6. Prior to the sentencing, Respondents made restitution of the unpaid wages to past and present employees in an amount in excess of \$120,000. (Resp. Brief, at 12; Resp. Exhs., at 29a.) The terms of the plea bargaining agreement required Respondents to

cooperate fully with the Department of Labor and the U.S. Government in its investigations. (Resp. Exhs., at 28a.) Respondents have complied with the terms of the plea agreement and have cooperated with the U.S. Government in its investigations. (Respondents' Brief, at 5, 11-12.)

7. Since the investigation of the company by the Department of Labor, the company has taken steps designed to prevent recurrences of violations of law. The company created and filled a position of Office Manager/Project Manager, the duties of which include monitoring all the company's federally funded paperwork, including payroll sheets, in order to assure compliance with state and federal laws and regulations. This position was created with the primary responsibility of directing and reviewing compliance with all applicable laws, and insuring that no violation of federal or state law would occur. (Respondents' Brief, at 5-6; Resp. Exhs., at 72a, 123a.) The company has also distributed a manual to its employees to inform them of their rights and responsibilities as employees of the company and to advise them of certain wage rates. (Respondents' Brief, at 6; Resp. Exhs., at 127a.)

Discussion

Respondents' request for an oral hearing is governed by the application of 24 C.F.R. §24.5(c)(2). Under this regulation, when a proposed debarment is based on a conviction, a hearing on the proposed debarment is limited to the submission of documentary evidence and written briefs. See Roy C. Markey/The Roary Co./Be-Mark Homes, HUDBCA 82-712-D33, 82-2 BCA ¶16,120 (denial of motion for oral hearing); Leonardo Leon Collazo, HUDBCA 86-987-D2 (November 22, 1985) (denial of request for oral hearing). Consequently, Respondents are not entitled to an oral hearing and their request for an oral hearing is denied.

Debarment is one of the most serious sanctions which the Department can impose upon a contractor. The purpose of debarment is to assure that the Department only does business with responsible contractors and grantees. 24 C.F.R. §24.0. It is a measure to be invoked for the purpose of protecting the public, and is not a measure to be imposed for punitive purposes. 24 C.F.R. §24.5(a). Responsibility is a term of art in Government contract law. It concerns the integrity and honesty of a contractor or grantee as much as his ability to satisfactorily perform the actual work of a contract or grant. Norman D. Wilhelm, HUDBCA 82-679-D15 (Aug. 27, 1983). Present lack of responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957).

Respondents were convicted for knowingly, willfully and unlawfully using the U.S. Postal Service for the purpose of executing a scheme to defraud their employees and the United States. Respondents' criminal acts are grounds for debarment

under HUD regulations. 24 C.F.R. §24.6(a)(1), (4) and (9). The fact that cause for debarment is established, however, does not necessarily require that Respondents be excluded from participation in Departmental programs. 24 C.F.R. §24.6(b)(1). Mitigating factors must be considered in determining whether the sanction is necessary to protect the public interest and is in the best interest of the Government. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976).

Respondents argue that despite their conviction, they are presently responsible contractors, and that debarment is not warranted in this case in order to protect the interests of the public or the Government. Mitigating factors averred by the Respondents include their cooperation with the U.S. Government, the complete financial restitution to underpaid employees, the fact that there are no prior convictions, evidence of good character, measures taken by Respondents to avoid recurrences of improper conduct and to assure full compliance with federal regulations, and the deterrent effect of the sentence and the probation period. Respondents submitted copies of over forty letters from friends, neighbors, employees, business associates and public officials in support of Facchiano which were sent to the U.S. District Court in February 1985. These letters generally portray Facchiano as a forthright and reliable man who made a serious error of judgment.

The Government contends that Respondents' arguments and submissions are neither valid nor sufficient mitigating factors. The Government argues that Respondents' positive acts subsequent to the discovery of their criminal conduct were intended basically to mitigate the sentence of the U.S. District Court in the criminal proceeding. The Government also submitted a letter from the Director of Allegheny County Department of Development who asserted that the underpayments were most serious and that Respondents' disregard for federal law created a serious doubt as to their responsibility.

