

based on a conviction, a review of the Departmental action is limited to the submission of documentary evidence and written briefs. This determination is based on the record, as submitted, considered as a whole.

Findings of Facts

Smith is the sole owner and controlling officer of Smith & Son. (Resp. Reply Brief, at 1; Govt. Exh. D, at 1.) Smith & Son is a New Jersey corporation which, as a requirement of the law of the State of New Jersey, "operates under" Smith's master plumber's license. (Resp. Reply Brief, at 3.) The corporation is heavily dependent upon HUD-assisted projects. (Resp. letter of November 1, 1985, p. 2.)

On August 21, 1984, Smith was charged by the U.S. Attorney for the District of New Jersey with violation of 26 U.S.C. §7201 (tax evasion). (Govt. Exh. D.) Specifically, Smith was charged with failing to report \$117,450 in personal income received from Smith & Son. Smith had certified in his individual income tax return (Form 1040) that in the year 1981, his taxable income had been \$16,700, when in fact it had been \$134,150. This false certification resulted in a claimed tax debt of \$2,397, when it should have been \$56,636.50. (Govt. Exh. D.)

On October 10, 1984, Respondent pleaded guilty and was convicted (Govt. Exh. C). The U.S. District Court for the District of New Jersey sentenced Smith to a one year and one day period of incarceration at the Federal Prison Camp at Allenwood, Pennsylvania (Govt. Exh. C).

Discussion

Under the definition set forth at 24 C.F.R. §24.5(f), individuals and private organizations which receive HUD funds directly or indirectly or which are in a business relationship with such recipients are contractors or grantees and are subject of HUD debarment regulations. It is uncontroverted that Smith & Son is a contractor or grantee because it is an organization which receives HUD funds directly. Smith is a corporate officer and major shareholder of the corporation. Accordingly, Smith is a contractor or grantee as defined by 24 C.F.R. §24.5(f) because he is in a business relationship with a recipient of HUD funds.

The Department's action is based on Smith's conviction for his failure to report \$117,450 in personal income received from the corporation. Under 24 C.F.R. §24.6(a) a contractor or grantee may be debarred for:

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

* * *

(9) Conviction ... for 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 for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

Smith's conviction for tax evasion clearly establishes a cause for debarment under HUD debarment regulations.

But even if cause of debarment is established, 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. 24 C.F.R. §24.6(b)(1). Present responsibility must be evaluated in determining whether the sanction is necessary to protect the public interest and whether the imposition of the sanction 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 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).

Smith argues that he should not be debarred from HUD programs because "he has not been charged with any fraud in regard to a HUD contract or any other customer's contract." (Resp. letter of Nov. 1, 1985, p. 1.) Smith's rationale evidences a clear misunderstanding of the issue involved. The tantamount issue in this proceeding relates to Smith's present responsibility, and Smith's tax evasion constitutes evidence of a serious lack of responsibility. Nathan A. Hicks, HUDBCA 79-438-D51 (January 7, 1980). "Responsibility" is a term of art in Government contract law. It is defined to include the concepts of integrity and honesty as much as ability to perform a contract. 49 Comp. Gen. 132 (1969); 34 Comp. Gen. 86 (1954). The pertinent HUD debarment regulations cited above do not distinguish between crimes perpetrated against HUD and crimes against other entities. I find that Smith lacks present responsibility in his professional conduct, and that his debarment is warranted to protect the Government and the public from doing business with him. 24 C.F.R. §24.0. The fact that

Respondent's criminal conduct was not perpetrated against HUD is not a mitigating factor. It is no comfort that Smith has demonstrated a lack of responsibility against parties other than HUD. Harold Farrell, HUDBCA 85-954-D29 (May 30, 1986). Smith has, however, defrauded the very entity which finances the HUD-assisted program by which Respondents have profitted.

Smith also argues that because he has already served seven months in a penal institution, he has effectively been debarred for seven months. This is not a true assessment. Although Smith was in prison for seven months, Smith & Son could continue to participate in HUD programs during Smith's period of incarceration. The eligibility of Smith & Son to participate in HUD programs did not formally cease until it was suspended pending resolution of this action. The fact that Smith was in prison did not terminate Smith's entitlement to HUD-derived benefits from Smith & Son or Smith's control over the operations of Smith & Son. Neither the Department nor the public was completely protected from doing business with an irresponsible contractor during the period of Smith's incarceration.

The Government asserts that the debarment of Smith's affiliate, Smith & Son, is necessary to protect the interest of the Department and the public even though Smith & Son was not involved in the criminal conduct. The Government's position with respect to the affiliate in this case is well-founded. The record clearly establishes that Smith controls the corporation. The corporation is wholly owned by Smith (Govt. Exh. D, p. 1.), and Smith's wife is the president of the corporation (Resp. letter of Nov. 1, 1985, p. 2). Furthermore, the corporation's existence is tightly linked to Smith because, according to New Jersey law, the corporation must have a licensed master plumber as its bona fide representative in order to do business. N.J.S. 45:1-8 and 9. I find that to debar Smith without debarring the corporation would insufficiently protect the Government or the public because Smith would remain in a position of control over the operation of Smith & Son. Roy C. Markey, The Roary Company, Be-Mark Homes, 83-2 BCA ¶16,688 (July 18, 1983).

Conclusion

I conclude that the debarment of Smith is warranted to protect the public interest. I also conclude that the debarment of Smith & Son is similarly warranted since Smith & Son is in an affiliated status with Smith. Respondents shall be debarred from

participation in Departmental programs for a period of one year up to and including October 23, 1986, credit being given for the Respondents' period of suspension from October 24, 1985.



DAVID T. ANDERSON
Administrative Judge

June 3, 1986