

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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: :
JAY D. MORROW, : HUDBCA No. 86-1612-D17
: (Docket No. 85-1057-DB)
: :
Respondent :
: :
:

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DETERMINATION

Statement of the Case

By letter dated March 10, 1986, Silvio J. DeBartolomeis, Acting General Deputy Assistant Secretary for Housing of the U.S. Department of Housing and Urban Development ("HUD"), notified Jay D. Morrow ("Respondent"), that HUD proposed to debar him for a period of five years pursuant to 24 C.F.R. §§24.6(a)(4) and (9) and that he was temporarily suspended from participation in HUD programs pending final determination of the action.

The notice of proposed debarment identified Morrow, Inc. (a/k/a Culloden Associates of Florida, Inc.) as affiliates of Respondent and included them within the scope of the debarment action. However, because Respondent has indicated that he is no longer affiliated with those entities, HUD has elected to limit the debarment action to include only Respondent, individually.

The proposed debarment and temporary suspension were based on Respondent's conviction in the U.S. District Court for the Middle District of Florida (Tampa), for violation of 18 U.S.C. Sections 1010 (submission of false statements to HUD), 371 (conspiracy to defraud the United States) and 201(f) (bribery of a public official). Respondent filed a timely request for a hearing, which is limited by 24 C.F.R. §§24.5(c)(2) and 24.7 to the submission of documentary evidence and briefs. This Determination is based upon the written submissions by the parties.

Findings of Facts

1. On October 4, 1985, a Grand Jury convened for the U.S. District Court for the Middle District of Florida (Tampa), returned a 14-count indictment which charged Respondent with 13 counts of violating Federal laws (Govt. Exh. D).

2. Respondent subsequently entered into a Plea Agreement. On November 26, 1985, Respondent pleaded guilty and was convicted as charged of Counts 1 and 4 of the indictment and Count 1 of a bill of information filed in connection with the negotiated plea. He was sentenced to a three-year period of probation, on condition that the first six months of probation be spent at the Salvation Army Community Treatment Center in Lakeland, Florida, and was fined \$10,000. (Govt. Exhs. B, C, E, F).

3. Count 1 of the indictment charged Respondent with conspiring to defraud the United States in violation of 18 U.S.C. §371. Specifically it charged Respondent with a variety of criminal conspiratorial acts while acting in his capacity as president of Morrow, Inc. (a/k/a Culloden Associates of Florida, Inc.), a Florida corporation engaged in development, construction and management of multifamily housing projects, certain of which were financed by HUD-insured mortgages. Count 4 of the indictment charged Respondent with bribing a public official in violation of 18 U.S.C. §201(f). Count 1 of the information charged Respondent with filing a false statement with HUD in violation of 18 U.S.C. §1010. (Govt. Exhs. D, E, F.)

4. The Stipulated Facts in the Plea Agreement recite, in part,

During the period of 1977 through early 1983, [when] JAY D. MORROW was President of Morrow, Inc., Jerry L. Davis [having] joined this corporation in 1979 and [become] its Executive Vice President in 1980, ... the defendants falsified records of the corporation so as to enable them to draw funds for various construction and management activities in excess of the actual costs of these activities. In addition, the defendants gave gifts to a certain federal employee who was in charge of inspecting these housing projects.

5. During the times relevant to this action, Morrow, Inc.'s primary business was the development, construction, and management of government financed and insured low rent housing projects, including multifamily projects administered under programs of the Farmers Home Administration (FmHA) and HUD (Govt. Exh. D).

6. During that time, Respondent, his business associate Jerry L. Davis, and Morrow, Inc. conspired to defraud FmHA and HUD by diverting funds obtained by billing for work and materials of a higher quality than they provided. In addition, while Respondent was a general partner in Leesburg, Ltd., the owner and mortgagor of a Federally insured housing project, Leesburg, Ltd. filed a cost certificate with HUD which included costs of electrical work at Respondent's personal residence in the amount of \$3,146. These costs were paid by a check drawn on Leesburg, Ltd.'s construction account. (Govt. Exh. E.)