Although many of the letters submitted by the Respondents attest to Facchiano's good character, the Respondents' criminal actions were, nevertheless, deliberate, elaborate and repeated. The illegal conduct continued for thirty-three months until the Government intervened. This prolonged and repeated conduct cannot be viewed as a mere aberration of character, nor was the cessation of this criminal behavior due to a voluntary change of heart. The serious crimes committed by Respondents resulted in depriving their employees of \$126,298.27. Equally deplorable was Respondents' corruption of the Department's program by creating a scheme to subvert HUD policies and regulations. To participate in such an obviously offensive and illegal practice required a state of mind which believed that laws could be broken with impunity.

In his efforts to rehabilitate the company and himself, Facchiano has accepted responsibility for his actions, and the company has made restitution to all the employees affected. The record presents no evidence of substantial personal or corporate sacrifice in order to make the restitution, and the Government's argument that restitution merely returned money to employees which Respondents had illegally withheld and that restitution was a factor in mitigating the Respondents' sentences in the U.S. District Court proceedings is well taken. Nevertheless, Respondents' willingness to accept responsibility and to make payment in restitution are positive acts which can be considered in mitigation.

At least two significant steps were taken by Respondents to prevent future violations to federal regulations. Respondents promulgated an Employee Handbook outlining the rights and responsibilities of employees of Facchiano Construction. Of particular relevance is paragraph 5 in the employment section of the handbook (Resp. Exh., at 132a) which states:

(5) Each Employee has his own standard hourly rate. In these circumstances in which a different, higher rate is applicable due to the particular legal or contractual requirements of a contract, each Employee will be paid the higher rate dependent upon his classification. Job notices will be posted on those projects in which higher rates are to be paid. Employees are encouraged to inquire as to whether the higher rate is applicable. Employees are also encouraged to advise the company if, in the Employee's opinion, the classification of work which they are performing is different from their actual job classification.

In educating their employees, Respondents demonstrate a sincere effort toward the prevention of future violations. A meaningful application of the handbook provisions should encourage management and employees alike to be mindful of proper labor practices. See Milo L. Pike, Pike Industries, Inc., and Bruce A. Homer, HUDBCA 84-885-D41 and 84-886-D42, at 4.

A second significant step toward the prevention of further violations of federal law and regulations was the establishment of a new position of Office Manager/Project Manager. The ostensibly positive effect of this position may be subject to scrutiny because there is no evidence that this position is not subordinate to or under Facchiano's direct control. It would have been a more meaningful signal if there was evidence in the record that this newly created position could function with complete organizational independence.

Although complete cooperation with the U.S. Government was required by the terms of the plea agreement and Respondents have

benefited from this cooperation, I am persuaded that the Respondents' conduct as contractors prior to the occurrence of the criminal actions and the Respondents' professional conduct since the commission of these criminal acts are significant factors which reflect favorably on the question of Respondents' present responsibility. Roemer v. Hoffman, supra. Facchiano appears to be sincere in his commitment to keep himself and his company on the path of compliance with federal law and the regulations governing the performance of federally assisted contracts. See Norman D. Wilhelm, HUDBCA 82-679-D15, 82-2 BCA ¶16,002 (contractor no longer a threat to HUD programs).

While I am convinced that a period of debarment of the Respondents is warranted, I find that a period of debarment of eighteen months is sufficient to protect the interest of the public and the Department. This period should also provide sufficient time for the company's new Office Manager/Project Manager to prove his usefulness and effectiveness in overseeing the company's compliance with governmental regulations and those contract requirements which affect employee rights.

ORDER

It is hereby ordered that MICHAEL FACCHIANO, JR. and FACCHIANO CONSTRUCTION CO., INC., be debarred for a period of eighteen months until November 15, 1986, credit being given for the period of suspension since May 15, 1985.



DAVID T. ANDERSON
Administrative Judge

March 5, 1986