UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of: VICTOR G. McLENDON, JR., Respondent	HUDBCA No. 87-2376-D13 (Docket No. 87-1099-DB)

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DETERMINATION

Statement of the Case

By letter dated December 1, 1986, the U.S. Department of Housing and Urban Development ("HUD") notified Respondent Victor G. McLendon, Jr. that it intended to debar him for a period of five years based on McLendon's conviction for violation of 18 U.S.C. §1001. McLendon was temporarily suspended pending determination of debarment. The specific regulatory grounds cited to support debarment were 24 C.F.R. §24.6(a)(4) and (9). In cases of proposed debarment based upon a conviction, a hearing is limited to submission of documentary evidence and briefs. 24 C.F.R. §24.5(c)(2). McLendon timely requested an opportunity to file a brief and documentary evidence before a final determination on the proposed debarment was made.

No brief or documentary evidence was received from McLendon. An Order to Show Cause why this case should not be dismissed for lack of prosecution was issued. No response to the Order to Show Cause was received by the undersigned. This case was dismissed with prejudice and remanded to the appropriate Assistant Secretary for further action. Subsequently, McLendon filed a

Motion to Set Aside Order of Dismissal, together with an answer to the Government's complaint and a response to the Order to Show Cause. Evidence was submitted to substantiate McLendon's contention that he had attempted to timely file a response to the Order to Show Cause and an answer, but that they had either been lost in the mail or misdelivered. Counsel for the Government had received McLendon's response to the Order to Show Cause on time and did not oppose the Motion to Set Aside. The Motion to Set Aside was granted on October 27, 1987, and McLendon's debarment was converted back to a temporary suspension pending determination of debarment. A new schedule for filing briefs and documentary evidence was satisfied by both parties.

Findings of Fact

1. In 1982, McLendon was the City Engineer for the City of Quitman, Mississippi. In that capacity, he caused bid documents to be prepared and submitted to HUD in connection with work on a Community Development Block Grant ("CDBG") project funded by HUD. Those bid documents concealed the fact that McLendon held a 50 percent ownership interest in a company that would provide roadbed and topping material for use on the CDBG project. McLendon knew that HUD regulations prohibited him from having any direct or indirect interest in the CDBG project. He knowingly and wilfully concealed his interest on the bid documents by devise and scheme. (Govt. Exhs. 2, 7.)

2. On November 14, 1985, a grand jury for the U.S. District Court for the Southern District of Mississippi returned a three-count indictment against McLendon for alleged violations of 18 U.S.C. §1001. The first two counts were dismissed, but McLendon entered a plea of guilty to the third count of the indictment, which recited his intent to conceal from HUD by devise and scheme his ownership interest in the company that was to provide materials for the CDBG project, knowing that HUD regulations forbid him to have any interest in CDBG projects because he was the City Engineer. (Govt. Exhs. 2, 7.)

3. McLendon was convicted based on his guilty plea. He was sentenced to five years imprisonment and was fined $10,000. The prison term was suspended and he was placed on probation for five years. (Govt. Exh. 2.)

Discussion

The purpose of debarment is to assure the Government that it only does business with responsible contractors and grantees. 24 C.F.R. §24.0. Debarment is to be used to protect the public, it is not to be used for punitive purposes. 24 C.F.R. §24.5(a). Responsibility is a term of art in Government contract law, defined to include not just the ability to perform a contract, but the honesty and integrity of the contractor or grantee. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976). Although

present responsibility is the critical test of whether debarment is necessary, present lack of responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957).

McLendon has challenged both the duration of the proposed debarment and the regulatory procedures applied to this hearing. He contends that it was inappropriate and a denial of due process for this hearing to be limited to submission of briefs and documentary evidence because one of the two grounds for debarment cited by the Government is 24 C.F.R. §24.6(a)(4), which does not refer specifically to a conviction. He further contends that he was not convicted of any offense enumerated within 24 C.F.R. §24.6(a)(9), and that this ground should be stricken. McLendon further argues that a five-year debarment is punitive because it is out of proportion to the seriousness of the acts for which he was convicted. In his answer to the Government's complaint, he also challenged the assertion that he is a "contractor or grantee" within the scope of HUD's debarment regulation, but replacement counsel did not treat that issue in the brief filed on McLendon's behalf.

I find that McLendon is a "contractor or grantee" within the scope of HUD's regulation applicable to debarment because he was an employee of a city receiving HUD funds and he prepared CDBG applications and bids for those HUD funds in his official capacity. Moreover, he was an engineer in a business relationship with a local government that was a direct recipient of HUD funds, and in the instant case, he was also a recipient of those funds in his private capacity as an owner of a roadbed and topping material company. See 24 C.F.R. §24.4(f).

First, I find that the notice of proposed debarment was not so vague that McLendon did not know the basis for the sanction. The notice of proposed debarment makes it clear that McLendon's proposed debarment is based on his conviction for violation of 18 U.S.C. §1001. That notice cites 24 C.F.R. §24.6(a)(4) and (9) as the regulatory grounds for debarment. It is sufficiently clear that those citations refer back to the conviction and the acts underlying the conviction. McLendon's answer to the notice of proposed debarment, which stated that it would serve as the Government's complaint, shows no confusion about the charges that would indicate a denial of due process for failure to state a claim to which McLendon could respond.