7. A ledger sheet for the King Park Court Project, a FmHA project, covering a two month period contained entries made at Respondent's direction which reflected a \$1,000 payment by the King Parks Court Project to Wagner Construction Company. This amount, however, was actually paid to finance a project in Homosassa, Florida, which was short of funds. That ledger sheet also reflected an illegal \$2,897.34 payment by the King Park Court Project to Jack Grantham for painting Respondent's personal residence. (Govt. Exh. E.)

8. Respondent, on one or more occasions, directed an employee of Morrow, Inc. to alter invoices submitted by subcontractors, and to put the altered documents in the files of certain housing projects. Those files were then made available to accountants who prepared the year-end cost reports for these projects which were eventually submitted to HUD and FmHA. (Govt. Exh. E.)

9. The conspiracy also included the bribery of William Tedder, a construction analyst for FmHA. Tedder was responsible for inspecting the quality of construction of housing projects then being constructed pursuant to the Rural Rental Housing Program. Morrow, Inc. provided the electrical wiring of Tedder's new home. The work was ordered by a construction supervisor employed by Morrow, Inc. Although Tedder wrote a check to pay the electrical contractor, he was given cash in the amount of the check by Jerry L. Davis, who was Morrow, Inc.'s executive vice president. (Govt. Exh. E.)

10. As charged in Count 4 of the indictment, Respondent, as president of Morrow, Inc., also bribed Tedder by arranging for a gift to Tedder of approximately 46 roofing shingles having a value of approximately \$1,352.40 (Govt. Exhs. D, E).

11. As charged in the information, Respondent submitted a false statement to HUD on the contractor's Certificate of Actual Costs which stated that the only identity of interest was between Leesburg, Ltd., a HUD Multifamily Housing Project of which Respondent was a general partner, and the Pegasus Group, Inc., the general contractor of the project, of which Respondent was a general partner and officer. The certificate failed to disclose the identity of interest between these entities and the Wagner Construction Company, a subcontractor on the project over which Respondent had full operational and managerial control, including control over its accounts. (Govt. Exhs. E, F.)

12. The Plea Agreement provided:

Defendant will plead guilty because he is in fact guilty of the charges contained in Counts One and Four of the Indictment in Case No. 85-130-Cr-T-13, and Count One of the Information in the latter case. In pleading guilty to these Counts, defendant acknowledges the facts as stated in the stipulation contained below are true, and were the case to go to trial, the government would be able to prove beyond a reasonable doubt the following [Stipulated Facts] (Govt. Exh. E)

Discussion

The purpose of debarment is the protection of the public interest, ensuring that HUD does not do business with contractors or grantees that are not responsible. 24 C.F.R. §§24.0 and 24.5(a). "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); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). As used in HUD's regulations, "responsibility" connotes probity, honesty and uprightness. Arthur H. Padula, HUDBCA 78-284-D30 (June 27, 1979); 48 Comp. Gen. 769 (1969). Although the test for debarment is the present responsibility of the contractor, present lack of responsibility can be inferred from past acts. See Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958); Stanko Packing Company, Inc. v. Bergland, 489 F. Supp. 927, 949 (D. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967).

Under the debarment standard of present responsibility, a contractor or grantee may be excluded from HUD programs for a period based upon projected business risk. Roemer v. Hoffman, supra; Stanko Packing Company, Inc. v. Bergland, supra. Any mitigating circumstances affecting responsibility must be considered. Roemer v. Hoffman, supra. Therefore, debarment is inappropriate if the affected participant demonstrates that, notwithstanding any past nonresponsible conduct, he no longer constitutes a business risk. 24 C.F.R. §24.0 and 24.6(b)(1).

Contractors and grantees are defined as:

[i]ndividuals ... 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 ... management and marketing agents, or those in a business relationship with such recipients ... [and] all participants, or contractors with participants, in programs where HUD is the guarantor or insurer; and Federally assisted construction contractors. (24 C.F.R. §24.4(f).)

As the president of Morrow, Inc., whose business was the development, construction, and management of HUD-insured multifamily housing projects; as a general partner of Leesburg, Ltd., the owner and mortgagor of a HUD-insured multifamily housing project; and as a general partner of the Pegasus Group, Inc., the general contractor of that project, Respondent qualifies as a "contractor or grantee" within the meaning of 24 C.F.R. §24.4(f).