Second, McLendon challenges the constitutionality of 24 C.F.R. §24.5(c)(2) on the ground that it constitutes a denial of due process, relying on the case of Larry v. Lawler, 605 F. 2d 954 (7th Cir. 1978). I find the extensive discussion of Larry to be inapposite. In Larry, the court found that the procedures used by the Civil Service Commission to place individuals on an eligibility list were a denial of due process because no provision was made for a procedure to confront or rebut negative evidence of personal reputation collected by the Commission. The

court concluded in Larry that an oral hearing could correct this deficiency.

Simply because a party was not afforded an oral hearing does not necessarily mean that he has been denied due process. Monumental Health Plan v. Dept. of Health and Human Services, 510 F. Supp. 244, 248 (D. D.C. 1981). A hearing in a suspension that is limited to submission of written evidence and briefs has been held to give sufficient due process. Transco Security, Inc. v. Freeman, 639 F. 2d 318 (6th Cir. 1981.) The HUD regulation challenged by McLendon has been found to be reasonable. See Roy C. Markey/The Roary Company/Be-Mark Homes, HUDBCA No. 82-712-D33, 82-2 BCA ¶16,120. McLendon was sent all of the materials relied upon by HUD in proposing his debarment, and he has had a full opportunity to respond to them, unlike the sequence of events in the Larry case. Count III of the indictment and McLendon's plea of guilty to it are the evidence supporting the Government's charges. McLendon admitted to all of the facts cited in Count III by his guilty plea. A guilty plea, once made, admits the facts to which the plea applies for all purposes in all forums.

Proposed debarments based upon convictions are limited to submissions of briefs and documentary evidence because the facts on which those convictions are based have already either been proven beyond a reasonable doubt or admitted. See 24 C.F.R. §24.5(c)(2). A debarment proceeding based on a conviction is not a forum for relitigating issues from a criminal trial or reneging on a guilty plea. McLendon cannot deny his guilty plea but he can argue issues of law ancillary to his conviction and the facts underlying it, and he can submit evidence in mitigation of the seriousness of the acts for which he was convicted. That is the scope of 24 C.F.R. §24.5(c)(2) and I must apply it as written. I lack the jurisdiction to rule on whether the regulation itself creates an unconstitutional denial of due process. Orlando Williams, ASBCA Nos. 26099, 26872, 84-1 BCA ¶16,983.

McLendon contends that he must be given an oral hearing because HUD has relied on 24 C.F.R. §24.6(a)(4) as one of the regulatory grounds for his debarment. This argument is without merit. Grounds for a debarment must be proven by a preponderance of the evidence. HUD has relied on the facts admitted by McLendon in his guilty plea to establish cause for his debarment under 24 C.F.R. §24.6(a)(4). That regulation does not prevent HUD from proving it by a conviction. If the facts substantiating it are proven by a conviction, the contractor or grantee cannot relitigate the conviction or those specific facts on which it was based. 24 C.F.R. §24.5(c)(2) is therefore applicable. McLendon was not entitled to a full oral hearing simply because HUD cited 24 C.F.R. §24.6(a)(4) as one of the causes for his proposed debarment.

McLendon further argues that the crime of which he was convicted is not enumerated in 24 C.F.R. §24.6(a)(9) and

therefore should be stricken as a ground for debarment. Section 24.6(a)(9) provides not only that conviction for the enumerated offenses is a ground for debarment, but that "conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility" is also a ground for debarment under that provision. McLendon was convicted of making or causing to be made false statements to mislead HUD. He covered up his financial interest in a supplier that would profit from CDBG funds. In his answer he states that his ownership interest was a matter of public record and that the City of Quitman saved money by using his supplies. These are hardly mitigating circumstances in this case, nor do they make the gravamen of McLendon's acts less serious.

McLendon knew that he would be violating HUD regulations if his roadbed supplies were used on the CDBG project. That regulatory violation alone is serious enough to warrant debarment. Public employees may not benefit privately from public contracts and grants. Conflict of interest is evidence of a serious lack of business integrity and honesty. Furthermore, making or causing to be made false statements to conceal that conflict of interest compounds the offense. It is criminal. It is dishonest. It is utterly lacking in business integrity. It directly affects the question of present responsibility. It is encompassed within the scope of 24 C.F.R. §24.6(a)(9). The Government has proven cause for debarment, and the evidence submitted in mitigation of that cause is not compelling.

I find the record in this case warrants debarment to protect the public interest. HUD has proposed a debarment of five years. McLendon has not been participating in HUD programs since August 12, 1986, when a Temporary Denial of Participation was imposed on him, based upon his conviction. Although this case only involves the proposed debarment, I note that HUD and the public have been protected from McLendon since the date of the earlier sanction. Intent to defraud or mislead is most serious. McLendon tampered with the CDBG bid process, he engaged in a conflict of interest for private gain, and he deliberately misled HUD. A five-year debarment is warranted and is not punitive under such facts; it is necessary, particularly because McLendon still shows no understanding at all of the seriousness of his actions. Debarment is a prospective sanction and cannot be applied retroactively. Inasmuch as McLendon has not been participating in HUD programs since August 12, 1986, he will be given credit for that time. I find that it is in the public interest that he be debarred from this date up to August 12, 1991.

Conclusion

For the foregoing reasons, VICTOR G. McLENDON, JR. shall be debarred from this date up to August 12, 1991.

JEAN S. COOPER
Administrative Judge

July 25, 1988