Under 24 C.F.R. §24.6(a), HUD is authorized to debar a contractor or grantee 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 ... bribery ... or conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

Respondent's conviction for violation of 18 U.S.C. §§1010, 371, and 201(f), and the facts admitted in relation to the counts of the indictment and information on which his guilty pleas were based, establish a dramatic lack of responsibility, honesty, and integrity, and provide ample cause for an extended debarment. Respondent was an experienced contractor. He had extensive experience in Federally-assisted programs. Respondent's criminal activity was clearly intentional.

The plea of guilty resulting in the Respondent's conviction has been entered pursuant to a Plea Agreement. Because the Plea Agreement recites a negotiated stipulated factual basis for the plea, the scope of Respondent's admission of underlying facts, which is probative evidence, is circumscribed by the stipulated facts, notwithstanding the broader scope of criminal activity and overt acts charged in the conspiracy count of the indictment. Respondent contends that his admissions were narrow in scope and

that he would have disputed "the accuracy of some of the testimony and opinions of Government witnesses," had there been a trial instead of a guilty plea. However, Respondent waived his rights to challenge the stipulated facts when he entered his plea. Significantly, the Plea Agreement provides that Respondent acknowledges the Stipulated Facts to be true and that "were the case to go to trial, the government would be able to prove [them] beyond a reasonable doubt" I find the facts to be as stipulated.

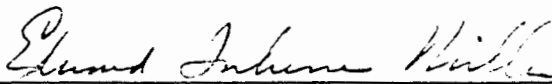
There is nothing "relatively minor" about the nature or quantum of the offenses to which Respondent has pleaded. The offenses involved are not merely technical in nature. The non-disclosure of an identity of interest in a context such as that disclosed by this record could have had far reaching economic and managerial consequences and could have affected significant decisions by HUD administrators. The fact that a Federal agency other than HUD was the immediate victim of the acts admitted in the Plea Agreement is of no significance in the evaluation of whether Respondent is presently responsible. William J. Smith, Jr., HUDBCA 86-1295-D6 (June 3, 1986); Harold Farrell, HUDBCA 85-954-D29 (May 30, 1986). The fact that Respondent may have condoned a bribe rather than caused it would not relieve him of responsibility. Cf. Norman D. Wilhelm, HUDBCA 82-679-D15, 82-2 BCA ¶16,002. Respondent's claim to a history of quality performance, which should mitigate the reasonable consequences of Respondent's fraudulent conduct, is disputed by the Government and is not supported by evidence. Respondent's conviction evidences serious, flagrant violations of several laws, a calculated pattern of fraudulent activity, and a lack of responsibility and business integrity which, in the absence of proof to the contrary, may be inferred to continue. Respondent's conviction establishes ample cause for his debarment pursuant to 24 C.F.R. §§24.6(a) (4) and (9).

The Government's evidence is not contradicted or significantly mitigated by other evidence in this record. Respondent's contentions in mitigation are unpersuasive. There is no affidavit or personal representation by Respondent himself. The two letters Respondent has submitted reflect unsworn personal appraisals of Respondent's character and conduct by individuals about whom little is disclosed, in contexts too limited and unrelated to the matter before me to be given weight. There is no evidence whatever in the record that the passage of time has imbued Respondent with any greater understanding of what constitutes responsibility in dealing with the Government than he had when the conspiracy to defraud the Government occurred. The record, therefore, establishes the necessity and appropriateness of a substantial period of debarment of this Respondent to protect the public interest.

HUD has proposed a debarment of not less than five years to protect the public interest by insulating HUD from having to deal with Respondent. The nature and multiplicity of the criminal offenses admitted by Respondent and the lack of any mitigating circumstances in this record warrant Respondent's debarment for the proposed five-year period.

Conclusion

Respondent shall be debarred from participation in HUD programs through March 9, 1991, credit being given for the time Respondent has been temporarily suspended.



EDWARD TERHUNE MILLER
Administrative Judge

August 15, 1986